



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCC. NO. 87 OF 2019

EQUIP AGENCIES LIMITED.....PLAINTIFF

VS

I & M INVESTMENT BANK LIMITED.....1ST DEFENDANT

JOHN GIKONYO T/A GARAM INVESTMENTS AUCTIONEERS.....2ND DEFENDANT

TOWER SACCO SOCIETY LIMITED [LUCAS KIIRU NGIGI, PAUL MBUGUA, MARY

WANGARI GITHUME sued on their own behalf and in their capacities as Office Bearers of

GILGIL TOTAL INVESTMENTS SELF HELP GROUP.....3RD DEFENDANT

RULING

1. The effort by Equip Agencies Limited (Equip or the Plaintiff) to save property known as LR No. Gilgil Township Block 2/210 (the suit property) from sale and transfer by I & M Investment Bank Limited (I & M Bank) as chargee has been eventful.

2. The latest effort is by way of an amended Notice of Motion dated 6th March, 2019 which seeks the following substantive prayers:-

1. Spent

2. THAT pending the hearing and determination of this application inter-partes, this honourable Court be pleased to grant a temporary order of injunction restraining the Defendants whether by themselves, their employees, servants or agents from disposing of or otherwise howsoever completing by conveyance or transfer of the purported action sale, taking possession, leasing, letting, charging or otherwise however interfering with the Plaintiff's ownership of and title to all that parcel of land known as L.R No. Gilgil Township Block 2/210.

3. THAT this Honourable Court be pleased to issue temporary orders in terms of prayer 2 above pending the hearing and determination of the suit.

4. THAT the Honourable Court grant any other Order as may deem fit and just in the circumstances

5. THAT costs and incidental to the application be provided for.

3. That application is presented in the context of the Plaint of 26th February 2019 and filed on 27th February 2019. In the suit, Equip avers that it is the registered owner of the suit property which is developed in three parts and measures approximately 16.73 hectares or 41.34 acres. Equip asserts that it remains in ownership and possession of the said property which has been illegally sold by the 2nd Defendant under instructions from the Bank.

4. In that Plaint, Equip gives a short background to the events leading to the alleged sale. That on or about 22nd April 2013, it duly executed a legal charge over the suit property in favour of the 1st Defendant to secure a sum of Khs.324,000,000.00. That raising various complaints,

including that the Bank had breached the provisions of the Land Act and the Banking Act, Equip filed various suits against the Bank in August 2016 and 16th December 2016.

5. It is in those suits that Equip sought orders of permanent injunction to restrain the Bank from selling or dealing with the suit property. It further requested for a discharge of the property. Simultaneously, Equip applied for an interim orders of injunction. Equip states that the various applications were dismissed.

6. The dismissal orders paved way for the exercise of the chargee's statutory power of sale. Acting on behalf of the Bank, the 2nd Defendant advertised the property for sale by way of an auction scheduled for 24th January 2019. Equip asserts that one of the preconditions of the sale was that interested bidders were to deposit a sum of Kshs. 10,000,000.00 before the date of auction.

7. The Plaintiff states that on the auction date it sent its representatives to the venue to ascertain compliance with the law in the conduct of the auction. Equip contends that its representatives did not witness any auction on that day. It is therefore its case that the alleged sale of the property to the 3rd Defendant is fraudulent.

8. The particulars of fraud and illegality are found in paragraph 11 of the Plaint and are reproduced below:-

- i. Whereas it was mandatory precondition to deposit Kshs.10 million with the auctioneers before was allowed to bid, neither the 3rd Defendant nor other purported bidders deposited the said amount.
- ii. No public action took place at the venue.
- iii. The 3rd Defendant, although purportedly declared ads the highest bidder did not deposit the mandatory 25% deposit on the day of auction.
- iv. The property was undervalued to secure the illegal predetermined sale (appearing at pages 61-77 of the Bundle is a copy of the current valuation)
- v. No bid numbers were issued which is a clear manifestation that the purported bidders were ineligible to participate in the auction including the 3rd Defendant.
- vi. The highest bidder in a public auction is the purchaser subject to compliance with the conditions of sale and in this case the conditions were not complied with.
- vii. There was no waiver of the conditions of the sale and the extension of payment period was not communicated.
- viii. No valid certificate of sale was executed on the purported auction day.
- ix. The Plaintiff urges the Court to find that the Defendant have filed *in toto* to demonstrate that the public auction was not flawed.

9. Equip seeks the following intervention from the Court:-

- a. A declaration that the purported Public Auction conducted on the 24th January 2019 in respect of L.R No. GILGIL TOWNSHIP BLOCK 2/210 was illegal, and fraudulent and therefore null and void and of no effect.
- b. An Order that the Public Auction staged for the sale of the suit property being LR NO. GILGIL TOWNSHIP BLOCK 2/210 on 24th January 2019 be and are hereby set aside.
- c. A permanent injunction restraining the Defendants, whether by themselves, their appointed agents or representatives from doing any of the following acts, that is to say, from advertising for sale, selling, by private treaty or public auction, leasing, subleasing, charging, disposing off, taking possession, subdividing, or otherwise howsoever completing any conveyance or transfer from any sale conducted by private treaty or public Auction or otherwise interfering with the Plaintiffs ownership and possession of L.R NO GILGIL TOWNSHIP BLOCK 2/210.
- d. Damages for the illegal and unlawful sale of the suit premises.
- e. Costs and interests of this suit.
- f. Such other and/or further relief as this Honourable Court might deem fit and just to grant in this matter.

10. The contents of the Plaint are rehashed in the affidavit of one Divyesh Indudhai Patel sworn on 26th February 2019 in support of the Motion. Mr. Patel also sworn further affidavits of 5th March 2019 and 9th April, 2019.

11. In these two latter affidavits the deponent raises matters which fall outside the pleading by Equip. And whilst the Court will set out those issues, it will have to decide whether it can consider the application on the basis of matters that are not subject of the pleadings before it.

12. It is contended by Equip that the description of the property under the charge did not include the treatment plant, generators and machinery. These are said to have a value of over Kshs.120,000,000.00. Equip states that the property advertised for sale could only be in respect to land and buildings and the 3rd Defendant could not have bought the factory equipment and machinery. It is contended by Equip that this notwithstanding, the 3rd Defendants are laboring under the misapprehension that the purchase included the equipment and machinery as they have sent people to the suit premises to take stock of them.
13. Related thereto, it is asserted that the advertisement was opaque and many interested parties did not participate and so the auction was flawed and fraudulent.
14. Raising issues that had featured in its earlier suits, Equip re-asserts that the statutory notice served on it was fatally defective for amalgamating debts without recourse to the law. Further that this suit should be consolidated with several other pending suits, all of which have interim orders restraining sale and transfer of the respective suit properties by way of injunction. It being argued that it is necessary that the sale herein be halted.
15. The Plaintiff also states that it is owed over Kshs. 30 billion by the Government of Kenya which has promised to make payment in the June 2019 budget. That it will therefore pay any sums legitimately due to the Bank.
16. The Bank resists the application under four broad heads. First, that the entire suit is an abuse of Court process because both the High Court and the Court of Appeal have dismissed many other similar applications seeking injunction to stop the sale of the property. It is not necessary to cite those proceedings for now.
17. The Bank also argues that the application cannot succeed because Equip's equity of redemption was extinguished upon the fall of the hammer at the auction of 24th January 2019. Elaborating on the auction, the Bank states that there were a total of 12 bidders at the auction and one Lucas Kiiru Ngigi representing the 3rd Defendants made a bid of Kshs.353,500,000.00. That at the fall of the hammer, the highest bidder paid a sum of Kshs. 78,375,000.00 of the auction price in addition to 10,000,000.00 deposited earlier. The total working to Kshs.88,375,000.00. It is stated that the auction was conducted in compliance with the law and the conditions set out for sale.
18. It is further contended that Equip has deliberately refused to disclose that it has a similar application for injunction to stop the transfer of the property pending before the Court of Appeal. The Bank sees the current application as an abuse of Court process.
19. I & M tells Court that the debt owed by Equip stands in the sum of over Kshs.2 billion and despite admitting its indebtedness and making promises to pay, Equip has declined to do so. That the more the recovery process is delayed, the more the debt increases with a possibility that the debt would exceed the securities held by the Bank. Further, if the sale and transfer is allowed to proceed then any loss suffered by the Applicant will be compensated by damages which the Bank has already undertaken to pay.
20. On the issue of valuation, it is the position of the Bank that a valuation undertaken on 12th April, 2018 put the forced value at Kshs.352,500,000.00 which was less than the sale price to the 3rd Defendants by 1 million. At any rate, the Bank states that the issue of valuation was already dealt with in the past decisions of related matters.
21. Lukas Kiiru Ngigi, Paul Mbugua and Mary Wangari Gathume are jointly sued as 3rd Defendants on their own behalf and in their capacities as the office bearers of Gilgil Total Investors Self Help Group (hereafter the Self Help Group). They too oppose the application.
22. In brief, they state that the Self Help Group deposited cheques amounting to 10million shillings on the day of the auction before being allowed to bid. That, they successfully made a bid at Kshs. 353,300,000. That on the same day, they paid a total sum of KSH.78,375,000 by way or RTGS.
23. That upon payment of the 25% deposit, the three Defendants have executed an agreement with the 2nd Defendant on behalf of the Self Help Group. It is deponed that the Self Help Group is seeking financial help from various financial institutions so as to pay up the balance of the purchase price.
24. Ngigi reiterates that the auction took place as scheduled outside Standard Chartered Bank Limited, Nakuru County and the Self Help Group is not involved in any fraud, misrepresentation or dishonest conduct.
25. The Court has considered the application and responses thereto and the submissions made herein, both written and oral.
26. Some issues of preliminary nature need to be dealt at once. One opposition to both the main proceedings and the application is that the issues raised herein are *res judicata* and make the current matter an abuse of Court process.
27. This Court has familiarized itself with the various rulings made in relation to this matter and note that in so far as the substantial issue herein is about the legality of the actual auction which allegedly took place on 24th January 2019, the main issue herein is not *res judicata* the previous proceedings. The grievance of Equip in respect to that auction, and as pleaded, is that the property was sold at an under-value. Second, that no auction took place or if it did then it is fraught with illegalities and irregularities.
28. In respect to the latter complaint, this would be a new matter that had not arisen at the time of the filing of the previous suits and also in so far as two new parties are involved, that is the Auctioneer and the Purchaser, the filing of a new suit may have been inevitable or at least understandable.

29. As regards the complaint that the property was purportedly sold at an undervalue on the basis of the valuation undertaken on 12th April 2018 by Dunhill African Valuers Limited, the Bank's Counsel referred this Court to the Ruling of Mwongo J. dated 6th December in HCC 417 of 2018 and HCC 418 of 2018. Before the transfer of these suits to this division, Mwongo J. dealt with them in Naivasha. The Ruling was in Naivasha HCC No. 6 of 2018 GILGIL TREATMENT VS (1) I & M BANK LIMITED (2) EQUIP AGENCIES LTD. I have read the Ruling and I am unable to find a discussion and determination in respect to the valuation of 12th April, 2018. I hold that the issue is not res judicata.

30. But there is another aspect to the application before Court. The application is for an interlocutory injunction and the issues raised in the application must be congruent or consistent with the case pleaded by Court. In both the Complaint and the main Notice of Motion the only issues raised by Equip Agencies are the two alluded to above.

31. However, in affidavits subsequent to the responses by the Defendants Equip has sought to expand its case and to cling on to new matters.

32. First, there is the issue that the contested sale is illegal for a further reason that it included the sale of machinery and equipment which were not part of the charge over the suit property. This indeed turned out to be a cornerstone of Equip's case at the prosecution of the application. Secondly, that the sale proceeded on the basis of a defective statutory notice. Lastly, and this came up at the hearing itself, that the person who conducted the auction was not the auctioneer who advertised the sale.

33. My observation is that both in the Complaint and the Motion, Equip sets out the particulars of fraud and illegality of the auction which are specified to be:-

- i. Whereas it was mandatory precondition to deposit Kshs.10 million with the auctioneers before was allowed to bid, neither the 3rd Defendant nor other purported bidders deposited the said amount.
- ii. No public auction took place at the venue.
- iii. The 3rd Defendant, although purportedly declared ads the highest bidder did not deposit the mandatory 25% deposit on the day of auction.
- iv. The property was undervalued to secure the illegal predetermined sale (appearing at pages 61-77 of the Bundle is a copy of the current valuation)
- v. No bid numbers were issued which is a clear manifestation that the purported bidders were ineligible to participate in the auction including the 3rd Defendant.
- vi. The highest bidder in a public auction is the purchaser subject to compliance with the conditions of sale and in this case the conditions were not complied with.
- vii. There was no waiver of the conditions of the sale and the extension of payment period was not communicated.
- viii. No valid certificate of sale was executed on the purported auction day.
- ix. The Plaintiff urges the Court to find that the Defendant have filed *in toto* to demonstrate that the public auction was not flawed.

34. None of the new issues were raised in the Complaint and each one of them would be, or ought to have been, within the knowledge of Equip at the time of presentation of the suit. The Plaintiff did not seek to amend his Complaint or Motion and cannot be permitted to argue an application for interlocutory injunction on grounds not consistent with the case it has presented for determination. For the further reason that the new matters have not been embraced before this Court for determination, this Court shall proceed to hear and determine the Motion only on the grounds set out in the Complaint and the Motion.

35. As I turn to do so, I rehash the principles for grant of a temporary injunction as set out in the case of GIELLA VS. CASSMAN BROWN [1973] EA 358 as being:-

- a. An Applicant must show a prima facie case with a probability of success.
- b. An Interlocutory Injunction will not normally be granted unless the Applicant might otherwise suffer irreparable loss which would not be adequately compensated by an award of damages.
- c. If the Court is in doubt, it will decide an application on the balance of convenient.

36. This Court first determines whether the Plaintiff has made up a prima facie case that the property herein was undervalued for purposes of the intended auction. On this, it is common cause that the challenged sale proceeded on the basis of a valuation dated 12th April 2018 which returned the following values in respect to the suit property;

- i. Open market valueKshs.470,000,000.00
- ii. Mortgage valueKshs.376,000,000.00

iii. Forced sale value.....Kshs.322,500,000.00

37. To demonstrate the understatement of value, Equip showed Court a valuation it commissioned and was carried out on 15th and 16th November 2018 which returned a market value of Kshs.700,000,000.00.

38. Now, Section 97 of the Land Act sets out the duty of care owed by a chargee to a chargor in exercising a power of sale of charged land. It reads;-

“(1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an 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, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.

(2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.

(3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market—

(a) there shall be a rebuttable presumption that the chargee is in breach of the duty imposed by subsection (1); and

(b) the chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the chargee has complied with the duty imposed by subsection (1).

(4) It shall not be a defence to proceedings against a chargee for breach of the duty imposed by subsection (1) that the chargee was acting as agent of or under a power of attorney from the chargor or any former chargor.

(5) A chargee shall not be entitled to any compensation or indemnity from the chargor, any former chargor or any guarantor in respect of any liability arising from a breach of the duty imposed by subsection (1).

(6) The sale by a prescribed chargee of any community land occupied by a person shall conform to the law relating to community land save that such a sale shall not require any approval from a Community Land Committee.

(7) Any attempt by a chargee to exclude all or any of the provisions of this section in any charge instrument or any agreement collateral to a charge or in any other way shall be void”.

39. As valuation undertaken by the Bank was less than 12 months prior to the impugned sale by public auction, then the valuation has to be taken to be a recent valuation. In the absence of evidence that the valuation is a gross and fraudulent undervaluation, the Bank will be taken to have complied with the provisions of section 97(2) of the Act.

40. The Court is faced with two conflicting valuations and it may take a trial to determine which of the two, if any, is a true valuation of the charged property at the date of the impugned sale. At this stage this Court is unable to say which side has an upper hand. Yet, as said earlier, in so far as the Bank had a recent valuation, there seems to be compliance with the law. For purposes of the matter at hand, the question has to be whether the variance of the values can, on its own, defeat a public auction sale that may have happened.

41. On this, the Court is told by Equip that the property is of a unique character and of peculiar location and acreage and is impossible to replace in the event of sale. This, as I understand it, is an argument that it will suffer irreparable harm if the sale is allowed to complete.

42. As has been said many times over, once a chargee offers land as security then the land becomes a commodity capable of sale on default. If the property is of that character at the time it is charged then it must be taken to remain so even at the time the chargee exercises its right to sell. It has not been explained to this Court how the character of the property changed from a commodity capable of sale at the time the charge was taken to an irreplaceable one on the date it was sought to be sold. This Court is not persuaded by this argument. And as Equip does not doubt the Bank's ability to pay up any damages that may be ordered in the event that an undervalue is proved, the Court does not accept the proposition that the alleged undervaluation should stop completion of the sale.

43. Let me turn to examine the specific complaints in respect to the auction. First, did the auction take place at all and if so was it conducted in compliance with the law?

44. In the Plaintiff and supporting affidavit of Divyesh Patel sworn on 6th March 2019, Equip states that no auction took place at the venue. This is in paragraph 12 of the affidavit of Patel in which he deposes:-

“12.THAT on the auction date, the Plaintiff sent its representatives to the venue to ascertain compliance and conduct thereof. The Plaintiff's representatives attended the venue of the auction and did not witness any auction taking place”.

45. This assertion that no public auction took place, is repeated in paragraph 13(ii) as one of the particulars of fraud and illegality committed by both the Plaintiff and the 3rd Defendant.

46. But there is a change in the story in respect to whether there was an auction at all. Attached to his further affidavit of 9th April 2019 is a visual clip of the alleged “auction”. The Court has watched the clip. I am afraid, it does not support the contention by Equip that no auction took place at all. It is one thing to allege that no auction took place and yet another to state that although it took place it was flawed. In the instance before Court, Equip depones that no auction took place, on this it is unequivocal. It however produces audio-visual evidence that depicts part of the auction. This Court is unable to find prima facie evidence that no auction took place at the appointed venue.

47. The other charge levied against the auction was that there were no bid numbers and therefore no bids. Evidence, it is argued, that the alleged auction is a fiction. Although the Auctioneer did not react to this, the Bank produced a list of the persons who allegedly attended the auction. On the part of the Self-Help Group, Mr. Ngigi depones as follows in regard to that list:-

“12. THAT the Applicant herein is not being honest when he claims that no auction took place on 24th January, 2019 and further that he sent his representatives to the venue of the auction who did not witness any auction but noteworthy the Applicant does not state who these representatives were as there was even an attendance list provided by the 2nd Defendant detailing the participants to the said auction. (Annexed hereto and marked L.K.N VII is a copy of the attendance list by the 2nd Defendant).

48. Does the audio-visual evidence resolve these conflicting versions? In producing the flash disk for viewing by the Court, Mr. Patel states,

“... I now hereby mark “D.I.P-1” a flash disk containing part of the Auction”. my emphasis

This is an important revelation that the clip in the flash disk is not of the entire event.

49. Looking at that evidence, it seems to capture the last bit of the auction when the hammer was lowered in favour of the Self-Help Group as the highest bidder. As there is no evidence of the earlier part of the Auction, it is not possible to tell whether or not there were other bidders or whether the persons in the attendance list produced by the Defendants did or did not attend the auction. On this, therefore, is the word of the Plaintiff against that of the Defendants.

50. The other allegations are that the conditions of sale were breached by both the Auctioneer and the Self-Help Group. Two breaches are cited. That the Self-Help Group did not deposit Kshs.10 million before they were allowed to bid. Secondly, that the 25% deposit was not paid on the same of the auction day as required by the terms of the auction.

51. I have looked at the advertisement and on the bidding deposit, there is the following requirement,

“NB: That bidders will be required to produce a bidding deposit of Kshs.10 million by way of cash or bankers cheque before being allowed to bid”.

52. From the wording, it is not clear whether the cash or bankers cheque ought to have been deposited or paid (to the Auctioneer or chargee) before one is allowed to bid or whether the intending bidder merely had to produce evidence of ready and available deposit. Anyhow, the rationale for this condition would seem to be that only serious bidders should be allowed to participate in the auction so that it is not detracted or otherwise derailed by busybodies or persons intent on aborting the auction.

53. On this issue of deposit the evidence of the bank is not consistent with that of the Self-Help Group. The Bank states that the deposit was made prior to the auction. On the other hand, Ngigi depones that,

“...which bidding deposit I produced on the day of the bidding before being allowed to bid”.

54. What does the audio-visual clip show? It shows that the bidder had cheques with him at the auction. Whether these cheques had been shown to the Auctioneer prior to the bidding is not clear. Remember, however, that the clip shows but only part of the auction. What is clearer is that the cheques were handed over to the Auctioneer who then passed them to someone he referred to as “a Banker”, before the auctioneer lowered the hammer to the bid by the Self-Help Group.

55. My interim finding of the matter is that the Bankers cheques were produced at the auction but whether they were produced prior to the bidding may require further investigation. However, given that the bidder followed through by topping up the payment to the 25% deposit, I am unable to find that any infraction on the production of the deposit should, alone, undo the sale.

56. The discussion that follows must then be in regard to the 25% deposit. This was required to be paid to the Bank on the same day. Given the bid price was Kshs.353,500,000.00, the 25% deposit would be Ksh.88,375,000.00. The sum of Kshs.10,000,000.00 having been deposited later on the auction day, the balance of the deposit would be Kshs.78,375,000.00. In respect to this, the Bank and Gilgil Self-Help Group show Court an RTGS request of 24th January 2019 to transfer Kshs.78,375,000.00 to the Bank. Equip on the other hand say that this amount was only paid into its account on 31st January 2019, seven day later. Again whether or not the delay in the money being credited into Equip account is attributable to the Bank itself or the Self-Help Group is a matter for further interrogation. To be observed for now it that there is evidence of an RGTS request made on 24th January 2019 and receipt of payment at least by 31st January 2019, seven days after the auction.

57. On the evidence so far available, this Court makes an interim finding that Equip has not been able to demonstrate that the process of sale of the property was improper or irregular and if it was, it has not established that the Self-Help had actual or constructive notice of any such impropriety or irregularity. It would seem to this Court that the Self-Help Group should even at this stage benefit from the protection afforded to it as a purchaser by the provisions of Section 99 of the Land Act which are:-

“1) This section applies to—

(a) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or

(b) a person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.

(2) A person to whom this section applies—

(a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;

(b) is not obliged to see to the application of the purchase price;

(c) is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

(4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power”.

58. Statute contemplates that a chargee could be guilty of certain infractions in the exercise of its power of sale. However, where a Purchaser of the charged property is innocent of such irregularity or impropriety because of lack of actual or constructive knowledge then the law would, as a general rule, protect the purchaser. If purchase made from the exercise of a chargee’s power of sale were to be reversed routinely, then potential purchasers will have little faith that such purchase would be honoured. Potential purchasers would shun such sales with the result that the efficacy of charges over land as security would be severely weakened.

59. Taking a broad view of this matter and the provisions of section 99 of the Land Act, I cannot find that the Plaintiff has made out a prima facie case. If, however, such a case exists, then this is one instance where damages may be adequate compensation and the justice of the matter would not be to disrupt the sale that has happened.

60. Even as I come to that conclusion, the Court feels constrained to make an observation on one matter which, because it did not properly fall for my determination, was not considered in deciding the application. Equip contends that the sale of the property at the auction was only in respect of land and buildings. It makes a strong case that the sale did not include purchase of the treatment Plant, equipment and other assets, which it alleges, separately have a value of Ksh.120 million.

61. On looking at the valuation report of Dunhill Africa Valuers Ltd of 12th April, 2018, the Valuer says this of the valuation methodology he adopted;-

“In arriving at the value of the property we have relied on the following methods of valuation;-

Cost Approach

This method estimates value based on the value of the land plus the depreciated cost or replacing the existing development. As a basis for the estimate of the replacement cost new, we have relied on comparable building costs currently prevailing in the building industry. Values of vacant land have been obtained from sales of comparable plots. The final value estimate by the cost approach is the land value plus the replacement cost of the buildings”. (my emphasis)

62. This statement by the valuer taken together with the details of improvements in the report must lead to the question whether in fact the valuation and the sale included the sale of any assets other than land and buildings. While, I am may be unable to agree with Equip that the advertisement of the auction was vague as to what was up for sale, its argument that the sale was only restricted to land and buildings is not idle. I think that the can be lively debate as whether buildings in the context of this case would include the treatment plant and equipment.

63. Otherwise the Amended Notice of Motion dated 6th March, 2019 is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 26th Day of July, 2019.

F. TUIYOTT

JUDGE

PRESENT:

..... for Plaintiff

..... for Defendant

Nixon – Court Assistant