REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

COMMERCIAL AND TAX DIVISION

AT NAIROBI

CIVIL CASE NO. E185 OF 2020

CONSOLIDATED WITH HCCOM NO. 036 OF 2020

STEPHEN KIPKIYENY TARUS.....APPLICANT

VESUS

NCBA BANK KENYA.....1ST RESPONDENT

GARAM INVESTMENTS AUCTIIONEES.....2ND RESPONDENT

RULING

1. The application dated 4th June 2020 is brought under sections 1A, and 1B, 3A of the Civil Procedure Act (CAP 21) Laws of Kenya, Sections 89,90,96(2) and 97 of the Land Act (2012) and all other enabling laws. The applicant seeks the following orders;

> **1.Spent**
>
> **2. THAT this honourable court be pleased to grant a temporal injunction for stay of the sale purported to emanate from the unlawful/unprocedural auction conducted on the 19th May 2020 and/or payment of the purchase price, alienating, transferring by auction, disposing off or otherwise completing by conveyance transfer, taking possession, processing a transfer of ownership to themselves or to third parties, appointing receivers or exercising powers conferred by section 90(3) of the Land Act 2012, leasing, letting, charging and/or any other dealings of the parcel of land known a LR NO 2259/463(86846), pending the hearing and determination of the suit.**
>
> **3. That pending hearing and determination of the suit, the ownership status of the parcel of land known as LR.NO 2259/463 (86846) be and remain as it had been before the unlawful sale and/or unprocedural auction conducted on the 19th May 2020**
>
> **4. That costs of the application be provided for**

2. The application is premised on the grounds that: -

> **1. The respondent irregularly sold, offered sale and/or auctioned unprocedurally the land known as L.R No 2259/463(86846) situated at Karen- off Marula Lane, which belongs to the applicant.**
>
> **2. No statutory Notice or notification of sale had been served on the applicant as required under section 90(1) of the Land Act (2012) and the Auctioneer Rules 1996 respectively.**
>
> **3. That the sale was concealed with fraud and the plaintiff's equity of redemption was not extinguished when the sale by public auction was concluded.**
>
> **4. That the land was sold at a gross undervalue.**

3. The application is supported by the applicant's affidavit wherein he avers that he obtained a loan facility from the respondent which he repaid regularly from his salary until he stopped working. He admits that the loan repayment was not regular but states that the respondents

advertised the suit property for sale without prior notice to him as provided by the law and that he came to know of it through information he received from a friend. He adds that the statutory notice or the notification of sale was not served on him and the land was sold at a gross undervalue.

4. The respondents opposed the application through a replying affidavit dated 20th July 2020 wherein it is averred that the applicant voluntarily offered parcel of land known as L.R no 2259/463 (hereinafter "the suit property") as security to be charged in favour of the bank in order to secure an amount of Kshs 75,000,000.

5. It is further stated that the applicant and the borrower defaulted in the loan repayments thereby triggering the bank's process of realizing its security. The respondents state that three-month notice was issued on 7th March 2017 and a forty-day notice of sale dated 16th June 2017. They further state that on 10th March 2020 the court made an order directing the respondents to regularize its notices by serving the applicant with the auctioneer notices dated 12th March 2020 through the applicant's address. The respondent states that the property was sold at the correct forced sale value.

6. Parties canvassed the application by way of written submissions. The applicant submitted that the statutory notices were not issued to him thus frustrating his efforts and capacity to realize the security. It was further submitted that the bank and the auctioneers failed to notify the guarantor of their intention to sell the charged property as required by law.

7. On its part, the respondent submitted that not only does the application fail the test on the conditions for granting orders of injunction but that it is also *res judicata* in view of the fact that a similar application has been heard and determined before the High Court at Eldoret.

8. The main issues for determination are as follows: -

a. Whether the determination of this application is res judicata

b. Whether the application meets the requirements for the grant of equitable remedy of injunction.

Analysis and Determination

9. I have considered the pleadings filed herein, the submissions presented by the parties' respective advocates together with the authorities that they cited. The first issue is whether the application is *res judicata*. The principal of *res judicata* is found in Section 7 of the Civil Procedure Act which provides that:

> **"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."**

10. The 1st respondent argued that the prayers sought in the present suit are similar to the prayers that were sought in ELC No. 83 of 2018 and High Court Civil suit of 2019. In the former suit, it was submitted that the court lacked the jurisdiction to hear and determine the suit and in the latter the respondent submitted that the court held that the application was not merited.

11. In the case of ***The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others,*** **Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR),** the Court of Appeal held that:

> **"Thus, for the bar of** res judicata **to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;**
>
> **a) The suit or issue was directly and substantially in issue in the former suit.**
>
> **b) That former suit was between the same parties or parties under whom they or any of them claim.**
>
> **c) Those parties were litigating under the same title.**
>
> **d) The issue was heard and finally determined in the former suit.**
>
> **e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."**

The Court further explained the role of the doctrine thus:

> **"*The rule or doctrine of* *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be**

rendered a noisome nuisance and brought to disrepute or calumny. The foundations of *res judicata* ***thus rest in the public interest for swift, sure and certain justice."***

12. I have examined the 1st respondent's bundle of documents marked "NIC-5" which is the ruling delivered in respect to Civil Suit No 46 of 2019. The holding was that the applicant had not met the threshold to warrant issuance of an injunction but the respondents were directed to regularize the auctioneer notices. In this present application the applicant claims that the respondents failed to issue the requisite notices as directed by court. The applicant herein challenges the manner in which the sale was conducted and for that reason I find that the application does not strictly touch on matters that were previously tried in the earlier. It is therefore my finding that the application is not res judicata.

13. The second issue is whether the application meets the conditions for the granting of equitable remedy of injunction. The principles governing the granting of temporary injunctions were well set out in the case of ***Giella v Cassman Brown & Company Limited (1973)*** *E.A 385, at page 360 where Spry J. held that: -*

"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, 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. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

14. Principles were further discussed in **Nguruman Limited v Jan Bonde Nielsen & 2 Others,** CA NO. 77 OF 2012, together with the mode of their application 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) ally 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. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. 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 respondent 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 hurdles in between." (Emphasis added).

15. Having regard to the known principles of injunction as set out in the above cited cases, I will now turn to consider if the application meets the threshold set therein. It is well established that, in order to secure the injunctive relief sought, the applicant must first establish a prima facie case with a high chance of success. A prima facie case was defined in the case of ***Mrao Limited v First American Bank of Kenya and 2 Others*** *(2003) KLR 125,* **where** the Court of Appeal in determining what amounts to a prima facie case stated;

"A prima facie case in a Civil Case includes but is not confined to a "genuine or 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 latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

16. In the present case, the plaintiff seeks orders of injunction to restrain the respondents from completing the sale of the suit property. The plaintiff's gravamen is that the respondent irregularly auctioned the suit property without issuing statutory notices. In a rejoinder, the respondents stated that they instructed the auctioneers to issue a Forty-five-day Redemption notice and notification of sale, as shown in annexure marked "NIC-6". I note that the documentation presented in court shows that the auctioneer sent the notice of sale to the applicant. I note that the postage address therein is the same as the one found in the charge document. It is however noteworthy that the respondent never attached a certificate of posting as proof of service with the notices. Be that as it may, courts have taken the position that lack of or improper service with the statutory notices is not a ground for stopping the chargee from exercising its statutory power of sale. This is the position that was adopted in ***National Bank of Kenya Limited v Shimmers Plaza Ltd*** [2009] eKLR wherein the learned judges held as follows:

"We venture to say that where the court is inclined to grant an interlocutory order restraining 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 mortgage shall give a fresh statutory notice in compliance with the law. We respectfully think that the learned judge did not exercise his discretion judicially in the circumstances of this case when he granted an order of injunction until the determination of the suit."

17. The applicant also contended that the property was sold at a gross undervalue. According to the applicant, the value of the suit property is Kshs.110, 000,000. **In *Zum Investment Ltd v Habib Bank Ltd* (2014) eKLR the court** stated as follows;

> **"…It is not sufficient for the Applicant to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The Applicant must satisfactorily demonstrate why the valuation report the Respondent intends to rely on in disposing of the suit property does not give the best price obtainable at the material time."**

18. In the circumstances of this case, I am not satisfied that the applicant has demonstrated that the respondent has undervalued the suit property. In the present case, the applicant did not deny that there was a valuation report on the suit property. The contest was that the property had been undervalued. Courts have however held that undervaluation *per se* cannot form a ground for the issuance of orders of injunction since breach by the chargee in selling the property at an undervalue can be remedied through a claim for damages. (See ***Jashvantsing L. Solanki v Diamond Trust Bank Ltd.*** [2014] eKLR).

19. I also note that the applicant does not deny that he is truly indebted to the respondent. I am therefore not satisfied that the applicant has made out a *prima facie* case with a probability of success as enunciated in the case of ***Giella Vs Cassman Brown & Co Ltd*** **(supra).**

20. On the issue of irreparable harm, I am guided by the decision in the case of ***Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others*** **[2016] eKLR** in which the Court considered the ***Halsbury's laws of England*** on what irreparable loss is and stated that:

> **"first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages."**

21. The applicant's case was that the sale was fraudulent as the land was sold at a gross undervalue in which case, his equity of redemption was not extinguished.

22. In **Bomet Beer Distributors Ltd & Anor. v Kenya Commercial Bank Ltd & 4 Others (2005) eKLR t**he court held that;

> **"What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished. The only remedy for the chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages."**

23. Having regard to the foregoing authorities, findings and observations, I am not satisfied that the applicant has made out a case for the granting of the orders sought in the instant application which I hereby dismiss with costs to the respondents.

Dated, signed and delivered via Microsoft Teams at Nairobi this 17th day of December 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Nyakeriga for applicant

Court Assistant: Sylvia