



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL CASE NO. 18 OF 2019**

**MILLING CORPORATION OF KENYA (2009) LTD.....PLAINTIFF**

**VERSUS**

**STANDARD CHARTERED BANK KENYA LTD.....DEFENDANT/RESPONDENT**

**AND**

**DIAMOND LALJI .....1<sup>ST</sup> INTERESTED PARTY/APPLICANT**

**SHAHID LALJI.....2<sup>ND</sup> INTERESTED PARTY/APPLICANT**

**RULING**

1. There are two applications before me for determination. **The first application is by the plaintiff.** It is dated the 16/5/2019. It is brought under the Provisions of **Order 40 Rules 1,2,3,4** and **Order 51 Rule 1 of the Civil Procedure Rules (CPR) and Section 3 and 3A Civil Procedure Act, and Sections 102, 103 and 104 of the Land Act** as well as under **the Constitution of Kenya.**

2. The plaintiff seeks an order of injunction to restrain the Defendant by itself or agents from advertising for public auction, or offering for sale by public auction of its Land Parcel known as **Nakuru Municipality/Block 8/1** and Machinery thereon or howsoever dealing with the said land parcel and the machinery pending hearing and determination of this suit.

An interim order of injunction in terms of prayer 2 was granted by the court on the 17/5/2019. It is in force.

3. The **second application** is dated the 8/7/2019. Under **Section 97 of the Land Act and Section 1A, 1B and 3A** of the Civil Procedure Act.

The applicants are Directors of the Plaintiff Company, and guarantors of the loan the company was given by the Defendant. By their application, they seek an order to be joined in the suit as interested parties, before the application dated 16/5/2019, by the plaintiff company is heard and determined.

In both applications, the defendant/ respondent filed grounds of opposition and submissions to urge the parties rival positions.

**4. The Application dated 8/7/2019.**

I have considered the supporting affidavit, the grounds of opposition dated 9/7/2019 as well as submissions.

The applicants seeking to be joined as interested parties in these proceedings are directors of the plaintiff company. They are guarantors to the loan advance to the plaintiff by the defendant. They state that they have a genuine and identifiable stake and interest in these proceedings and an outcome without their involvement will adversely affect them as they will be exposed to more than Ksh.60 million in debt.

5. The defendant in its Grounds of Opposition oppose the application on grounds that there is no provision under the **Civil Procedure Act and the 2010 Rules** for joinder of a party to a civil suit as an interested party. It is further urged that being directors of the plaintiff, they are the ones who authorized commencement of these proceedings, and therefore the application to have them enjoined thereto is an abuse of the court process.

6. The issue for determination is whether the applicants are necessary parties and whether they meet the threshold for joinder.

An interested party, as defined by the Supreme Court of Kenya in **Communications Commission of Kenya & 4 others Vs. Royal Media Services Ltd & 7 others, Petition No. 14 of 2014 (2014) e KLR**, citing the case, **Trusted Society of Human Rights Alliance Vs. Mumo**

**Matemo (2014) e KLR** held that

*“An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause”.*

7. Similarly in the case of **Meme Vs. Republic (2004)**, the High Court observed that a party could be enjoined in a matter for reasons that:

- (a) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings
- (b) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law
- (c) Joinder to prevent a likely course of proliferated litigation.

8. For a party to succeed in such application, sufficient grounds must be laid before the court. The personal interest or stake must be set out in the application and the interest clearly identified. The likely prejudice to be suffered by the intended interested party in case of non-joinder must also be demonstrated to the satisfaction of the court – **Francis Karioko Muruatetu & another Vs. Republic & five others, petition No. 15/16 (2016) e KLR**.

9. For the applicant, it has been submitted that **Order 1 rule 10(2) CPR** makes a provision for joinder of a necessary party.

It states:

*“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectively and completely to adjudicate upon and settle all questions involved in the suit, be added”.*

10. It is trite that a company is a separate legal entity distinct from its members, with powers to sue and be sued. The applicants interest in this matter has been stated in their affidavits. They are the ones that authorized filing of this suit by the plaintiff, and indeed gave instructions to their advocates including their interest therein as guarantors to the plaintiffs loan. They possess all the facts, and all documentary evidence in respect thereof. They are aware of the intended public sale of the plaintiffs property and machinery. They are aware of the valuations carried out by their appointed valuers. A perusal of the grounds appearing at the face of the application as well as in the supporting affidavit sworn by the intended 2<sup>nd</sup> interested party shows that all facts leading to the dispute hereto are well within their knowledge as directors of the plaintiff.

11. **Order 1 rule 8 and 9 CPR** gives the court discretion to add, or substitute parties to a suit, at any stage, if their presence is necessary in the proceedings.

The provision does not restrict the court to adding a party as a co-plaintiff or a co-defendant, but any party whose presence would assist the court to adjudicate and settle all matters in dispute in the suit.

I agree that the applicants have an interest in these proceedings as guarantors and directors of the company, but their presence in my view, is well taken care of by the plaintiff's presence and involvement in the suit.

12. In the case **Ebony Development Company Ltd Vs. Standard Chartered Bank Ltd (200) e KLR**, the High Court stated the obligations of a guarantor as

*“The obligation of a guarantor is clear. It (sic) becomes liable upon default by the Principal debtor.....It is not for the guarantor to see to it that the borrower complies with his contractual obligation but to pay on demand the guaranteed sum”.*

Further, at **Halsbury's Laws of England 4<sup>th</sup> Edition Vol. 20 paragraph 194**, the obligation is clearly and succinctly stated as follows:

*“On the default of the principal debtor causing loss to the creditor, the guarantor is, apart from special stipulation, immediately liable to the full extent of his obligation, without being entitled to require either notice of the default or previous recourse against the principal-----”*

13. **By the above, do the circumstances justify joinder of the applicants?** The interests and rights of the applicants as stated in their affidavit and submissions are well taken care of by the plaintiff, the principal debtor. Being the instructing persons on the way the plaintiffs suit progresses, and being in full control of the same, I find no prejudice or at if the orders sought are denied. It has not been shown that if the applicants are not enjoined to the suit, the court may not be fully equipped to settle the questions thereto or may be handicapped in anyway.

14. Indeed, the applicants have not demonstrated that they have a claim of their own which, in the circumstances of the matter need to be tried, on its own.

In the case **Central Kenya Ltd Vs. Trust Bank & 4 others CA No.222 of 1998**, the court held that

*“----- indeed a party can be joined even without applying. We also bear in mind the principle that no suit shall be defeated by reason only of the misjoinder or non joinder of a party, and that the court may proceed to determine the matter in controversy so far as the rights and interests of the party actually before it are concerned. Circumstances must justify the joinder, in that the claim and defence before the court must raise a doubt as to which of the parties is liable in the final outcome of the dispute----- it must be demonstrated that it would be desirable to add the applicant as a new party and that his presence would enable the court to resolve all the matters in the dispute”*

15. There is no doubt whatsoever on the duty of the guarantors, the intended interested parties, once the court determines the amount owed and due to the defendant. In this case, there is no dispute on the amount owed. It is admitted issue at hand is whether the securities should be sold by Public Auction or by private treaty. Upon the court determining the said issues, the applicants interests will thus be settled. To that end, I am persuaded, that the circumstances hereto do not in my considered opinion, justify joinder of the applicants as interested parties in these proceedings.

16. **Consequently, I find no merit in the application dated 8/7/2019. It is dismissed with costs.**

17. **The Application dated 16/5/2019.**

The applicant/plaintiff's seeks for an Order to restrain the Defendant Bank/Defendant by its agents, from advertising for Public Auction or offering for sale by public auction of the suit property, **Nakuru Municipality/Block 8/1** and Machinery thereon pending hearing and determination of the suit.

There is no dispute over the amount the plaintiff owes the defendant. A perusal of the documents availed to the court, and particularly the Notification of Sale by Legacy Auctioneering Services, as at 11<sup>th</sup> March 2019, the sum stood at Shs.731,906,759/22 plus interest at 13% and additional estimated recovery charges of Kshs.12,840,476/=.

18. The applicant is agreeable to the sale of the suit property to settle the indebtedness but contents that the bank has not met the statutory requirements, and in particular that the valuation it intends to rely on to set the reserve price is not less than six months old and therefore disadvantageous to itself as well as to the defendant. It also faults the Defendant's refusal to allow potential and interested purchasers to purchase the property by private treaty or contract, which it submits would be more advantageous to both parties, urging that such sale would raise the best possible price, as it is allowed under **Section 98(1) Land Act, 2012** where the law allows chargee to sale by Public Auction or Private treaty.

19. The defendant Bank by its grounds of opposition dated **27/5/2019** puts forth several objections

*(i) that there is no statutory duty that it ought to exercise the power of sale through a private treaty citing **Section 98(1) of the Land Act 2012** that allows the defendant to sale the property through a Public Auction,*

*(ii) There is no requirement that a valuation should be not less than six months old on the strength of **Section 98** that provides for a valuation not less than six months where the chargee exercises the power of sale through private treaty.*

20. It is further urged that the plaintiff has not demonstrated what prejudice it would suffer as the Bank is stable and would be able to compensate the plaintiff if any proven loss would occur as a result. It urges that having complied with all statutory requirements under the **Land Act 2012**, the application should be dismissed and Sale by Public Auction allowed.

I have considered the parties written submissions and authorities filed in support of the rival positions.

21. **Issues for Determination.**

*(1) Sale of charged property by Public Auction or Private Treaty?*

*(2) Whether the defendant has complied with Section 97 (2) and (3) of the Land Act 2012 on the matter of Valuation.*

*(3) Whether the plaintiff has met the test and threshold for grant of a temporary injunction.*

22. The facts leading to the filing of this application have been stated above. It is admitted by the plaintiff that it has been served with all the statutory notices required under **Section 90 and 96** of the **Land Act**, but as a result of economic down turn, and cash flow constraints, it has not been able to service its debt obligations to the defendant, and run into default status. I have seen several correspondence between the parties but no settlement on whether the suit property ought to be sold by public auction or private treaty.

23. For the defendant, it is submitted that no serious offers or any prospective purchasers have been fronted for its consideration, and urging that, nothing stops the prospective purchasers referred to by the plaintiff from attending the public auction and bidding to purchase the property to ensure the best price is received.

24. **Section 97** spells the duty of a chargee` exercising its power of sale to obtain the best price reasonably obtainable at the time of sale; including necessity of a forced sale valuation to be undertaken by a valuer, so as to protect the rights of the charge and to prevent unscrupulous charge from selling the charged property at a price not comparable to interests in the land of same character and quality, hence

the requirement for valuation at least six months prior, but only when the sale is by private treaty, not when the chargee intends to sale by public Auction.

25. In the case **Stephen Kipkatam Kenduiywa t/a Kapchebet Farm Vs. Sidian Bank Ltd & Aother, (2017) e KLR**, the court held that the chargee has discretion to either allow the chargee to sell the property by private treaty, or by public auction through its statutory power of sale.

It stated

*“No prejudice is caused to the chargor if the bank opts to take the latter route. The buyer that the chargor has can indeed go to the Public Auction Sale and Purchase the property-----”*

26. In the case **Francis Kalama Mulewa Vs Kenya Commercial Bank (2017) e KLR**, in very similar circumstances, the Court stated

*“----- the plaintiff cannot dictate the terms of the auction. He can exercise his equity of redemption by receiving the deposit and pay off the loan before the property is auctioned”.*

The plaintiffs apprehension and suspicions of the defendant’s motives in insisting on sale by Public Auction has not been demonstrated, as the only thing it states is what it calls reliance on outdated valuation. I will come to the matter of valuations herebelow.

27. As rendered in the case **Stephen Kipkatam Kenduiywa (Supra)**, the charge has the option to sell the charged property by either public auction or private treaty. In the present matter, the charge has opted to sell by public auction, and that is well anchored under **Section 98 of the Lands Act**.

I find no merit in the plaintiffs prayer that the charged property ought not be sold by public auction. Indeed there is no statutory duty that a charge ought to exercise the power of sale through private treaty. See also **Stephen Kipkatam Kenduiywa (Supra)**.

I find no merit in the plaintiffs submissions in that regard.

28. **On the matter of Various Valuations.**

Two valuations of the charged property were commissioned by the plaintiff. They are dated **31/7/2017** and **31/7/2019**, through Mwaka Musau Valuers.

The defendants valuation which it intends to rely on to sell the property is dated **6/7/2018**, by Proland Valuers.

The plaintiffs reports shows forced Sale Value as Shs.711,600,000/= and Shs.696,539,475/= respectfully.

29. On the other hand, the defendant’s valuation states a forced sale value of Shs.471,539,475/=. The plaintiff submits that its valuation undertaken by Mwaka Musau Valuer on 31/5/2019 places a market value of Shs. 1,007,000/= and a forced sale at Shs.755,250,000/= with a significant difference of market value of Shs.295,400,000/= and forced sale at Shs.255,000,000/=.

It is submitted by the plaintiff that the apparent disparity in valuation will prejudice and negatively affect it and its guarantors’ position, and thus urges for sale by private treaty as the plaintiffs latest valuation has produced a valuation higher than that by the defendants.

30. **Section 97 (2) of the Lands Act** places a duty on the chargee to ensure a forced sale valuation is undertaken, which it did by its valuation report dated 6/7/2018. If the plaintiff was not comfortable with the said valuation, it ought to have raised the matter before the filing of the suit to show that the said valuation did not result in the best price reasonable obtainable for the property – **Zum Zum Investment Ltd Vs. Habib Bank Ltd (2014) e KLR**. The valuation it commissioned a few days after filing the suit, in my view, was not done in good faith.

31. A party disputing a valuation report is under a duty to demonstrate the reasons behind, but not just to oppose it without sufficient grounds. As stated in the **Zum Zum Case (Supra)**, the plaintiff ought to show, for instance, that the Defendant’s valuer was not qualified or competent, or took into account irrelevant factors, or that the valuation was done way before the time of the intended sale.

32. In the case **Okasaki Ltd Vs Equity Bank Ltd (2015) e KLR**, dealing with similar issue, Gikonyo J, adding onto the above, held that

*“The report must be dislodged on real items, terms and legal parameters which are acceptable in the practice and profession of Valuers”.*

For those reasons, I reject the plaintiffs submission that the defendant’s valuation dated 6/7/2018 would in anyway prejudice its positions, if it had any suspicions, it ought to have raised them before the defendant commenced the process of exercising its statutory power of sale.

33. The valuation report by the defendant was less than a year old at the time sale process was commenced. The Land Act does not provide for specific period but it ought to be a reasonable period, as properties appreciate in value.

**Under Section 97 (2)** the charge is under a duty to undertake a valuation of the property. It reads:

*(2) A charge shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.*

In the circumstances, I find no justification to reject the defendants valuation and adopt one by the plaintiff, conducted after it brought this suit to court. I find and hold that the defendant has complied with the requirements of **Section 97 (2) (3) of the Land Act**, as well as **Rule 11 (1) (b) (x) of the Auctioneers Rules, 1997**.

**34. Interlocutory injunction under Order 40 Rule 1 CPR.** The test and principles for granting of an injunction were stated in the case **Giella Vs. Cassman Brown (1973) EA 358**. The East African Court of Appeal stated that to succeed in such an application, the applicant must demonstrate:

*(a) a prima facie case with a probability of success.*

*(b) an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages.*

*(c) if the court is in doubt, it will decide the application on the balance of convenience.*

**35. A prima facie case is defined in the case of Mrao Ltd Vs. First American Bank of Kenya & 2 Others (2003) KLR 125 as:**

*“A prima facie in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.*

**36.** The circumstances and facts in the present application speaks for themselves. The applicant/plaintiff admits being in default. The amounts of the outstanding loan is not in dispute. All statutory notices have been served upon the plaintiff. A valuation of the charged property was conducted before the sale process was commenced. The defendant wishes to sale the charged property by public auction, which the plaintiff is not comfortable with. The court, upon consideration finds no sufficient grounds demonstrated by the plaintiff for the sale by private treaty as opposed to by Public Auction. This must be an afterthought to defeat the impending exercise of the defendant's power of sale.

**37.** It has not been demonstrated by the applicant that it would suffer irreparable loss that would not be compensatable by damages should the property be sold by public auction. The applicant has failed to state any of its rights that the defendant has infringed.

It is trite that a chargee will not be restrained from exercising its power of sale due to a dispute on the amount owing or because the charger has began a redemption action or because it objects to the manner in which the sale is arranged or planned – **Mrao Ltd (Supra)**. The charge has opted to sale the charged property by public auction. It is within its statutory rights to do so.

**38.** In the circumstances, I am persuaded that the balance of convenience tilts in favour of refusing the interlocutory injunction. The applicant is not making any effort to liquidate the amount owing. Interest continues to accrue on the principal sum. The defendant in my view is capable of compensating the plaintiff in damages should it not succeed upon full hearing of the suit. No contrary submission was tendered by the Applicant.

**39.** To that end, I find and hold that the applicant/plaintiff has fallen short of meeting the threshold and test upon which an interlocutory injunction would normally be granted as stated in the **Giella Vs. Cassman Brown Case (Supra)**. **The upshot is that the plaintiff's application dated 16/5/2019 lacks merit. It is dismissed with costs.**

**40. The interim orders of injunction dated 17/5/2019 are hereby discharged, and vacated.**

Orders accordingly.

**Delivered, signed and dated at Nakuru this 27<sup>th</sup> Day of February 2020.**

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**J.N. MULWA**

**JUDGE**