



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 10 OF 2016

BRADE GATE HOLDINGS LTD....1ST PLAINTIFF/APPLICANT

DR THUO MATHENGE.....2ND PLAINTIFF/APPLICANT

VERSUS

JAMII BORA BANK LIMITED.....DEFENDANT/RESPONDENT

RULING

The plaintiffs sought, in the interim, an injunction restraining the respondent from selling or offering for sale or dealing with a parcel of land known as Title No. Ruguru/Gachika/254 ('the suit property') pending the determination of their motion dated 15th September, 2018 which is the subject of this ruling. They have also sought for an order for valuation of the suit property by an independent valuer or, in the alternative, a joint valuation be undertaken by valuers appointed by the parties to ascertain the suit property's market and forced sale value. The motion has been filed under Order 40 Rules 1 and 2 of the Civil Procedure Rules, sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act and section 97 (1), (2), (3), (4) and (5), of the Auctioneers Act.

The motion is supported by the affidavit of the 2nd plaintiff who has sworn that the respondent has advertised for auction the suit property apparently in exercise of its statutory power of sale in disregard of section 97(1)(2), (3) and (4) of the Land Act No. 6 of 2012. According to the applicant, the respondent has failed to carry out a proper forced sale valuation and has instead grossly undervalued the suit property to the detriment of the applicant.

The applicant laments that although valuation of the suit property carried out by a valuer appointed by the respondent itself in June, 2015 put the forced sale value at Kshs. 58,500,000/=, the notification of sale issued by the respondent's auctioneers as indicated the forced sale value as Kshs. 40,000,000/= as at 30th May, 2017. In the applicant's view the property has been grossly undervalued.

The respondent has opposed the motion and to that extent filed a replying affidavit sworn by its legal manager on 5th February, 2018. According to the respondent the outstanding amount due and which applicants have not denied owing stood at Kshs. 26,550,630.67 as at 5th of February 2018. And that this honourable court sanctioned the sale of the property in its ruling dated 16th November, 2016.

As far as the valuation of the suit property is concerned, the respondent has sworn that it complied with the provisions of section 97(2) of the Land Act, 2012 and has undertaken a proper valuation of the suit property prior to the intended sale. The valuation was done on 27th May, 2017 which is within the twelve-month period of the date of the intended sale. The respondent's case is that the current application by the applicants is intended to frustrate the defendant's rightful exercise of its statutory power of sale to recover a debt which is not disputed.

The applicants' motion is not the first of its kind in the present suit; they filed a similar motion on 17th of June 2016 except that they were then seeking for a temporary injunction restraining the respondents from disposing of the suit property pending the hearing and determination of his suit. They have sought for similar orders in the present application and the only new prayer is for the order of an independent valuation of the suit property or a joint valuation appointed by the parties. As is in this motion, the previous one was also filed under order 40 Rules (1) and (2) of the civil procedure rules, section 1A, 1B, 3A and 63(e) of the Civil Procedure Act, amongst other provisions of the law that the applicant invoked.

This honourable court rejected the earlier motion leaving it open to the respondent to proceed and dispose of the suit property in realisation of its security. But by its present motion, the applicants appear to be not done yet. This time around, they challenging the valuation of what I suppose has been advertised as the reserve price of the suit property.

As both parties agree in their submissions, section 97(2) of the Land Act, requires the chargee to undertake a valuation before exercising the right of sale. For better understanding it is relevant to reproduce both subsections (1) and (2) of section 97 of the Act; it says:

97. Duty of chargee exercising power of sale

(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.

The respondent has exhibited on its replying affidavit a valuation report by Messrs. Dayton Valuers Limited that puts the open market value of the suit property at Kshs. 40,000,000. In principle therefore, it has complied with section 97(2) of the Act, at least to the extent that the property has been valued.

But the Act goes further to place an obligation upon any chargee that even if the property is valued in compliance with section 97(2), it shall not be sold at a price that is less than 25% of the property's market value. If this happens, the chargor shall be deemed to be in breach of the duty of care it owes the chargor of ensuring that it obtains the best reasonable price that can be obtained at the time of the sale. This protection accorded to the chargor and the extent of the chargee's responsibilities and liabilities are encapsulated in the rest the subsections of section 97. Those subsections provide as follows:

(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.

The applicants' case is that the respondent has not discharged the burden placed upon it by the foregoing provisions of the law. In support of their case, they have exhibited their own version of valuation Report of the suit property; this valuation, undertaken by Messrs. Mureithi Valuers Limited, has put the market value of the property at Kshs. 81,000,000/= and a forced sale value at Kshs. 60,750,000/=.

With these figures, there is no doubt that the applicants' valuer's report has largely influenced their decision to seek for an alternative valuation.

In the final analysis this honourable court is confronted with two competing valuation reports by presumably people who are experts in their field. It is as it were, one man's word against another. I would say that before these experts are interrogated by way of cross examination on their reports, it would be asking too much of this court to embrace one report over the other based on the affidavit evidence. It is only after this suit has been heard on its merits that an informed decision can be made on which report carries the day. In the circumstances, I suppose that it is premature to allow the applicants' application and direct that the suit property be valued afresh either by independent valuers or by valuers appointed by each of the parties to this suit.

But the question that still lingers is this: assuming the applicants are right that the respondent is in breach of its duty of care towards the applicants even as it seeks to exercise its statutory power of sale, what is the remedy available to the applicants? I found the answer to this question in section 99. (4) of the Land Act. It states as follows: -

99.(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.

I understand this provision to imply that if it turns out, as the applicants allege, that the respondent has not complied with the provisions of sections 97 of the Land Act and disposed of the property below the prescribed lower limit to the detriment of the applicants, the latter will have their remedy in damages. I suppose that if their valuation report passes the test of time, it will be an important component in calculation of damages that the applicants may be awarded.

In the ultimate I do not find any merit in the applicant's motion dated 15th January, 2018. It is dismissed with costs.

Signed, dated and delivered in open court this 21st day of September, 2018

Ngaah Jairus

JUDGE