



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 23 OF 2015

GEOFREY WAHOME MUOTIAPLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITEDDEFENDANT

RULING

Background

1. In an earlier application dated 22nd January 2015, the plaintiff/applicant herein sought, *inter alia*, orders to restrain the defendant/respondent from exercising its statutory power of sale over L.R. No. 209/12544, Upperhill Nairobi (hereinafter “**the suit property**”) pending the hearing and determination of the main suit. The said earlier application was on 31st May 2019 dismissed when the court rendered itself as follows:

“My findings are that the defendant is at liberty to exercise its statutory power of sale provided that it fully complies with all the provisions of the law. For the avoidance of doubt, the defendant shall not exercise its statutory power of sale of the property until it re-issues a Statutory Notice and conducts a valuation of the said property. It is hereby directed to fully comply with the provisions of the law.”

Application

2. Through the instant application dated 20th February 2020, the plaintiff filed yet another application seeking the following orders:

1. Spent

2. Pending the inter partes hearing and determination of this application; the 1st respondent through themselves, their servants, employees, nominees, assignees, agents and specifically Garam Investments Auctioneers who are the 2nd respondents or any other persons or authority connected therewith be restrained by a temporary injunction order from this court from selling, disposing, leasing, occupying or in any way dealing with or alienating the proprietary rights in the applicants charged property being land parcel No. L.R No. 209/12544 Upper Hill, Nairobi.

3. The applicant does not refute indebtednesses to the bank and has no objection to the bank selling the property as he is unable to service the loan due to the fact that the business of the hotel has gone down. His one and only interest is that in the exercise of the said power of sale, the bank must comply with the provisions of the law and the order of this honourable court from the ruling of 31st May, 2019.

4. In the alternative to 3 above, this honourable court be pleased to order the 1st respondent and/or their servants, employees, nominees, assignees, agents and specifically Garam Investments Auctioneers who are the 2nd respondents or any other persons or authority connected therewith to undertake a valuation of the subject property being No. L.R. No. 209/12544 Upper Hill, Nairobi as a precondition before the execution of the intended sale in the exercise of its statutory power of sale in order to determine the forced sale value of the property.

5. The Honourable court be pleased to order the 1st respondent and or their servants, employees, nominees, assignees, agents and specifically Garam Investments Auctioneers who are the 2nd respondents or any other persons or authority connected therewith to comply with the provisions of the law in before exercising its statutory power of Sale L.R. No. 209/12544 Upper hill and the order of this honourable court through the ruling delivered on 31st May 2019.

6. The cost of this application be provided for;

3. The application is supported by the applicant's affidavit and is premised on the main grounds that even though the applicant does not deny being indebted to the defendant and has no objection to the bank's exercise of its statutory power of sale, such sale must be conducted in compliance with the law. The applicant accuses the respondent of non-compliance with the terms of this court's ruling delivered on 31st May 2019 especially in respect to the valuation of the suit property and issuance of the mandatory notices contemplated under Sections 90 and 96(2) of the Land Act (hereinafter "**the Act**").

4. He further accuses the 1st respondent of gross overstatement of the debt due and for callously and deliberately colluding with the 2nd respondent to sell the said property at a gross undervalue.

5. He further contends that the 1st respondent has persistently frustrated the applicant's numerous attempts to discharge the suit property by refusing to engage prospective buyer who are willing to purchase the said property at the market value.

6. When the matter came up for mention on 25th February 20120, **Miss Owade**, learned counsel for the applicant sought temporary orders to postpone the auction for a reasonable period of time to allow the applicant to sell the property so as to settle the loan.

7. Counsel argued that the bone of contention is that the property will be sold at a gross undervalue and that the 1st respondent has always concealed the valuation of the property from the applicant. Counsel urged the court to grant the applicant 180 days to enable him conclude the sale and settle the debt. Counsel confirmed that the applicant will, if granted the 180 days, be able to pay 10% of the purchase price being kshs 87 million to the 1st respondent within 90 days.

1st respondent's case

8. The 1st respondent opposed the application through the replying affidavit of its Credit Manager, **Rhoda C. Sirma**, who avers that the application is not merited as the plaintiff was issued with all the requisite statutory notices and that the 1st respondent has caused the suit property to be valued for purposes of determining its forced sale value. She avers that the applicant has received every possible indulgence from the 1st respondent in his quest to redeem the suit property.

9. At the mention, **Mr. Mutua**, learned counsel for the 1st respondent submitted that the applicant has not presented any basis for the granting of the orders sought in the application. Counsel noted that the applicant had shifted his claim in the application from the failure to serve the statutory notices and lack of valuation to that of gross under valuation of the suit property.

10. Counsel urged the court to note that the applicant had not serviced the loan since 2014 and further, that the obligation to sell the charged property, under the Act, is vested on the chargee. It was the 1st respondents case that the law does not require the parties to carry out a joint valuation or that the reserve price be disclosed in the advertisement.

11. I have carefully considered the instant application, the 1st respondent's response and the submissions by the parties' respective advocates. I note that even though the applicant sought several orders in the application under consideration, when the matter came up for mention, the applicant's counsel only urged the court to postpone the sale scheduled for 25th February 2020 for 180 days to enable the applicant sell the suit property. It would appear that the applicant abandoned all the other prayers sought in the application, However, considering the age of this case and this court's ruling of 31st May 2019, I am still minded to consider all the prayers sought by the applicant herein.

12. I note that the main reason advanced by the applicant in seeking the orders in the instant application is the alleged undervaluation/lack of valuation of the suit property and the claim that statutory notices had not been served on the applicant.

13. In its rejoinder, the 1st respondent demonstrated, through annexures "**RCS 1 a, b, and c**", "**RCS 2 a, b, and c**", "**RCS 3 a, b, and c**", "**RCS 4 a, b, and c**", that it served all the requisite demand notices and carried out the necessary valuation in accordance with the provisions of the Auctioneers Rules and Sections 90, 96(2) and 97 of the Act.

14. The applicant did not deny or controvert the 1st respondent's assertion that it had complied with all the requisite statutory provisions and the terms of the ruling of this court delivered on 31st May 2019. This court notes that it is almost 9 months since it rendered itself on the earlier application for injunction. My finding that the applicant has all along, from the time his earlier application was rejected and indeed, from the time he defaulted in making the loan repayments way back in 2006, been aware of the 1st respondent's intention to sell the suit property owing to his said default.

15. I find that the applicant cannot therefore be seen to run to court on the eve of the auction, upon being properly served with the statutory notices, and seek the postponement of the auction on the basis that he needs time to sell the charged property.

16. My finding is that the applicant has had more than ample time to get buyers for the suit property. I further find that no material was placed before the court to show that such a buyer exists and that nothing stops the applicant from presenting such a buyer to the 1st respondent even on the D-day of the auction.

17. Having found that the 1st and 2nd respondents have complied with the legal requirements preceding the sale of the charged property, I find that this court cannot stand in the way of the chargee in exercising its statutory power of sale where the debt is clearly admitted.

18. For the above reasons, I find that the application dated 20th February 2020 is unmerited and I therefore dismiss it with costs to the respondent.

Dated, signed and delivered in open court at Nairobi this 12th day of March 2020.

W. A. OKWANY

JUDGE

In the presence of:

Miss Owade for Arwa for the applicant

Mr Mutua for defendant

Court Assistant – Sylvia