



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL CASE NO. 28 OF 2016

1. JOSHUA KAMAU WILLIE

2. MARY NDUTA KAMAU.....PLAINTIFFS

VERSUS

1. UNAITAS SACCO SOCIETY LIMITED

2. INTERGRA AUCTIONEERS(K) CO.....DEFENDANTS/RESPONDENTS

AND

BRICK HOLDINGS & ENGINEERING LTD.....INTERESTED PARTY

RULING

1. In a ruling delivered on 30th April 2019 in respect of the Plaintiff/Applicant's earlier motion dated 13th December, 2016 this court had stated at paragraph 29 that:

“For all the foregoing reasons, the court is of the view that the 1st Applicant or the Applicants have neither made out a prima facie case with a probability of success, nor demonstrated that damages will not be an adequate remedy. While dismissing the prayer for an interlocutory injunction, I direct that the 1st Respondent shall not proceed with the exercise of its statutory power of sale in respect of the suit property until the following two conditions are met:

a. the 1st Respondent serves upon the 1st Applicant, in the manner stipulated under clause 39 of the Charge Instrument, an original statutory notice under Section 96 (2) of the Land Act which should be in the same terms as the copy exhibited in the affidavit of Harriet Nyambok as annexure HN 6.

b. The 1st Respondent procures a valuer other than Kenstate Valuers Ltd to undertake a fresh forced sale valuation of the suit property”.

2. The subsequent application filed under certificate of urgency on 18th October, 2019 was prompted by the advertisement placed in the Daily Nation Newspaper of 7th October 2019 by Garam Investments Auctioneers on the instructions of 1st Defendant/Respondent (chargee), for the public auction scheduled for 22nd October 2019 of the property pledged to the chargee by the Applicants as security for the loan advanced to the Applicants 2014.

3. The key prayer is for an interim injunction to restrain the 1st Defendant/Respondents their agents and servants;

“from selling, transferring, disposing off and/or interfering in any other manner whatsoever with the parcel of land to wit Title No. LR. No. 21096/228 – off Thika Superhighway pending the hearing and determination of the suit herein”.

For purposes of this ruling, the relevant grounds on the face of the motion are No. 5, 6, 7, and 8. Grounds 5 states as follows:-

“THAT the 1st/Defendant/Respondent intends to sell the suit property despite it not having conducted a forced sale valuation in accordance with the provisions of Section 97(2) of the Land Act and that of the ruling and orders of this Honourable court

delivered on 30th April, 2019 at paragraph 29(b)”.

4. Grounds 6 and 8 state that if the sale proceeds, the charged property would have been sold **“at a grossly undervalued price”**, and in contempt of the orders of the court. The application is supported by the affidavit of **Joshua Kamau Willie**, the 1st Plaintiff/Applicant. The affidavit basically repeats the content in the grounds on the face of the motion. The Applicant deposes that he stands to suffer irreparable damage and that the suit will be rendered nugatory if the sale proceeds.

5. In view of the urgency disclosed, the court directed that the application be served for inter parties hearing on the next working day, which fell on the 22nd October 2019. The 1st Defendant/Respondent **Unaitas Sacco Society Ltd** filed a Replying affidavit on 22.10.19 through its Legal Officer, **Harriet Nyambok**. The deponent, having outlined the conditions set by the court in its ruling of 30th April 2019, proceeded at paragraph 5 to 8 to outline the steps taken by the 1st Defendant/Respondent to comply with the conditions set by the court, including the service of the notice under Section 96(2) of the Land Act, on the Plaintiff/Applicants on 6th May 2019, and the procurement of a fresh forced sale valuation of the charged property by **Tyson's Ltd**. The report, dated 15th July 2019 was marked as annexure. **“HN3** to the Replying affidavit.

6. Further it is deposed that the said valuation report was also served upon the 1st Plaintiff/Applicant on 2nd October, 2019. Thus, the deponent asserts that the 1st Defendant/Respondent has fully complied with the court's orders. And moreover, that there is no basis to support the Applicant's assertion that the charged property has been grossly undervalued, and that, in light of the admitted default by the chargor, the chargee's exercise of its statutory power of sale should not be stopped.

7. In urging the application Mr. Olaka for the 1st Plaintiff/Applicant submitted that the 1st Defendant/Respondents had not complied with this court's order and also introduced new matters to the effect that the Applicant had conducted his own valuation of the property in October 2019, which is based on the completed construction. He stated that the valuation undertaken by the 1st Defendant/Respondent did not align with the letter and spirit of Section 97 of the Land Act. He confirmed receipt of the second forced sale valuation on 2nd October, 2019 from the Defendant/Respondent.

8. Counsel for the 1st Defendant/Respondent Mr. Juma asserted due compliance with the court's order of 30th April 2019 and stated that, the Applicant's latest report had not been exhibited in the application or served on Defendant/Respondent. He highlighted the forced sale valuation figures in the initial valuation by **Kestate Valuers** and the subsequent report by **Tyson's Ltd** and observed that counsel are not professionals in valuation matters. He stated that a dispute in respect of valuation cannot be the basis for the granting of an injunction, especially in the instant case where the Applicant's loss is quantifiable and can be compensated through damages.

9. The court has duly considered the application, the parties' respective affidavit and submissions. The key ground upon which the application was premised was that the 1st Defendant/Respondent was intending to auction the charged property despite non-compliance with the conditions set at paragraph 29 of the ruling delivered on 30th April 2019. The Replying affidavit of the 1st Defendant/Respondent and annexures thereto provide a complete answer to this charge. Indeed the Applicant eventually conceded that a second forced sale valuation had been carried out in compliance with the court's order, and a copy of the valuation report by **Tyson's Ltd** served upon the Applicant on 2nd October, 2019.

10. A party seeking the equitable relief of an interim injunction has a duty to disclose all the facts available to him as accurately as is practicable at the time of applying. From the facts now before court, the 1st Applicant was possessed of the second forced sale valuation at least six days before he approached the court alleging that no such forced sale valuation, had been conducted since 30th April 2019.

11. At the hearing of the instant application the Applicant purported to fault the second forced sale valuation report for reasons that it did not accord with the letter and spirit of Section 97 of the Land Act and that based on the Applicants own report, which was not exhibited in the application, the charged property was grossly undervalued in the second forced sale valuation.

12. Section 97 of the Land Act provides that:

“(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 charger, any guarantor of the whole or any part of the sums advanced to the charger, 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 charger 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 charger or any former charger.”

13. The duty of the chargee in this Section is in part to ensure that a forced sale valuation is undertaken by a professional valuer prior to the auction. This duty is consistent with the chargee’s duty of care to the chargor

“to obtain the best price reasonably obtainable at the time of sale.” [sub section 1]. Thus, the chargor is protected from the unscrupulous exercise of the chargee’s power of sale to the chargor’s detriment.

14. In this application, the Applicant did not make any reference to his own valuation report and it appeared that his complaints regarding the “gross” undervaluation of the charged property was based on the allegation that no second forced sale valuation had been carried out. It is too late in the day for the Applicant to attempt to base his allegations of undervaluation on a report not annexed to his affidavit.

15. Moreover the valuation of property is done by professional valuers pursuant to subsection (2) of Section 97 of the Land Act. This court does not possess the relevant expertise to enable it scrutinize the substance of the second valuation report, for purposes of establishing whether it represented a fair valuation. Beyond noting the obvious fact that, the forced sale value in the **Tyson’s Ltd** report (KShs.45 million) is higher than the forced sale value (KShs.37,500,000), in the first report by **Kenstate Valuers** dated 27th June 2016. The actual price of the property will only emerge upon the sale of the property, and it is too much to ask this court without any evidence, to anticipate that the property will be sold at a gross undervaluation in the circumstances of this case.

16. The Applicant was obligated to establish, prima facie, that the 1st Defendant/Respondent has failed to discharge its duty of care under Section 97(1) of the Land Act, in that the impugned second forced sale valuation represents a gross under valuation of the charged property. In **Zum Zum Investment Ltd v Habib Bank Limited [2014] e KLR Kasango J** while dealing with a similar scenario observed that:

“It is not sufficient for the Plaintiff to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The Plaintiff must satisfactorily demonstrate why the valuation report that the Defendant intends to rely on (in auctioning the charged property) does not give the best price obtainable at the material time ... The Plaintiff needs to show, for instance, that the Defendant’s valuer is not qualified or competent to carry out the valuation, or that the valuation was carried out in consideration of irrelevant factors or that the valuation was done before the time of the intended sale.”

In this instance, not even the counter-valuation report is proffered by the Applicant in an attempt to prove the alleged undervaluation.

16. As observed by the Court of Appeal in the case of **Nguruman Limited v Jan Bonde Nielsen and 2 Others [2014] e KLR:**

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”

17. In this case, the Applicant’s claim that a second forced sale valuation in terms of the court’s order was not carried out has been totally controverted. The Applicant has also failed to demonstrate, *prima facie*, how the second forced sale valuation represents an undervaluation of the charged property, or in other words, how it breaches the duty of care envisaged in of Section 97(1) of the Land Act. Besides, the Applicant’s loss if any as may arise from the sale is quantifiable. Damages will therefore be adequate compensation. In the circumstances, this court finds no merit in the application filed on 18th October 2019 and will dismiss it with costs.

DELIVERED AND SIGNED AT KIAMBU THIS 24TH DAY OF OCTOBER 2019

C MEOLI

JUDGE

In the presence of

Mr. Olaka holding brief for Mr. Njuguna for the Applicant

Miss Murimi holding brief for Mr. Juma for Respondent

Court Assistant - Kevin