



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL CASE NO 24 OF 2018

DAVID ISOE AYUBU.....PLAINTIFF/APPLICANT

VERSUS

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

GARAM INVESTMENTS AUCTIONEERS.....2ND DEFENDANT

RULING

By a Notice of Motion dated 17th April 2018, the applicant/plaintiff **DAVID ISOE AYUBU**, instituted this suit seeking the following orders:

1. That this Honourable Court be pleased to issue an Order an order to restrain the Defendants by themselves, servants, agents and or legal representatives from transferring, alienating evicting tenants, interfering with possession or occupation or dealing in any other with the Plaintiff's property namely L.R No. Ngong/Ngong/9895 situate at Ongata Rongai in Kajiado County pending the hearing and determination of this application inter-partes.
2. That this Honourable court be pleased to issue an order to restrain the Defendants by themselves, servants, agents and or legal representatives from transferring, alienating evicting tenants, interfering with possession or occupation or dealing in any other manner with the plaintiff's property namely LR. No. Ngong/Ngong/9895 situate at Ongata Rongai in Kajiado Country pending the hearing and determination of this Court.
3. That this Honourable be pleased to issue an order for cancellation of the sale conducted on 30th January, 2018 by way of public auction pending the hearing and determination of this suit.
4. The OCS Ongata Police Station to ensure compliance with the above orders.
5. That the costs of this application be in the cause.

The Plaintiff's application is based on the grounds that the plaintiff is the registered owner of the property known as LR. No. Ngong/Ngong/9895; that as at the time of the alleged auction, the Plaintiff had paid a sum of Kshs.5, 300, 000/= leaving a balance of Kshs.1, 700, 000/= only; that as at 30th January, 2018 the date alleged sale, the amount that was being demanded by the defendant was Kshs.3, 700, 000/- even before rendering accounts; that on 26th September, 2011 the Plaintiff charged the subject property to the defendant for sum of kshs.7, 000, 000/=; that on 30th of January 2018 the defendants sold the Plaintiff's property by public auction without informing the plaintiff about the sale; that the Plaintiff was sold by the Defendants at Kshs.23, 000, 000/- which is not the market value of the subject property; that the plaintiff was and still willing to clear the loan arrears upon the defendant rendering accounts; that the plaintiff has not refused and/or neglected to pay the outstanding loan arrears upon rendering accounts; that no prejudice will be occasioned upon the Defendants if the orders sought herein granted; that it's only fair and just that the order sought herein be granted; that the Auctioneers never issued Statutory Notices in accordance with the law and that the sale is a nullity in law for non-compliance with the legal requirements.

The Applicant's Case

The fulcrum of the Plaintiff's application is that the defendant sold the plaintiff's property (known as LR. No. Ngong/Ngong/9895) on the 30th January 2018 without serving him with the requisite notices as required under the Land Act, 2012. (*Annex DIA1 is the copy of the Title Deed*). He stated that he learnt of the sell from an email sent to me on 7th April, 2018 by one Vincent Barchok. (*Annex DIA2 is a copy of the email*). According to the Plaintiff, he had charged the property for a sum of Kshs.7, 000, 000/= to I & M Bank Limited. He averred that the said property was sold at Ksh. 23,000,000/= which is not the market value of the subject property.

The Plaintiff further asserted that the defendant's own valuer the valued the property at Kshs.30, 000, 000/=. (*Annex DIA 3 is a copy of the*

Valuation Report). It was deponed by the Plaintiff that he was and still willing to make good the loan arrears upon the defendant reconciling the statement of accounts and that he did not refuse or neglect to pay the outstanding loan arrears upon reconciliation of the accounts. He also said that he made numerous requests to the defendant so as to be furnished with a statement of accounts but the same was never issued to him.

He also averred that he was not issued with the mandatory statutory notice as provided for under section 74 of the Registered Land Act Chapter 300 of the Laws of Kenya. He conducted a search on 11th April, 2018 and confirmed that the transfer to a Third Party had not been effected (*annex DIA 4 is a copy of the official search*). The Plaintiff also challenged the interest charged by the Defendant Bank pointing out that it is more than the amount borrowed contrary to section 39 of the Central Bank of Kenya Act Chapter 491 of the Laws of Kenya. He reiterated that the defendant will not in any way be prejudiced if the orders sought herein granted.

The Defendant Case

In response to the Plaintiff's claim, the defendant filed a replying affidavit through its employee namely: VINCENT BARCHOK, dated 18th July 2018. The deponent acknowledges the issuance of a court orders by this court on 30th April 2018 but however denied having acted in contempt of the same. He acknowledged the fact that the Plaintiff charged the suit property to the Defendant Bank for the sum of Kshs.7, 000, 000/=. (Copy of the offer letter dated 17th August 2011 and the charge dated 26th September 2011 exhibited at page 1 to 20 of the defendant's document).

In response to the Plaintiff's claim that he was willing to service the loan upon reconciliation of accounts, the Defendant averred that the Plaintiff deliberately refused to service the loan for no apparent reason. Further that the Bank has always supplied him with Statements of Account upon request contrary to the Plaintiff's allegation that the Bank never issued the same. The Bank produced exhibit in form of copies of Statements of Account in accordance with Section 177 of the Evidence Act being from 11th November 2011 to 16th February 2018. (Exhibit at page 29-38).

The Defendant also contested the allegation by the Plaintiff that he was not served with statutory notice. It was deponed on behalf the Defendant that following persistent default, the Bank instructed its advocates to issue the Statutory Notices under the Land Acts. He reiterated that statutory notices were duly issued to the Chargor by registered mail. A copy of the statutory notice together with the certificate of posting was produced as exhibit before court. This is exhibited at page 39 to 42 of the Defendant's bundle of documents and the forty days' notice together with a certificate of posting are exhibited at page 43 to 45 of the same bundle of documents.

It was asserted that the requisite Auctioneers Notices were also issued by the 2nd defendant by Registered post in compliance with law. (Copies of the notices and evidence of service are exhibited at page 46 to 50). It was therefore asserted by the deponent that the allegations that the requisite notices were not sent is not true. In the deponent's view, the Plaintiff knowingly misled this Court that the Bank had not issued the said statutory Notices to try and obtain an interim order of injunction.

As regards the Valuation Report & Sale of the suit property by public auction, the deponent averred that the suit property in question L.R No. Ngong/Ngong/9895 was successfully auctioned on 30th January 2018 for an outstanding amount of Kshs.4, 502, 858.04. It was the deponent's further averments that on the 30th January 2018, a bid was accepted for Kshs.23, 000, 000.00/= against a Forced Sale Value of Ksh. 22,500,000.00/=whereas the market value was Kshs.30, 000, 000.00/=. (Copy of valuation provided at page 51 to 62). The same was sold to the purchaser that had the highest bid. (A copy of a memorandum of sale exhibited at page 63).

It was also deponed that the purchaser deposited Kshs.5, 800, 000.00/= with the Auctioneers on 30th January 2018 upon the fall of hammer. Further that after paying off the loan together with the advocates and auctioneers fees, the balance of the proceeds of sale in the sum of Ksh. 17, 250, 000.00/= was transferred to the Plaintiff's account on 26th March 2018. (Statement of account showing disbursement of the said balance of sale proceeds are exhibited at page 64 to 73). It was stated that upon receipt of the said monies by the Plaintiff, he did not protest that the property had been undervalued. The deponent claims that the Plaintiff utilized a substantial sum of the said amount. Further that as at 24th April 2018, the Plaintiff only remained with the sum of Ksh. 1, 058, 780.00/= in his account. (See page 73 of the Statements of Accounts).

On the 19th of April 2018, the Plaintiff formally handed over the said property to the new purchaser and owner, KIPSOSION RERIMO KIPKORIR. He said that the Plaintiff is not sincere in trying to stop the transfer of the property to the said new owner when he formally handed the property to him voluntarily. In the deponent's view, the plaintiff is trying to unjustly enrich himself by stopping the new owner from taking possession of the property whereas he has already utilized the balance of the sale proceeds paid to him after deduction of the outstanding loan.

He further asserted that the allegation by the plaintiff that the suit property was sold below the Market value has no basis because it is not a requirement of the law for the charge to sell the charged property at Market Value; the requirement and duty imposed on the charge is to ensure that the property is not sold below the Forced Sale Value and the property having been sold at the sum of Ksh. 23, 000, 000, 00/= whereas the Forced Sale Value is Ksh. 22, 500, 000.00/=, the bank discharged its duty under the law.

It was the deponent's averment that the relief sought cannot issue because the suit property was transferred to the Purchaser on 30th January 2018 by operation of law upon the fall of the hammer at the public auction; in the circumstances the plaintiff's equity of redemption had already extinguished; the relief sought have been overtaken by events and the only recourse available to the plaintiff is damages in the event it is found, after full trial, that the Bank was wrong in exercising its statutory power of sale.

The deponent therefore prayed for the dismissal of the application with costs on a full indemnity basis.

ISSUES FOR DETERMINATION.

- a) Whether the statutory power of sale was proper.
- b) Whether the issue as regards the valuation and the conduct of the public auction prejudiced the Applicants.

On the question of statutory notice, Advocate Ondabu, learned counsel for the Applicant contend that the suit property was sold on the 30/1/2018 without statutory notice contrary to the provisions of the law. In response to the Applicant's allegation, Advocate Wamae, learned counsel for the Respondent dismissed the Applicant's above allegation and averred that the bank did serve the Applicant with a statutory notice. The law as regards issuance of statutory notice by chargee is clearly set out under section 90 of the Land Act, 2012 which lays down the requirements of a valid statutory notice. Section 90 provides that;

"90. Remedies of a chargee

(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

According to section 90(2) the notice to be served shall adequately advise the chargor of;

" (a) the nature and extent of the default by the chargor;

(b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;

(c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;

(d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and

(e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies."

Section 90(3) provides that if the chargor does not comply within two (2) months after the date of the notice the chargee may;

"(a) sue the chargor for any money due and owing under the charge;

(b) appoint a receiver of the income of the charged land;

(c) lease the charged land, or if the charge is of a lease, sublease the land;

(d) enter into possession of the charged land; or

(e) sell the charged land;"

Section 90(1) in my view lays down the circumstances under which the statutory notice is issued by the chargee to chargor. Clearly as provided for under the aforementioned section, a statutory notice is issued where there is default of payment in performance of the expressed and implied covenants in a charge. A notice must be served to the chargor by the chargee in writing clearly stating the payment of any amount owing or performance and observance of the agreement as the case may be. This notice is mandatory on the part of the chargee thus it is mandatory that the chargee, as the law requires under the sections, issues the requisite statutory notice notifying the chargor of the intended sale of the charged property by auction.

The effect of a statutory notice issued in terms of section 90(2) of the Land Act, 2012 is that it triggers the security realization process, which leads to the chargee ultimately exercising its remedies enshrined under section 90(3) of the said Act. The notice is issued pursuant to a default or breach of any of the covenants under the charge. There is no prescribed format promulgated as yet by the Cabinet Secretary in charge of Lands and Housing as he is mandated under section 90(5) hence different formats of the notice have emerged leading to a veritable maze where challenges and questions on what truly constitutes a valid notice are numerous. See ***Cieni Plains Company Limited & 2 others v Ecobank Kenya Limited (2017) eKLR.***

The general purpose of the notice is majorly to protect the chargor. This was stated in the case of **First Choice Mega Store Limited v Ecobank Kenya Limited [2017] eKLR**

" [37] ...The law regulates the contractual relationship between the parties by ensuring that the purpose of a charge (pledged property) is not defeated. The purpose is mainly for the property to act as security and no more. The chargor must have the

chance, nay right, to redeem the property. In the absence of a notice it would be much easier for unscrupulous chargees to rid the chargor of the equity of redemption. The borrower who pledges and charges his property must be confident that the property will be held as security and when the lender must then act and start the process of selling the same, the borrower will have both notifications of such action and an opportunity to redeem his property.

[38] It would be appropriate to however also conclude that there is a need always to preserve a balance between the respective rights of both the chargee and the chargor. In the words of Lord Bingham of Cornhill, spoken in Royal Bank of Scotland Plc v Etridge [2002] 2 AC 733, [2], the law “must afford both parties a measure of protection”. The lender who thus also feels able to advance money on security, including non-possessory security, like land, in reasonable confidence reasonable confidence that it may at an appropriate time enforce the security is also protected.

[39] A purposive construction of section 90 is necessary. Section 90 must thus be read and understood with the open fact that the chargee also has a right to pursue his various remedies. Any interpretation, which curtails that right, should not be favored given that it is the same section that triggers the application of a chargee’s rights and remedies.”

In the foregoing, the evidence on record shows that the Learned Counsel for the Respondent produced documentary evidence in form of statutory notice dated 11/12/2013 annexed in their replying affidavit at page 39-42 of the Respondent’s bundle of documents dated 26/4/2018. Further, the Respondent also produced proof of service of the said statutory notice by way of a certificate of posting (at page 42). Counsel further produced the 40 days’ notice dated 1/4/2014 (at page 43-45) and the certificate of posting (is at page 45). This a typical case where the Chargor alleges non-receipt of the mandatory statutory notices. In that respect, I wholly associate myself with the case of *Livingstone Gichora –vs- Family Finance Building Society HCC 1480 of 2001* which relied on the Court of Appeal Civil Appeal No 145 of 1995 *Nyagilo Ochieng & Another vs Fanuel B Ochieng & 2 Others* [unreported] where their Lordships observed at page 4 that:

“Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent...it would have been a very simple exercise for the Bank to produce a slip or slips showing proof of posting of the registered letter or letters containing the statutory notice or notices... In the absence of proof of posting we are constrained to hold that the sale by auction was void”.

Clearly the Respondent herein complied exactly with what is depicted in the above judicial authority. I have seen the certificates of posting at page 42 and 45 of the Respondent’s bundle of documents. Thus in view of the above case law, it is very clear that a certificate of posting where a statutory notice had been served through a registered mail is prima facie evidence of service of such notice to the Chargor. I have also looked at the said notices and I find that the same was properly drafted and they capture the requisite particulars as required by the law. Having said so, and for the reasons alluded to above, I find that the Responding herein was properly served with statutory notices in compliance and pursuant to the relevant sections under the Land Act, 2012. The Applicant’s claim on this limb fails.

As regards the issue of valuation, the Applicant argued that in 2011, at the time the loan agreement was entered into, a valuation prepared and the market value of the same was set at Kshs.33 million whereas in 2017 the new valuer came up with a report valuing the same properties at Kshs.30 million. The point of reference that was used by the valuer to prepare the valuation report is at Maasai Lodge which the applicant believes to be far from where the suit property is situated. He contends that it is a requirement of the law that the valuation be conducted 3 months prior to the sell. It is now trite law that the chargee shall *have the duty to “obtain the best price reasonably obtainable at the time of sale.”* Section 97(2) of the Land Act requires:

“A Chargee shall, before exercising the right to sale, ensure that a forced sale valuation report is undertaken by a Valuer.”

In that respect Respondent is mandated with a statutory duty to ensure that a forced valuation is undertaken by a qualified valuer and to obtain the best price reasonably obtainable at the time of sale. Having said so, I place my reliance on **Palmy Company Limited vs Consolidated Bank of Kenya Limited** where the court made a finding that:

“The purpose of a valuation under Section 97(2) of the Land Act is twofold. The first one is to obtain the best price reasonably obtainable at the time of the sale, thus protecting the right of the Chargor to property...the second one is to prevent unscrupulous Chargee from selling the charged property at a price which is peppercorn or not comparable to interests in land of the same character and quality.”

In the cases of **Zum Zum Investment Limited v Habib Bank Limited [2013] eKLR**, Kasango J stated the following:

“It is not sufficient for the Applicant to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The Applicant must satisfactorily demonstrate why the valuation report that the Respondent intends to rely on in disposing of the suit property does not give the best price obtainable at the material time.....The Applicant needs to show, for instance, that the Respondent’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.

Kasango J went ahead to state:

The Applicant needs to show, for instance, that the Respondent’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.”

The Applicant herein has not raised any of such grounds.

In the case of *Palmy Company Limited vs Consolidated Bank of Kenya Limited [2014] eKLR* the Court stated as follows:

“The onus of establishing on prima facie basis, that the Applicant’s right has been infringed by the Respondent by failing to discharge the duty of care under section 97(1) of the Land Act lies on the Applicant...The court needs cogent evidence and material in order to say that prima facie, there has been an undervaluation of the suit property which is an infringement of section 97(2) of the Land Act by the Respondent as to entitle the court to call for an explanation or rebuttal from the Respondent.”

The applicant herein has not tendered evidence to show that the valuation is a complete undervaluation of the suit property. The competence of the Valuer has not been questioned. The contention as regards the preparation of the valuation was done using the 2011 valuation report as reference does not mean that the Respondent undervalued the suit property. It trite law that the chargee owes the Chargor a duty of care as far as the market value of the property sold is concerned. The Applicant herein is alleging undervaluation of the suit property and requested this court to reverse the sell. It seems from the evidence on record that the suit property herein has already exchanged hands and its now property of a third party who is not a party to this suit.

Furthermore, as regards the duty of the Chargee to obtain the best price possible, the same is also governed by the market forces of demand and supply. The Chargor or auctioneer cannot reasonably defer the highest bid in a public auction simply because it does not meet the market value of the suit property. It must also be noted that market value depends on the competitiveness of the market thus the prevailing market demand and supply. Herein the property was sold at a forced sell price. It is only reasonable to expect that the property sold in such a scenario will sell at a discount. Thus to my mind, valuation acts as a guide of the current estimated and true value of the suit property thus the market does not operate on valuation, it rather operates on demand.

The court is alert to the fact that valuation per se does not sell property. What determines the at which the property is sold is the circumstances surrounding it which may include the location of the property, the prevailing Kenyan market value, the value of the property itself, competitiveness of the market, the utilities and improvements made on it among other things. Further, the other circumstances that the court may set aside the sell as requested by the applicant herein where there is sufficient evidence that the sell was tainted with illegalities, impropriety in the sense that no reasonable steps were taken to secure the reasonable price possible. In that regard it must be proved that there was some kind of collusion to defeat the best price from being obtained. It is incumbent upon the Applicant herein to prove the abovementioned circumstances. In the case of *Mbuthia vs. Jimba Credit Finance Corporation and Another [1986-1989] EA 340; [1988] KLR 1* where the Court of Appeal held:

“A sale made at a fraudulent undervalue will be set aside. But the Court will not set aside a sale merely on the ground that it is disadvantageous, unless the price is so low as to be in itself evidence of fraud.”

In the premises, the arguments by the Applicant that the Respondent failed to discharge the duty of care under section 97 do not hold sway.

The Applicant has also taken an issue in the conduct of the public auction. He alleges that the highest bidder did not deposit 25% of the purchase price at the fall of the hammer. It stated that the highest bidder offered Kshs.25 000 000/= and he ought to have paid Ksh.5.750 000/= but the same did not happen. He claimed that the purchaser paid kshs.4 800 000/= and that goes to show that there was no sell as the highest bidder did not meet the conditions. The Responded dismissed the Applicant’s allegation on this limp as labelled the same not to be true. Learned counsel produced a memorandum of sale at page 63 which shows the amount deposited as Ksh. 5.8 million which meets the requisite 25%. In view of these arguments, it is clear that the Applicants herein made the above allegations which are not backed with any documentary evidence. The applicant ought to have produced tangible evidence to prove his allegation. The Respondent provided uncontroverted and prima facie evidence which shows that the 25% amount was paid as per the law. The Applicant therefore failed to prove its allegation on a balance of probabilities.

Turning on the third issue of determination on whether the conditions for issuance of an injunction have been met herein. The principles are well set out by the court of Appeal in *Giella Vs Cassman Brown* where the court has to consider the following questions before granting injunctive relief.

i. Is there a prima facie case.....

ii. Does the applicant stand to suffer irreparable harm.....

iii. On which side does the balance of convenience lie? Even as those must remain the basis tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice.....”

whether from the affidavit evidence before court the applicant has made out a prima facie case to warrant the grant of injunction is a matter for discretion by this court. This application by the plaintiff apparently raises some acts alleged to be a violation of his legal rights as made upon by the contested facts. Whether or not this court can with certainty rule that the claim has no merit at the interlocutory stage without the risk of injustice to the plaintiff is a matter which cannot be fully determined as of now. In an application of this nature I bear in mind some of the competing legal rights cannot be resolved without delving into the merits of the suit.

In the instant case, the respondent counter affidavit and depositions on certain elements of the sale and valuation was not sufficient to controvert the applicant’s dispositions. In so far as this court may be in doubt as to whether the applicant has a prima facie case with a serious issue to be tried at a full trial, weighing one factor after another the balance of convenience favours the applicant to ventilate his case on the issues raised in the notice of motion in the main suit.

In light of the above principle it is the court’s view that the affidavit evidence tendered by both parties to this suit is not sufficient to provide

the court with information so as to appreciate and have a good grasp of the issues articulated by the parties. Further the issue of valuation of the property raised by the plaintiff cannot be conclusively dealt with by way of rival affidavit evidence as it was the case in this application. Thus herein there is a probability of mistrial with a risk of injustice on the part of the plaintiff if an injunctive order in the manner outlined herein is not issued. Accordingly, the following orders shall abide the application by the applicant.

Orders:

- a) **It is hereby declared that if the suit property has not been transferred to a third party, the 1st Defendant is hereby restrained from transferring that property.**

- b) **If the title to the suit property has been passed to the third party, the Registrar to issue a restriction that no dealing is to be done on the suit property until the hearing and determination of this claim.**

- c) **The suit property to remain in the hands of the third party pending the hearing of the main suit.**

- d) **The suit be set down and the pretrial conference be done (in compliance with order 11 of the civil procedure code) within 60 days.**

- e) **Cost be borne by the Applicant.**

It is so ordered.

Dated, Signed and Delivered in open court at Kajiado this 22nd of October 2018.

.....

R. NYAKUNDI

JUDGE

Representation

Mr. Ongoto for Omboga for the 2nd Defendant

Mr. Ondabu for the Plaintiff

Mr. Wawire for the 1st Defendant