**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**COMMERCIAL SUIT NO. 46 OF 2018**

***(FORMERLY ELC NO. 280 OF 2015)***

**AL HYDER TRADING COMPANY LIMITED.....1ST PLAINTIFF**

**RANA SHAUKAT ALI WARYAM.....2ND PLAINTIFF**

**VERSUS**

**DIAMOND TRUST BANK KENYA LIMITED.....1ST DEFENDANT**

**JOSEPH GIKONYO T/A GARAM INVESTMENT.....2ND DEFENDANT**

**RULING**

The application dated 30th July 2019 was for an order of *"Permanent Injunction"* restraining the Defendants from selling, alienating, disposing of, or in any way interfering with the 2nd Plaintiff's quiet use and occupation of the suit property **L.R. NO. KISUMU MUNICIPALITY/BLOCK 10/24**.

1. The application was brought under a Certificate of Urgency, in the light of the fact that the Defendants were intent upon selling the suit property by Public Auction which was scheduled to be conducted on 14th August 2019.

2. The Plaintiffs expressed the view that the intended sale was unlawful because;

**a. Notification of Sale and Notice of *Redemption had not been served, as required under Section 96 of the Land Act;***

**b. Statutory Notice, stipulated under Section *90 of the Land Act had not been served;***

**c. The Defendants failed to comply with the *Requirements of Section 97 (1) of the Land Act, as they did not carry out a proper Forced Sale Valuation;***

**d. The scheduled sale was to be carried out *without the Defendants lawfully and regularly advertising it.***

3. The application was first listed before the Hon. Lady Justice T.W. Cherere on 30th July, 2019. The learned Judge directed the Plaintiffs to serve the application upon the Defendants, with a view to having further Directions given by the court on 8th August 2019.

4. It is common ground that the High Court ordinarily goes on recess from 1st August of every calendar year. During the duration of the recess, there is always a Judge who would be on duty; and in August 2019 the same practice was in force.

5. On 6th August 2019, the Hon. Justice Njagi, who was on *"Recess Duty"*, directed the Applicants to ensure that they complied with the rules which are applicable during the recess.

6. On 13th August 2019 the Applicants lodged an application seeking leave to have their application dated 30th July 2019 heard during the

recess.

7. On 13th August 2019, Hon. Justice Musyoka gave due consideration to the application, and he declined the quest for interim orders pending the inter-partes hearing of the application dated 30th July 2019.

8. The learned Judge set down the application for further Directions on 8th October 2019.

9. When the matter came up on 8th October 2019, the court asked the parties about what had happened on 14th August 2019, when the suit property had been scheduled for sale by public auction.

10. The parties confirmed that the property was not sold.

11. To my mind, as the sale which the Plaintiffs desired to have stopped, had not taken place, the court did not need to give any other order in respect thereto. I did not need to give an order to stop a sale which had not taken place.

12.The converse is equally true; that even if the court were to reject or to dismiss the Plaintiffs' application for an injunction, the auction which was scheduled to be conducted on 14th August 2019, cannot now be conducted.

13. Nonetheless as the parties have made submissions on the application, I will render my decision on it.

14. The law governing Interlocutory Injunctions is well settled: the Applicant needs to meet the following requirement;

> **a. He must demonstrate to the *satisfaction of the court that he has a prima facie case with a probability of success.***
>
> **b. He must satisfy the court that he will suffer irreparable injury, which *is incapable of being adequately compensated by an award of damages,* if the injunction was not granted.**
>
> **c. If the court is in doubt about whether *or not the potential injury could be adequately compensated by an award* of damages, the application will be *determined on the balance of convenience.***

15. In the case of **NGURUMAN LIMITED Vs JAN BUNDE NELSON & 2 OTHERS CIVIL APPEAL NO.77 OF 2012**, the Court of Appeal restated the law 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 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."**

16. The learned Judges of Appeal went on to further make it clear about how the 3 pillars are supposed to be applied by any court when called upon to determine an application for an injunction. This is what they said;

> **"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."***

17. And if there was any doubt about the meaning of those words, the Court of Appeal made the following point clear;

> **"If the applicant establishes a prima *facie case, that alone is not sufficient basis to grant an interlocutory injunction; the court must further be satisfied that the injury the applicant will suffer, in the event the injunction is not granted, will be irreparable.***
>
> **In other words, if damages recoverable *in law is an adequate remedy, and the respondent is capable of paying, no* interlocutory order of injunction should *normally be granted, however strong the applicant's claim may appear at that stage.***

**If prima facie case is not established,** ***then irreparable injury and balance of convenience need no consideration.***

**The existence of a prima facie case** ***does not permit 'leap-frogging' by the applicant to injunction directly without crossing the other hurdle in between."***

18. In order to ascertain whether or not a prima facie case has been established by the Applicants, we must peruse the Plaint.

19. The primary complaint in the Plaint is that the intended auction of the suit property was illegal, irregular, premature and in bad faith.

20. The basis for that complaint was that the Defendants had not served the Plaintiffs with the requisite Statutory Notices; and also because there had been no valuation of the suit property prior to the intended auction.

21. Furthermore, the Plaintiffs asserted that they did not owe the money which the bank was claiming, as they had *"dutifully liquidated the loan."*

22. At the time when the Plaint was filed, the Plaintiffs also filed the application dated 21st October 2015, seeking an interlocutory injunction.

23. By a Ruling dated 19th April 2016, S. M. Kibunja J. dismissed the application dated 21st October 2015. Within the ruling dated 19th April 2016, the learned Judge made a finding that the Plaintiffs had been served with all the requisite statutory notices.

24. The court also found that the 1st Plaintiff had fallen into arrears over a period of several months.

25. As regards the valuation of the suit property, prior to the bank taking steps to exercise its statutory powers of sale, Kibunja J. found that the chargee had done the needful. However, he also held that the absence of a forced valuation report was not enough to impeach the intended auction.

26.On the issue of irreparable injury or loss, Kibunja J. held that the value of the property is capable of being ascertained, and that, therefore;

***"…….*** **the plaintiffs would not suffer** ***any irreparable loss if the Defendants proceeded to auction it."***

27. Those findings have not been challenged either by an appeal or through review. Therefore, as regards the question on whether or not the Plaintiffs have proved a prima facie case, I can do no better than to re-echo the findings of my learned brother.

28. If the chargee has issued all requisite notices to the chargor, and if the chargor has not made good the arrears, the chargee has every right to exercise its statutory powers of sale, provided the property which is the security is valued.

29. As Kibunja J. had already held that the chargee had done the needful, from as far back as 2015; and because the Plaintiffs are still relying on the same pleadings which were found to have failed to give rise to a prima facie case with a probability of success, I hold the considered view that the Plaintiffs have failed to demonstrate any prima facie case with a probability of success.

30. That should be sufficient to dispose of this application.

31. However, in the event that I erred in my so holding, I must now ask whether or not the Plaintiffs have established that the injury or loss they would suffer, if an injunction was not granted, was irreparable.

32. The Plaintiffs' main complaint, as is evident in the submissions, is that although the bank carried out the valuation of the suit property, the same was an undervalue.

33. Logically, if the bank had, in **KISUMU CMCC NO. 201 OF 2016**, submitted that the Chief Magistrate's Court lacked jurisdiction because the suit property was valued at Kshs 75,000,000/= (at the least), it is difficult to understand why the same property would be valued at Kshs 55,000,000/= in 2017.

34. In effect, it is possible that the chargee has a valuation report which understates the value of the suit property.

35. Assuming for a moment, (without making a determination on the issue), that the Value of the suit property was Kshs 80 Million or Kshs 100 Million, that would imply that the valuation report which places the value at Kshs 55 Million, would constitute an under-value, by a significant margin.

36. The important thing, however, is that the Plaintiffs have placed a value to the suit property. Therefore, if the bank were to sell the said property for a sum which was later proved to have been a serious under-value, it should be possible to compensate the Plaintiffs.

37. Furthermore, by a letter dated 25th July 2016, the Plaintiffs' advocates had expressly stated that their clients had decided to let the bank

auction the property. The Plaintiffs' only concern was that the bank should strive to obtain the *"best possible market price."*

38. In the circumstances, where even the Plaintiffs were ready to support the auction of the property, I hold the considered view that it would be wholly inconsistent with justice to order the bank to stop the intended auction, when the Plaintiffs have not regularized their repayments.

39. In the result, there is no merit in the application dated 30th July 2019. It is therefore dismissed, with costs to the Defendants.

40. Nonetheless, in the light of the length of time that has passed since the security was last valued, it is prudent that a current valuation be undertaken by the chargee before it takes steps to exercise its statutory powers of sale.

41. As the chargee had originally given all the requisite notices, (as was held by Kibunja J.), I hold the considered view that the chargee ought not to be bound to issue fresh notices.

42. However, as a matter of abundant caution, and to obviate any potential challenges to the actions which the bank may decide to take, it may be useful to issue new notices.

**DATED, SIGNED** and **DELIVERED** at **KISUMU** This **29th** day of **April** 2020

**FRED A. OCHIENG**

**JUDGE**