



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

HCCC NO. 17 OF 2018 (FORMERLY KAJIADO

ELC SUIT NO. 83 OF 2018)

STANLEY MUNEI OLE KERU PLAINTIFF

VERSUS

OSCAR MIDAM OLUOCH1ST DEFENDANT

FAULU MICROFINANCE BANK LIMITED2ND DEFENDANT

RULING

The applicant Stanley Munei Ole Keru is the registered proprietor of all that land known as KJD/Mailua/3876 measuring 72 acres of the said property. On or about 7th June, 2017 he executed a guarantee Mortgage instrument in favour of the borrower Oscar Oluoch Midam who was to be advanced credit facilities of Kshs. 5,000,000 from Faulu Micro Finance Ltd against the property as security. The terms and conditions of the guarantee of indemnity is as spelt out in the agreement between the plaintiff and the 1st defendant. As it can be read from the pleadings and the statement of claim filed by the applicant/plaintiff on 11th June, 2018 the 1st defendant has breached the contract for failure to pay due consideration to the plaintiff and also default in repaying the loan amount. The 2nd defendant financial bank which hold the legal charge has invoked the statutory power of sale under Section 90(1) of the Land Act to redeem real property to realize the security by way of a public action.

The applicant aggrieved by the decision of the 2nd defendant filed a plaint and a notice of motion simultaneously on 11th June, 2018 which seeks to restrain the 2nd defendant bank from selling or alienating, disposing or taking vacant possession of the property, pending the hearing and determination of the suit. The applicant has relied on the following grounds.

1. That the plaintiff/applicant acted as a guarantor for 1st defendant – a stranger introduced to him by his brother and offered his property Title NO. Kajiado/ Mailua/3976 (“Title Property”) as security in favour to the 2nd defendant in a charge dated June, 20th 2017 for a loan of Kshs. 5,000,000 in circumstances where he was not advised or fully comprehend the implications of signing and granting the said charge in favor of the Bank.
2. That the said property is matrimonial property having been acquired in 2013 during the pendency of his spouse Benta Mueni Keru alias Benedetta Mueni Wambua. While the plaintiff/applicant was requested to bring his spouse to the Bank Advocates offices. The plaintiff was, therefore, required to avail a copy of her national identity Card to the Advocates for the Bank. The charge was, therefore, not supported by a spousal consent.
3. That the plaintiff/applicant and his spouse were not served with any of the statutory notices. The applicant only retrieved copies from the 2nd defendant’s Javanjee Branch in May, 2018 after he was tipped off by one of the Bank officials that the Bank had engaged auctioneers to sell the said property. The property is now set to be advertised on or around the 18th June, 2018 and will be auctioned on 4th July, 2018 at a price which is 33% of the value given by the Bank’s valuer in May, 2017 unless this Honourable court intervenes.
4. That in the circumstances, the purported charge is invalid for lack of the spousal consent. In the alternative, the purported exercise of the 2nd defendant’s statutory power of sale is premature owing to the failure to serve the mandatory notices as by law required and the gross undervaluation of the property meant to defraud the plaintiff/applicant.
5. That in the alternative, the plaintiff/applicant and the 1st respondent entered into an agreement and the same should be enforced forthwith to avert any losses to the plaintiff/applicant.

6. That the plaintiff/applicant is apprehensive that unless restrained by an order of this Honourable court, the 1st defendant/applicant will move to take possession of the plot to his detriment or may go ahead to transfer or any other way deal with the property to the plaintiff's detriment.

7. That it is in the interest of justice that this application is heard and the orders sought granted to ensure that the applicant's claim over the two properties is not defeated. It is, therefore, imperative that this application is heard and determined forthwith.

In all the applicant depones that there are serious issues to be tried at the trial against the defendants and no damages would be adequate to compensate the loss. Further the applicant placed reliance in the supporting affidavit dated 5th June, 2018. The applicant's major complaints with the 2nd defendant was in respect of not being served with the statement of accounts and copies of the correspondences issued to the 1st defendant. Secondly, that the 2nd defendant embarked on the sale of the property using evaluation report of Kshs. Seven million (7,000,000) contrary to the earlier valuation by Harrison Valuers dated 4th May, 2017 which valued the property at Kshs. Twenty-one million (21,000,000) with a forced sale of fifteen million (15,000,000). To the applicant the valuation by the Auctioneer was a gross under valuation of the suit property which would occasion his irreparable harm. Thirdly the applicant introduced an angle of lack of spousal consent rendering the mortgage contract unlawful.

Defendant's Case

Mr. Steve Biko, the legal officer with the Bank filed a rejoinder through a replying affidavit filed in court on 2nd July, 2018, asserting that the application for injunctive orders cannot lie in the circumstances of this case which he tabulated as follows:

First, that mutually executed guarantee instrument between the applicant/plaintiff with the 2nd defendant for Kshs, 5,000,000 loan advance to the 1st defendant is not in dispute. Secondly, that the applicant/plaintiff agreed to have his property referred as LR. Kajiado/Mailua/3976 as security for the loan. Thirdly, the security was duly registered in favour of the 1st defendant. Fourthly, that the 1st defendant defaulted in repaying off the loan and the 1st defendant embarked on the process of pursuing the recovery of the loan by issuing all the necessary demands and notices under the Land Act. Fifth, that the loan agreement and a charge on the said property has not been challenged by the applicant/plaintiff. Finally, that the 2nd defendant valuation report remains a price guider as the public auction is regulated by the bids received during the auction. He denied any manipulation of the process of sale as stated by the applicant/plaintiff.

Analysis and determination

From the pleadings and affidavit evidence the applicant contends that the 2nd defendant action of generating statutory power of sale is an abuse of the process of the court on grounds that the sale of the suit Land is at a gross under value. That the valuation report by the Auctioneer attaching a value of 7.5 million is a misdescription of the property with the sole aim of denying him a fair and full compensation. Section 97 of the Land Act provides as follows:

“A charge who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of the order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor and any charge under a subsequent charge or under a lieu to obtain the best price reasonably obtainable at the time of sale. A charge shall before be exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.”

Subsequently under Rule 11(b)(1) of the Auctioneers rules it stipulates that ***“The reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale.”***

In the present case the central question is whether there was an enforceable guarantee. This court was forwarded with affidavits from the applicant and the 2nd defendant bank which do not dispute the following facts:

(a) That Stanley Munei Ole Keru covenants on 7th June, 2017 that he offers his land parcel No. Kjd/Mailua/3876 to Oscar Oluoch Midam the borrower to use as security for the loan facility.

(b) That the borrower was to carry out in full his obligations and requirements in repayment of the loan under the Mortgage contract. As a consideration to the guarantee document the borrower had agreed to compensate the guarantor with 500,000 as consideration for the said obligations.

According to the legal officer Mr. Steve Biko for the defendant Bank the 1st defendant received a benefit of the loan as guaranteed by the plaintiff. The loan was negotiated by the 1st defendant with the 2nd defendant but the sole signatory to the conveyance of the security offered to secure the loan was the plaintiff as the registered owner of the property. That therefore made the plaintiff to be a party to the mortgage deed.

Provisions to make periodic payments to settle the loan for the executed contract was never honoured by the borrower. That the plaintiff as a guarantor of the debt had an obligation to see to it that the borrower performs his obligations. On the facts of this case the plaintiff cannot rely on the conditional precedent of spousal consent not to strictly comply with the guarantee deed.

I found that there is no credible evidence than the statutory power of sale by the charge has not crystalized a part from the bare assertion that the guarantor's property comprises of matrimonial home and as such should not be subject to the sale by the 2nd defendant bank. The cases of ***Gierlla v Cassman Brown co. Ltd 1973 EA and Mrao Ltd v First American Bank of Kenya Ltd & 2 others*** sets out the threshold issue that it would be improper to grant an injunction to restrain the chargee's power of sale if there are no serious issues to be heard and

determined in the main suit more so as to the validity of the mortgage contract which the statutory power of sale is founded by the charge.

On the other hand, the law places a duty of care on the charge under the provisions of Sections 96, 97, 98, 99, 100 and 101 of the Land Act, 2012 to ensure that the Auction or seller attracts the best market value for the property. It is appropriate that the property should not be sold below the reserve price which has been indicated in the recent valuation report.

A general rule on this issue in relations to valuation was stated in the case of *David Githome Kihungaka v Equity Bank Ltd 2013 eKLR* where Havelock J said that:

“the obligation on charge to ensure that a forced sale valuation is undertaken by valuer comes under the heading to Seller 97 of the Land Act 2012.”

Duty of chargee exercising power of sale. To my mind such a duty is obligatory. In the case before me the plaintiff contends that the charge the 2nd defendant bank is exercising the power of sale without an appropriate valuation report. The plaintiff relying on the initial valuation report dated 4th May, 2017 contended that the valuer set out the open market value of the property at Kshs. 21,000,000 while the forced sale is at Kshs. 15,000,000. This is in contrast with the value mentioned by the Auctioneers to be dated 26th April, 2018 to be Kshs, 7,000,000.

On the other hand, the plaintiff fearing that his property would be sold for song by the Auctioneers provided a valuation report dated 13th February, 2019. It was clearly stated in the report that the current market value stands at Ksh, 22, 500,000 while the forced sale is at Ksh. 16,875,000. In appreciating the parameters applied by Horison valuers in their valuation report dated 4th May, 2017 and the latest valuation carried out by Clayton valuers Ltd dated 13th February, 2019 there is manifest error on the figure of 7000,000 provided by the Auctioneer.

In his notification of sale, it would not be right to say that the 2nd defendant advanced the loan amount of Kshs. 5000,000 to the 1st defendant on the basis of a property valued at Ksh. 7,000,000 nor it is possible to suggest that a property valued at Kshs. 21,000,000 on 4th May, 2017 has since depreciated to a mere Kshs, 7,000,000 in the year 2018. I am afraid I cannot see how the Auctioneer arrived at a value of the property pointed out in his notice to be Kshs, 7,000,000.

In the present case when one considers the provisions of Section 97, 98, 99 and 100 of the Land Act its abundantly clear that the public Auction of any property is to be subjected to a reserve price. The charge acting through the Auctioneer must guard the chargors interest from any fraudulent and predatory arrangements to have the property sold at a value below the reserved price. The emphasis in law on public Auction is to secure a fair offer of the property under the guidance stipulated in the recent valuation report.

The law demands of the chargee in the exercise of his or her power of sale of the mortgaged property to act in good faith and take reasonable precaution to obtain the sale bids at the auction.

In my view there is nothing irregular for the charge to postpone the auction or sale until a fair and reasonable price for the property is secured other than selling it at an under value. The question to be asked is whether the value of the property is that stated in the auctioneer notice of sale of Kshs, 7,000,000 or a evidential based valuation reports from Harison and Clayton valuers.

I believe that two valuation reports from certified valuers provided what the law requires under Section 97 of the Land Act. I found that valuation reports credible about the property and the factors used to arrive at the market and forced value of the property.

In my view the competitive bidding of the property to obtain the best price possible should be grounded by the two valuation reports and not the Auctioneers value. For this reasons a declaration be and is hereby issued that the Auctioneer value falls the legal threshold that he took account valuation parameters and principles to arrive at a value of Kshs. 7,000,000 for the property initially valued at Kshs, 21,000,000. That disparity of price also was not expected by the Auctioneers. As a consequence, the reasonable and true maximum value of the plaintiff’s property is as stated in the latest valuation report by Clayton valuers Ltd dated 13th February, 2019.

In the event the chargee sells the property at a price far below the forced value the plaintiff may be entitled to damages. Costs of this application be provided for as agreed by both parties or taxed by the Deputy Registrar.

Dated, signed and delivered in open court at Kajiado this 26th day of February, 2019.

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R. NYAKUNDI

JUDGE

Representation:

Ms. Koech holding brief for Kayugira for the plaintiff