



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 007 OF 2020

BETWEEN

THE OTHAYA VILLAS LIMITED.....PLAINTIFF

AND

VICTORIA COMMERCIAL BANK LIMITED1ST DEFENDANT

DUNHILL AFRICA VALUERS LIMITED.....2ND DEFENDANT

KENYA SHIELD AUCTIONEERS.....3RD DEFENDANT

RULING

1. The plaintiff is the registered owner of the property known as LR No. 2951/138 (Vol N80 Folio 83/1) situated at Farasi Close, Off Lower Kabete Road within Nairobi City County (“the suit property”).

2. The plaintiff’s case is set out in the plaint dated 14th January 2020. The plaintiff complains that the defendants committed fraud in the manner in which the suit property was undervalued by the 2nd defendant (“Dunhill”) who had a conflict of interest as it previously acted for the plaintiff before being instructed by the 1st defendant (“the Bank”) to prepare the valuation before the intended auction of the property. The plaintiff further alleged Mr Eddy Orinda, Advocate practicing as *One & Associates Advocates*, acted for it before being instructed by the Bank to issue and deliver an undated 45-day Statutory Notice on 5th March 2020. He also instructed Moran Auctioneers to issue a 45-day Notice of Sale and thereafter proclaim and sell the suit property.

3. The plaintiff avers that Dunhill accepted instructions from the plaintiff on 3rd June 2015 to conduct a professional valuation of the suit property and came up with the following valuation:

a. Current Market Value of land	Kshs. 130,000,000/=
Improvements thereon	Kshs. 550,000,000/=
Total	Kshs. 680,000,000/=
b. Mortgage Value	Kshs. 520,000,000/=
c. Forced sale value	Kshs. 480,000,000/=
d. Insurance value	Kshs. 450,000,000/=

4. Dunhill subsequently accepted further instructions from the Bank on 23rd August 2018 without disclosing that it had been instructed by the plaintiff before. It conducted another valuation of the property and came up with the following valuation:

- a. Market value Kshs. 500,000,000/=
- b. Mortgage value Kshs. 400,000,000/=
- c. Forced sale value Kshs. 350,000,000/=

5. The plaintiff avers that the market value was undervalued by Kshs. 180,000,000/= without any reasonable basis or explanation after 3 years of the first valuation. Further, that the forced sale valuation was reduced by Kshs. 130,000,000/= over a period of 3 years leading to a conclusion of outright fraud.

6. The plaintiff also avers that sale of the suit property advertised on 13th January 2020 and scheduled for sale on 17th January 2020 was unlawful and illegal as the 3rd defendant never issued a notice to sell in violation of **section 96(2)** of the **Land Act** and a notification of sale under the **Auctioneers Act**. The plaintiff also complains that the 2nd defendant did not issue notices to the lessees within the suit property.

7. Following the allegations of fraud and failure to serve the relevant notices, the plaintiff seeks the following reliefs in the plaint:

1. A declaration do issue that the 1st and 3rd Defendants have no right in law to sell or dispose of the Plaintiffs' suit property known as **Title No: Nairobi/LR. Number 2951/138 (Vol. N80 Folio 83/1)** in contravention of the law.

2. A declaration do issue that (the) 1st Defendant in cahoots with the 2nd defendant caused a fraudulent valuation on the suit property, being **Title No: Nairobi/LR. Number 2951/138 (Vol. N80 Folio 83/1)** so as to deprive the Plaintiff of the true value of its property and the valuation of 28th August 2018 is therefore null and void.

3. An injunction do issue restraining the Defendants their servants, officers, employees, assigns and/or agents, Advocates or Auctioneers or any other person acting for and/or on their behalf, from doing the following acts or any of them, that is to say from advertising for sale, disposing off, alienating, dealing with, selling by public auction, or otherwise howsoever at any time from or by completing by transfer of any sale concluded by auction and/or private treaty, leasing, letting or otherwise howsoever interfering with ownership of title to and/or interest in **Title No: Nairobi/LR. Number 2951/138 (Vol. N80 Folio 83/1)**, without following the due process as prescribed by law.

4. Cost of this suit together with interest thereon and any further or other order relief that this Honourable Court deems fits to grant.

8. Together with the plaint, the plaintiff also filed a Notice of Motion dated 14th January 2020 under, inter alia, **Order 40 rules 1, 2 and 4** of the **Civil Procedure Rules** ("the **Rules**"), seeking, amongst others, an order of injunction restraining the Bank and 3rd defendant ("Kenya Shield") from selling the suit property pending the hearing and determination of the suit. The application was supported by the affidavit of Kirir Bhagwanda Kanabar, a director of the plaintiff, sworn on 14th January 2020. The affidavit reiterated the facts in the plaint which I have set out above.

9. The defendants opposed the application through the replying affidavit of Clement Gitau, the Bank's Legal Officer, sworn on 31st January 2020. He deponed that the plaintiff failed to disclose that the suit property had been charged to the Bank by a 4th further legal charge dated 28th January 2016 to secure repayment of a loan facility to Specialized Blocks Limited, a company associated with the plaintiff, and at the time the suit was filed and ex-parte orders sought, it owed the Bank, Kshs. 702,563,965.75 inclusive of interest as at 31st October 2018.

10. Mr Gitau further deponed that the Bank through its advocates, *Harit Sheth and Company Advocates*, issued a statutory demand notice under **section 90** of the **Land Act** dated 26th November 2018 giving the plaintiff 90 days' notice to remedy the default from the date of service of the notice of the letter failing which the property would be sold as provided by the charge document. The document was sent by registered post as evidenced by certificate of posting and emails forwarding the letter to the plaintiff's directors in accordance with the Clause 41 of the Charge document. Mr Gitau further deponed that the Bank's advocate, *One Associates Advocates*, issued and served a 40-day notice required under **section 96(2)** of the **Land Act** and that the same was followed by the auctioneer's notification of sale by a letter dated 19th June 2019 by the 3rd defendant which was sent by registered post.

11. The Bank further states that prior to the intended auction, it instructed Dunhill to undertake a valuation of the suit property as required by **section 97(2)** of the **Land Act** and it did prepare a valuation report dated 28th August 2019. It also instructed FAPCL Valuers Limited ("FAPCL") to value the suit property which it did as per the valuation report dated 7th October 2019. Mr Gitau deponed that the FAPCL report which would inform the sale scheduled for 17th January 2020 placed the market value of the property at Kshs. 300,000,000/= and the forced sale value at Kshs. 225,000,000/=.

12. As regards, the valuation difference in valuation report by Dunhill in 2015 and 2018, the defendants relied on the affidavit of Isaac Wirunda, a director of Dunhill, who deponed in an affidavit sworn on 31st January 2020 that differences in the valuation could be explained by several factors. He deponed that log homes are a new concept in Kenya whose uptake was difficult as the homes have a high maintenance cost and need specialized technical support which is lacking in Kenya. He further stated that the suit properties were in superb condition in 2015 and needed sprucing up in 2018. Mr Wirunda also deponed that since the target market for potential buyers is the very high end market, the suit property has very few potential buyers. He also points out that the general property market has been experiencing a down turn hence the fall in prices.

13. The Bank contends that the report by FAPCL was an independent valuation which shows that the value of the property continues to deteriorate. In the Bank's view, it is the one that stands to be prejudiced since its exposure increases while the value of the property

diminishes hence the need to realise the security. The Bank further contends that its right to sell the property has been realized and that the outstanding debt has not been disputed hence the plaintiff has not made out a case for the grant of an injunction.

14. Kirit Kanabar filed two further affidavits sworn on 26th February 2020 in response to the affidavits of Clement Gitau and Isaac Wirunda. Mr Kirit deponed that since the loan was disbursed, he has never received a single statement from the Bank and that he does not understand how the amount claimed is made up. Further, he states that that the amount claimed is inconsistent with the statement furnished in Mr Gitau's deposition. Mr Kirit further stated that the plaintiff sent to the Bank, Kshs. 132,000,000/- by cheque which has not been credited to its account. He reiterated that that the valuations by Dunhill were fraudulent. He relied on HASS Consult Price Index to argue that the value of the land based on that index alone would be Kshs. 200,000,000/= hence that forced sale value of a property covering 15,000 square feet suggested by Dunhill and FAPCL was an undervalue. He also deponed that the log homes concept was hardly a new or trial concept and that there were other high end residential and commercial properties in Kenya based on that concept. He added that contrary to the assertion by Mr Wirunda, the suit property was not spruced up in 2018 and the maintenance costs are very low due to the technology adopted. He also stated that FAPCL also had a conflict of interest as it acted as a financial consultant and selling agent of the suit property and it valued the property at Kshs. 600,000,000/=.

15. Mr Kirit also contended that the Bank acted in bad faith and that it had an interest in disposing of the property at a heavily discounted price and even tried to sell a related property for Kshs. 375,000,000/= in 2019. That the Bank rejected an offer the plaintiff had from a Finnish international organisation to purchase two buildings for Kshs. 445,000,000/-. The plaintiff also had a lease with an option to purchase by a UK based firm for Kshs. 520,000,000/=.

16. Counsel for both parties made oral submissions in support of their respective positions along the lines set out in the respective pleadings and depositions. Counsel for the plaintiff submitted that there was evidence of fraud as the valuations were infected by conflicts of interest and did not reflect the value of the property and that the Bank intended to sell the property at an undervalue. He maintained that the requisite statutory notices were not served on the plaintiff. On the defendants' side, counsel argued that the statutory notices were served and that the valuations were reflective of the market value of the suit property. He added that the plaintiff did not disclose its indebtedness and there was no reason to grant an injunction as the plaintiff had not established such a case.

17. As is often said, the principles upon which the court acts in granting an interlocutory injunction are well settled and I will do no better than cite the case of *Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR* where the Court of Appeal reiterated the principles set out in *Giella v Cassman Brown [1973] EA 358* as follows:

In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.

18. From the prayers set out in the plaint, the plaintiff's suit is founded on two grounds. First, that the Bank did not issue the relevant statutory notices to the plaintiff. Second, the valuation of the properties was fraudulent.

19. As regards the notices, the first port of call is **section 90(1)** of the *Land Act, 2012* which provides as follows:

90(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

While **section 96(1)** of the *Land Act, 2012* provides that:

96(1) Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90 (1), a chargee may exercise the power to sell the charged land.

20. The Bank through the replying affidavit furnished a copy of the statutory notice dated 26th November 2018 setting out the full details of indebtedness by the plaintiff, demanding that the outstanding sum of Kshs. 702,563,965.75 due and owing as at 31st October 2018 together with interest be paid. That notice was very detailed on informing the plaintiff of its remedies and notifying it that the Bank would exercise statutory power of sale if default continued for three months after service of the notice. The notice was sent to the plaintiff by registered post as shown in the certificate of posting dated 28th November 2018 (No. M00100-11184512304). Based on this evidence, I am satisfied that the statutory notice under **section 90(1)** of the *Land Act* dated 26th November 2018 was duly served on the plaintiff and that the statutory power of sale had arisen.

21. Before selling the property, the Chargee must issue a notice to sell charged property under **section 96(2)** of the *Land Act* which provides that:

96(2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell.

22. According to the Bank, an undated 40-day notice prepared by *One Associates Advocates* under **section 96(2)** aforesaid was sent to the plaintiff. The plaintiff admitted that it received the notice on 5th March 2019 at para. 6 of the plaint. It also admitted that it received the 45-day auctioneer's notice under **Rule 15** of the **Auctioneers Rules** before the scheduled sale. The plaintiff's contention is that Mr Eddy Orinda was its advocate and that he had a conflict of interest. Mr Kirit annexed bank deposit slips showing that he and an associated company, Highgrove Holdings had paid Mr Eddy Orinda, Kshs. 150,000/- on 15th May 2019, Kshs. 135,000/= on 18th June 2019 and Kshs. 150,000/= on 6th November 2019 all on account of legal fees. The Bank did not controvert this evidence nor comment on the allegations of conflict of interest. In the circumstances, I find that although all notices were issued by the Bank, they were infected by conflict of interest.

23. The second plank of the plaintiff's case concerns the valuation of the property and it is hinged on the two valuation reports prepared by Dunhill showing a diminution in the forced sale value of the property. Under **section 97** of the **Land Act**, a chargee is expected to exercise a duty of care towards a chargor, failing which it would be liable for breach of duty of care. The relevant provisions states as follows:

97(1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.

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

24. The aforesaid provision is to be read with **Rule 11 (b) (x)** of the **Auctioneers Rules** which stipulates that:

The reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale.

25. Although the plaintiff complains about the valuations by Dunhill, the plaintiff instructed FAPCL who conducted a valuation dated 7th October 2019 which stated that the forced sale value was Kshs. 225,000,000/=. Although the plaintiff had complained about the undervaluation of the property, it has not furnished its own updated and recent valuation of the property. It has relied on a property price index which does not constitute a valuation but is only a factor to be taken into account in valuation of the property. The other complaint, which in my view, appears valid, is that FACPL acted for the plaintiff while it was seeking refinancing and at the material time, valued the properties.

26. I am satisfied that the issue of the 40-day notice and the subsequent valuation were coloured by conflicts of interest. Such conflicts are however not fatal to the exercise of the statutory power of sale which I have found has accrued as a valid notice under **section 90(1)** of the **Land Act** was duly issued.

27. An injunction is an equitable remedy. The court may take into account whether the plaintiff has come to court with clean hands, whether it has disclosed or failed to disclose material facts and like factors which may influence the court's discretion. As the Bank pointed out, the plaintiff carefully avoided the fact that the property was security for advances to an associated property and that it had defaulted in payment of the loan. It only referred to a cheque of Kshs. 132,000,000/= which it allegedly paid by cheque in October 2016. It did not provide any evidence of any other payment over the subsequent period of 4 years. Moreover, having admitted that it received the notice of sale and auctioneers notice, it did not raise any issue of indebtedness or that it had not received any statements. I can only conclude that its claim that it never received any statements is an afterthought. I am therefore persuaded to take the route suggested by the Court of Appeal in **National Bank of Kenya v Shimmers Plaza Limited NRB CA Civil Appeal No. 26 of 2009 [2009] eKLR** where it observed as follows:

An injunction is an equitable and discretionary remedy. The duration of an order of injunction is at the sole discretion of the trial Judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law. We venture to say that where the court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law.

28. The statutory power of sale has accrued and the sale scheduled on 17th January 2020 has aborted. The plaintiff's complaints concern the manner in which the power of sale is being exercised. This court has accepted that the notices and valuations issued were stained by conflicts of interest by the advocates who issued the notice to sell and instructed the auctioneer and that the valuer who valued the property prior to the auction acted as a financial consultant and selling agent of the property previously.

29. In order to neutralize the conflicts of interest, I will grant the Notice of Motion dated 14th January 2020 on the following terms:

a. The 1st defendant shall not sell the suit property; **Title No: Nairobi/LR. Number 2951/138 (Vol. N80 Folio 83/1)** unless it complies with the following conditions:

i. It shall issue a fresh notice under **section 96(2)** of the **Land Act** through any other advocate other than Mr Eddy Orinda practicing as *One Associates Advocates*.

ii. Before proceeding to sell the property, it shall carry out a fresh valuation by any other valuer other than Dunhill Africa Valuers Ltd and FAPCL Valuers.

30. The plaintiff shall have half the costs of the motion.

DATED and DELIVERED at NAIROBI this 13th day of MARCH 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Onderi instructed by Nchogu, Omwanza and Nyasimi Advocates for the plaintiff.

Mr Koech instructed by Harit Sheth Advocates for the defendant.