



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. E 209 OF 2019

SEMA HEALTH PRODUCTS..... PLAINTIFF/APPLICANT

-VERSUS-

HOUSING FINANCE COMPANY OF

KENYA LIMITED.....1ST DEFENDANT/RESPONDENT

TAIFA AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

NJOGU-INI BUILDING INVESTMENT

LIMITEDPROPOSED 3RD DEFENDANT/RESPONDENT

RULING

1. On 3rd December 2019, this Court dismissed the Plaintiff's Notice of Motion dated 27th November 2019. The following day the Defendants sold the suit property by public auction to a 3rd party.
2. The 3rd Party is Karima Holdings Limited. There is now another application dated 11th December 2019 in which the Plaintiff seeks that this Honourable Court be pleased to issue orders restraining the Bank from transferring and/or interfering with registration status of the suit property pending the hearing and determination of the Applicants' intended Appeal.
3. The Intended Appeal is from the Court's decision of 3rd December 2019 for which a Notice of Appeal was filed on 9th December 2019.
4. In the Application, the Applicant states that the Judge erroneously found that the Applicants were not entitled to the injunctive orders and that the Judge failed to address the fact that the Applicants' equity of redemption was unfettered in relation to the Applicants' efforts in finding a purchaser for the suit property.
5. The Court is told that if the suit property is transferred and registered to a 3rd Party, it will make the substratum of the intended appeal otiose and the intended appeal will be rendered nugatory and a mere academic exercise.
6. The Bank responds to the Application through grounds of opposition of 13th December 2018 and two affidavits of Joseph Lule sworn on 17th December 2019 and 3rd February 2020.
7. The Bank emphasizes the consent order entered between the parties on 9th July 2019. That on the basis of the consent, the previously scheduled public auction slated for 10th July 2019 was suspended as the Plaintiff has been given up to 31st October 2019 to sell the suit property. That the Plaintiff breached the express and specific terms of the consent order and so the Bank duly scheduled another public auction.
8. That once again, by an application dated 27th November 2019, the Plaintiff sought to suspend the public auction slated for 4th December

2019 and to vary the terms of the consent order. The Bank supports the Courts Ruling of 3rd December 2019 and thinks it to be correct.

9. The Bank contends that it has over a period of five (5) years suspended various scheduled public auction and has filed 4 suits in that scheme namely:-

I. Nairobi Hccc 52 of 2015 Sema Health Products ltd vs HF and another.

II. Nairobi Hccc394 of 2018 Sema Health Products vs HF and another.

III. Nairobi Hccc E063 of 2018 Sema Health Products Vs HF and another.

IV. Nairobi Hccc E209 of 2019 Sema Health Products Vs HF and another.

10. In the further affidavit, the Bank shows to this Court a valuation dated 2nd November 2019 by Sec & M Co. Limited which was used as a basis for the auction of 4th December 2019. The valuer returned the following values:-

i. Market value: Kshs.155,000,000/=

ii. Market value with special assumption/reserve price – Kshs.116,500,000/=

iii. Estimated maintainable monthly rental value – Kshs.1,500,000/=

11. Attached as well is the memorandum of sale of the property dated 4th December 2019 showing the purchaser at the public auction as being James Mahianyu Gachie c/o Karima Holdings Limited ,although the Bank states that the purchaser was Karima Holdings Limited. The purchase price is said to be Kshs.130,000,000/=

12. The Application is brought under the provisions of Orders 40 Rule 1 which reads:-

“Cases in which temporary injunction may be granted.

1. Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or y g wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

13. As the application had the potential of prejudicing the rights of the purchaser, the Court allowed for its joinder as an interested party. There is an affidavit of service of Tobias Onyango Olum sworn on 17th February 2020 that demonstrates that the interested party was served with the application now before Court and invited to hearing. The interested party neither filed any papers nor appeared at the hearing.

14. At the hearing, Mr. Okatch for the applicant lay emphasis on issues raised in the application of 3rd July 2019. Just to rehash those matters is that so as to pay its debt, the Plaintiff entered into a sale agreement on 4th December 2018 by way of private treaty to sell the charged property to Njogui-ini Buildings Investment Limited at an agreed price of Kshs.210,000,000/=. A sum of Kshs.23,800,000/= is said to have been paid and that payment of Kshs.186,200,000/=was to be completed within 90 days. That on 18th December 2018, One Robert Kibaara was appointed the Chief Executive Officer (C.E.O) of the Bank. It is said that the C.E.O is a shareholder of the intending purchaser company. That using insider information, the C.E.O started to frustrate the sale by insisting on reduction of price from Kshs.210,000,000/= to Kshs.190,000,000/=.

15. The Plaintiff allege a scheme to frustrate the sale so that the matter would proceed at a public auction for a lower price.

16. While it is common ground that the application of 3rd July 2019 was compromised by the consent order of 9th July 2019, Mr. Okatch pointed out that the Plaintiff was in a weak bargaining position as it was a “sheep forced to negotiate with the wolf”.

17. On its part, the Bank argued that the consent which eventually paved the way for the sale has neither been set aside nor challenged. The Bank also makes the point that the sale by public auction has extinguished the Plaintiff’s equity of redemption.

18. This Court has considered the arguments before it. The consent of 9th July 2019 compromised the application of 3rd July 2019. The consent was as follows:-

1. The Plaintiff has up to 31st October 2019 to complete the sale of the suit property to Njogu-ini Building Investment Limited or

enter into a sale agreement with any other purchaser.

2. Should the Plaintiff fail to complete the sale to Njogu-ini Building Investment Limited or enter into a sale agreement with a credible purchaser by 31st October 2019, the 1st Defendant be at liberty to proceed with the sale by public auction of the suit property.

3. Costs in the cause.

4. Mention on 28th November 2019.

19. The Plaintiff had indicated a willingness to sell the charged property so as to pay off its debt to the Bank. That was the very essence of the sale agreement with Njogu-ini. The Plaintiff however complained that the new C.E.O of the Bank, using insider information, sought to have the agreed purchase price of Kshs.210,000,000/= reduced to Kshs.190,000,000/=. The scheme was therefore to abort the sale so that the property would be sold through a public auction for a lower price.

20. As I understood the consent, it was to give the Plaintiff opportunity up to 31st October 2019 to complete the sale of the property to Njogu-ini Building Investment Limited or to enter into a sale agreement with any other purchaser. The option to sale the property to any other purchaser would be a demonstration, I think, that any scheme to force the Plaintiff have to sale at a price it was not happy about was not condoned.

21. At the hearing of the application, the Plaintiff's counsel seemed to imply that the Plaintiff entered the consent from a disadvantaged position but clarified that it was not his client's position that the consent was fraudulent.

22. It is true as pointed out by Miss Abuya appearing for the Bank that the Plaintiff has not sought to challenge or set aside the consent of 9th July 2019. Indeed in its application of 27th November 2019 the Plaintiff seeks extension of time to fulfil the terms of the consent. Margaret Wanjiru Nzioka, a director of the Plaintiff Company, deponed as follows in support of the application.

“That the Plaintiff pleads for extension of time within which to clear the outstanding loan balance and negotiate with the previous interested purchaser who had on (sic) even filed an application to join this matter but denied by the Court.”

23. The Plaintiff does not call for the impeachment of the consent as a whole or terms thereof.

24. In the application before Court, the Plaintiff argues that the Court failed to address the fact that the Applicant's equity of redemption was not extinguished in relation to the Applicant's efforts in finding a purchaser for the suit property. Of course, the Plaintiff will have its say in the Court of Appeal and this Court is unable to predict the outcome.

25. That notwithstanding the Plaintiff had shown its willingness to let the property go by way of private treaty and then the terms of the consent made certain adjustments to the said arrangements. The parties agreed that the Plaintiff would either complete the sale to Njogu-ini Building Investment by 31st October 2019 or enter into a sale agreement with a credible purchaser by 31st October 2019. The parties, by the consent, placed terms upon which the Bank would be allowed to proceed with its statutory power of sale. This Court is not too sure about the strength of the argument that, without attacking the terms of the consent, the Court can be faulted for allowing the default terms of the consent to kick in. But as this is a post-ruling injunction it is embarrassing for this Court to even start defending its ruling.

26. What must concern the Court more is whether to decline the application would render the Appeal nugatory. The Plaintiff has all along been willing to have the suit property sold either to Njogu-ini or to any other purchaser. If the issue is that the purchase price achieved in the public auction is an undervalue or it can be demonstrated that the Bank wrongfully prevented it from selling the property to Njogu-ini at Kshs.210,000,000/= ,then the remedy for the Plaintiff would be the difference between the price at the auction and the negotiated price of Kshs.210,000,000/=.

27. The Court is not told that the Bank will not be in a position to pay up that difference if eventually required. For that reason this Court is unable to say that the Appeal will be rendered nugatory if the orders are not granted.

28. In reaching this decision the Court is well aware that the purchaser at the auction has not made any representations in respect to the application. The Plaintiff argued that it is the purchaser more than the Bank who would be affected by an order that restrains the completion of the transfer. I am not too sure that the Bank does not have an interest in the matter because an order injuncting the completion of the sale could discourage the purchaser from paying the balance of the purchase price. That is a prejudice to the Bank.

29. The Application of 11th December 2019 is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 15th Day of June 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Kimaiti for Okatch for the Applicant.

Ms Abuya for the Respondent.