



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 149 OF 2017

GREEN AFRICA INTERNATIONAL LIMITED.....PLAINTIFF

-VERSUS -

JAMII BORA BANK LIMITED.....DEFENDANT

RULING

1. **Green Africa International** (*Green Africa*) charged its properties **LR No. 2279/2 and LR. No. 3223** (suit properties) to **Jamii Bora Bank Limited** (*the Bank*) to secure facilities of **Ksh 369,000,000**.
2. By its application dated **6th April 2014**, **Green Africa** sought an injunction to restrain **the bank** from realising its security.
3. **Justice Onguto**, by his ruling dated **12th May 2017** granted the following orders:

“(a) That the Defendant do immediately issue the Plaintiff with a ninety (90) day fresh statutory notice compliant with the provisions of Section 90 of the Land Act.

*“(b) The Defendant **is in the meantime** restrained from selling or disposing of the suit property until after the expiry of the statute notice period and issuance of the consequent notices under S. 96 of the Land Act and, further, after a current valuation has been undertaken and availed to the court and permission to sell issued by the court. The Defendant is at liberty to cause a joint valuation to be undertaken for expediency purposes.*

“(c) The parties are at liberty to apply.

“(d) Each party will bear its own costs of the application.”

4. Subsequent to the aforesaid ruling the parties appeared before **Justice Onguto** on **7th February, 2018** when the following consent order was recorded in the presence of the learned counsels for **Green Africa** and **the bank**.

“by consent the suit property be valued for the forced sale value proposed by M/s Llyod Masika valuers.”

5. Following that consent, the learned counsels for both parties in this matter jointly instructed **Lloyd Masika Ltd** by a letter dated **8th February, 2018** to carry out valuation of both open market and forced sale value of the suit properties.
6. **Lloyd Masika Ltd** by their valuation dated **2nd June 2018**, indicated that the forced sale value of both properties was **Ksh 412, 500,000**.
7. On **3rd May 2018**, in the presence of both counsels for the parties; and after the court engaged those counsels, in an off record discussion, the court made the following order:

“IT IS HEREBY ORDERED BY CONSENT:

1. **THAT** leave be and is hereby given to the Defendant to begin the process of realizing/selling the property.
2. **THAT** the Plaintiff if indeed they have a buyer may approach the court for review of this order.

3. *THAT for the avoidance of doubt, the property will only be sold at the amount stated the valuation of Lloyd Masika dated 26th February, 2018.*

4. *THAT mention to monitor sale is fixed for 25th July, 2018.*”

8. **Green Africa** approached this court by a Notice of Motion application dated **28th May 2018** seeking to stay sale of the suit properties which was scheduled to take place on **30th May 2018**. When that application which was filed under certificate of urgency, was considered by myself in chambers, I ordered it to be served upon **the bank** for interpartes hearing on **30th May 2018**.

9. On **30th May 2018**, the matter proceeded for hearing and after submissions by both learned counsels, the court made the following order:

“the application has fully been argued before me in much detail by both parties. Having considered those arguments, I decline to grant interim orders of injunction. I shall issue a full ruling on this matter on 17th July 2018.”

10. On **7th June 2018** **Green Africa** filed an application dated the same date, by which **Green Africa** prayed for *stay of execution of transfer, discharge of charge, registration or charge to 3rd parties of the suit property pending the hearing and determination of the intended appeal* arising from the court order issued on **30th May 2018**. On considering that application, in chambers, the court declined to grant any order in the interim because there was no substantive order made on **30th May 2018**.

11. It is because of the intimation by **Green Africa**, that it wishes to pursue an appeal before the Court of Appeal, that the delivery of this ruling was brought forward to be on **13th June 2018**.

12. This ruling therefore is in respect to the *Notice of Motion* dated **28th May 2018** filed by **Green Africa**. By that application, **Green Africa** sought three prayers, that is, *to stay sale of the suit properties which was scheduled on 30th May 2018; that the auctioneers be ordered to serve green africa with ‘proper’ statutory notice of sale for 45 days; for an order for the suit properties to be valued ‘afresh’ by another independent valuer.*

13. That application was supported by an affidavit of **Githinji Kinyanjui, director of Green Africa**. The deponent stated in his affidavit that if the sale was postponed, **Green Africa** will within 2 and 3 months clear the bank facility. That assurance was based on negotiations between the deponent and another person called **Issa Ndangi**. I need to state that I looked at the emails between the deponent and **Issa Ndangi**, and I was unable to follow what the negotiations related to.

14. The deponent also attached an agreement between a company called **Cocorico Investment Limited** and **Diocese of Nyeri Trustee**, whereby that diocese has agreed to purchase property **Nyeri/Municipality Block 1/182**, of Cocorico investment Limited, at **Ksh 325,000,000** by **23rd August 2018**.

15. The deponent faulted **Lloyd masika’s** valuation of the suit properties, and stated that the same undervalued the suit properties because the suit properties were valued at **ksh 1.4 billion** in the year **2015**.

16. The deponent without supporting his deposition, deponed in regard to **Lloyd Masika Ltd** as follows:

“that moreso from reliable source I have been informed that the current valuer was interferred with by the bank and defendant as they were promised work on other unrelated projects if they were to undervalue the parcel to the bank’s suiting.”

17. The above deposition fails to identify the source of the information regarding the damning information of **Lloyd Masika** and accordingly that deposition will not be considered further in this ruling.

18. The deponent further deponed that **Green Africa** had planned to sell quarter acre, on sub-division of suit property, but that, that sale was stopped by **the bank** when **the bank** placed a public notice in the local newspaper which notice discouraged potential buyers.

19. The deponent further stated that the auctioneer was obligated to give 45 days notice, to **Green Africa**, before setting the date of auction on **30th May 2018**.

20. **The bank**, through the affidavit of it’s legal manager **Christine Wahome**, termed **Green Africa’s** Notice of Motion as a sham, lacking basis both in law and fact, and an abuse of the court process.

21. The deponent further stated that **the bank** in good faith advanced **Green Africa ksh 369,000,000** which amount was secured by the suit properties. That the said facility was not repaid as agreed and at present stands at **ksh 500 million**.

22. **The bank** through its legal manager deponed that following **Justice Onguto’s** ruling of **12th May 2017**, it issued **Green Africa** with statutory notices as ordered by the court. That **the bank**, through valley auctioneers issued 45 days notification of sale on **7th March 2018**, which notice was acknowledged by **Green Africa** by it’s letter of **9th March 2018**.

23. That after the court granted permission to **the bank**, on **8th May 2018**, to sell the suit properties by auction **the bank** advertised the sale on **10th May 2018** in the **Daily Nation** newspaper and the sale was scheduled for **30th May 2018**. In **the bank’s** view the notice of motion was therefore brought after inordinate delay.

ANALYSIS AND DETERMINATION

24. It is important to note that many of the issues raised by **Green Africa** in the application under consideration were raised before **Justice Onguto** who considered those issues in his ruling of **12th of May 2017**.

25. One of those issues that **Justice Onguto** considered was the allegation that **the bank** was clogging **Green Africa's** right of redemption, by interfering with the sale of the subdivided plots. This is how the learned **Judge Onguto** delivered himself on that issue:

*“...I do not find the plaintiff (**Green Africa**) has made any **prima facie case**. When plaintiff claims that it’s right of redemption is being clogged by the defendant (**the bank**), failure to play along in some arrangement to subdivide and sell the property but the plaintiff does not avail evidence on how far it had committed the sales even by way of professional undertaking or executed agreements, the plaintiff’s argument in these respects falls flat.”*

26. **Justice onguto** having delivered himself on that issue whether **the bank** was frustrating sale of subdivided plots this court cannot sit as an appellat court to a court of coordinate jurisdiction. That position was re-emphasized by the Court of Appeal sitting in Malindi in **Dubai Bank kenya Limited v Kwanza Estates Limited [2015] eKLR** where the court of appeal in dismissing an appeal stated with approval thus:

*“The learned Judge in her ruling also was alive to the fact that it could not sit on appeal against the ruling of **Muya, J** as they were courts of coordinate jurisdiction and further stated that an issue that had been raised, argued and determined could not be re-argued via an application for review but any aggrieved party had the option of appeal.”*

27. Indeed **Green Africa**, on the issues considered by the High Court, it is not permitted to re-litigate them in the high court. It should refer them to the court of appeal.

28. On valuation, it will be recalled that **Justice Onguto** recorded a consent of the parties that the suit properties be valued by a jointly appointed valuer **Lloyd Masika**. It follows that **Green Africa** has erred by going behind that consent and seeking that this court do order another valuation to be conducted.

29. On **8th May 2018**, when both parties were represented by learned counsels, an order was recorded by consent for the sale of the suit properties as valued by **Lloyd Masika**.

30. In view of that consent, **Green Africa** cannot now seek to stay sale to which its own advocate consented to.

31. I am satisfied that the statutory notices, following the order of **Jsutice Onguto**, were served on **Green Africa**. Similarly the auctioneers notification was also served. The property was advertised in the **Daily Nation** on **10th May 2018**.

32. In my view, bearing the above in mind, **Green Africa** has failed to satisfy the principles of **Giella vs Cassman Brown & Co. Ltd [1973] E. A. 358**.

33. Accordingly, the **Notice of Motion** dated **28th May 2018** is dismissed with costs for lack of merit.

DATED, SIGNED and DELIVERED at NAIROBI this 13th day of June, 2018.

MARY N. KASANGO

JUDGE

Ruling read in open court in the presence of

Court Assistant.....Sophie

.....for the Plaintiff

.....for the Defendant