



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 25 OF 2018

MOHAN SINGH DHARIWAL.....1ST PLAINTIFF

KULWANT KAUR DHARIWAL.....2ND PLAINTIFF

VERSUS

I & M BANK LIMITED.....DEFENDANT

AND

ADM CONSULTING LIMITED.....1ST INTERESTED PARTY

GARAM INVESTMENT LIMITED.....2ND INTERESTED PARTY

RULING

1. On 18th January 2019, the Plaintiffs filed a Notice of Motion of even date seeking, inter alia, to injunct the public auction of that piece of land known as LR. NO.209/8000/188 (the charged property), due for 22nd January 2019 at 11.00am, pending the hearing and determination of the Application in the first instance and thereafter the main suit.

2. The Motion also sought to set aside the Consent Order dated 11th May 2018, filed on 14th June 2018 and adopted by Court on 1st October 2018. The Consent is as follows:-

“BY CONSENT

1. The Applicants and/or the Interested Party shall clear the entire balance on the loans advanced to the Interested Party together with accrued interest and bank charges within six (6) months from the date of this Consent.

2. If the entire balance on the loans advanced to the Interested Party together with accrued interest and bank charges are not cleared within six (6) months from the date of this Consent, the Defendant shall be at liberty to exercise its statutory power of sale and realize its charged security.

3. The suit filed herewith is hereby marked as fully settled”.

3. The Application was placed before me on 21st January 2019, whereupon I certified it as urgent for interpartes hearing on 22nd January 2019 at 9.00am. Keenly aware that the auction sought to be restrained was due to commence two hours later on that day, that is, 11.00am, I also made an Order that the Application be served upon the Respondents by 4.00pm of 21st January 2019.

4. When the Advocates for the parties appeared before me on the morning of 22nd January 2019, I inquired from the Applicants’ Advocate whether he had served the application on the firm of Muga and Muga Associates who previously had the conduct of the Applicant’s case. My inquiry was premised on the reason that, in seeking to set aside the Consent, a running theme by the Applicants was that the said firm entered the Consent without their express instruction and/or permission. The Application sought to impugn the manner in which the firm of Muga and Muga Associates entered the Consent. A matter which, in fairness, could not be determined without granting the said firm an

opportunity of being heard. It being clear that the said Advocates had not been served, the Court directed that the limb of the Application for setting aside of the Consent be heard on a later date. Counsel then prosecuted Prayer 2 of the Motion for Injunction.

5. The Applicants sought to stop the Auction for three broad reasons. One, that after the Consent was entered, some payments were made towards reducing the debt and it was incumbent upon the Bank to issue further Statutory Notices before restarting the realization process. Secondly that a Notification of Sale earlier issued on 27th October 2017 was sent to a wrong address and a fresh Notification needed to have been served. Lastly that the Bank intended to proceed with the Sale on the basis of an old Valuation.

6. Because the Application came late in the day and it was served upon the Respondents Counsel at 3.43pm on 21st January 2019, I permitted Counsel to present any documents they would be relying on without necessarily presenting them in an Affidavit. The reality being that the late Service of the Application and the time by when the Application needed to be heard and determined may not have allowed the said Advocate to prepare an Application in response. The exigencies of presenting an application so close to the date when the action sought to be injuncted is to happen! Counsel for the Respondents, taking advantage of this direction, presented to Court a Report and Valuation of the charged property dated 21st December 2018.

7. It is common ground that the Plaintiffs had previously, through a Notice of Motion of 22nd January 2018, sought to injunct the Sale of the charged property by the Bank. The Suit was however compromised through the Consent Order dated 11th May 2018. Thereafter the Plaintiffs made some payments to the Bank but there was fresh default. Was the Bank to issue fresh Statutory Notices? This Court does not understand the Law to be that fresh Statutory Notices need to be issued merely because an Auction has been suspended as a respite to the Chargor or principal Borrower to make good a default or breach. Once default or breach happens again, the Chargee is entitled to proceed with realization on the basis of the already issued Statutory Notices and no fresh Notices need be given.

8. On the Notification by the Auctioneer, this was one of the issues raised in the compromised suit. It can be argued that the Consent had the effect of compromising that complaint. It cannot be taken up again and reagitated to challenge the new realization process.

9. As to valuation, the Court is shown a Valuation Report dated 21st December 2018. Counsel for the Plaintiffs challenged the Valuation on the basis that no Valuation was indeed carried out. Whether or not the allegation by the Plaintiffs is valid will have to await a Trial. For now it is word of one person against the other. If however, the Chargors succeed in faulting the Valuation, they are not without remedy in view of the provisions of Section 99(4) of The Land Act. This Court is not persuaded that it should injunct the intended Auction merely because there is an allegation that there was no valuation on 21st December 2018 when there is a Report of that date.

10. These are the reasons why the Court declined to grant Prayers 2 and 3 of the Notice of Motion of 18th January 2019. Costs to the Respondents. The parties are at liberty to take a date for hearing of the application on the remainder of the Motion.

Dated, delivered and signed in open Court at Nairobi this 25th day of January, 2019.

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F. TUIYOTT

JUDGE

Present:-

Chepkoech for Kimathi for Plaintiffs/Applicant

N/a for Defendant

Nixon – Court Assistant