



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 124 OF 2017

SEAMAN BUILDING & CIVIL ENGINEERING....PLAINTIFF/RESPONDENT

VERSUS

NCBA BANK KENYA LIMITED.....DEFENDANT/APPLICANT

RULING

1. I have before me for determination the defendant/applicant's Notice of Motion dated 3rd May 2021 brought under section 80 of the Civil Procedure Act Cap 21 Laws of Kenya and Order 45 of the Civil Procedure Rules 2010. The defendant/applicant in the application sought the following orders:-

1. That this Honourable Court be pleased to review and or set aside the Consent Order filed on 24th May, 2017 and substitute the same with an Order that the defendant/applicant be allowed to sell and or auction the suit properties L.R No.Naivasha Municipality Block 5/227 based on the new valuation report made on the 6th July, 2020 by Knight and Frank Valuers Limited.

2. That without prejudice to Order (1) above, the Honorable Court be pleased to make an Order directing that a new comprehensive valuation of the suit properties referenced L.R No. Naivasha Municipality Block 5/227 and L.R No. Nakuru Municipality Block 10/42 be conducted by a designated property valuer agreed upon by the parties herein and the respective valuation reports be deposited with the court within a prescribed time or period to enable the auction process to commence.

3. That costs of this application be provided for.

2. The application was supported on the grounds set out on the body of the application and on the supporting affidavit sworn by the defendant/applicant's senior legal counsel on 3rd May 2021. He averred that on 24th May 2017 the parties filed a consent to the effect that accrued sum be settled by way of sale of the suit properties and further on 18th July 2019 the court gave directions with respect to the valuation of the suit property L.R Naivasha Municipality Block 5/227 where a valuation report was done and filed in court. He stated that based on the valuation report dated 19th August 2019, the court approved the subject property L.R Naivasha Municipality Block 5/227 to be auctioned. The legal counsel further averred that there had been a major development constituting new and important evidence not placed before the court that would have occasioned different orders being issued had the same evidence been available to the learned judge at the time of making the decision. He stated that the new development was that the valuation report done by Knight and Frank Valuers Limited had a fundamental error and or gross mistake in terms of the market value of the subject property L.R No. Naivasha Municipality Block 5/227 being overvalued at market value of Kshs.200,000,000 and Kshs.150,000,000 being the forced sale value.

3. The applicant stated that as a result, the valuation report dated 19th August 2019 was recalled by the valuer and a new valuation report dated 6th July 2020 was issued with the correct market value of the property being Kshs.150,000,000 and Kshs.112,500,000 as the forced value. The applicant averred that the discrepancy and difference between the two valuation reports with respect to the value of the suit property L.R No.Naivasha Municipality Block 5/227 is a sum of Kshs.50,000,000 under open market valuation and Kshs.37,500,000 under forced sale circumstances. The applicant averred that due to the mistake/error contained in the report issued on the 19th August 2019 the subject property L.R No.Naivasha Municipality Block 5/227 has remained unsold in the auction market due to the overvaluation. The applicant averred that unless the auction allowed to proceed on the basis of correct market value of the suit property, they will not be able to get a purchaser for the property and its debt now in excess of Kshs.110,000,000/= will remain owing to its prejudice.

4. The plaintiff/respondent opposed the application vide grounds of objection dated 14th June 2021.The respondent averred that the application is an abuse of the court process and that the applicant had not satisfied the legal requirements for reviewing a consent and that the application ought to be dismissed with costs.

5. The parties canvassed the application by way of written submissions. The applicant filed its submissions on 17th September 2021 while the

plaintiff/respondent filed theirs on 30th September 2021. The applicant submitted that the applicant had made a case for review and urged the court to exercise its discretion in its favour and make an order reviewing the consent order based on the valuation report dated 20th May 2020 which constituted new evidence and/or material that was not in their possession even after due diligence at the time of the consent order in 2017. The applicant placed reliance on the Court of Appeal case of **Shanzu Investments Limited vs Commissioner of Lands [1993] eKLR** where the court stated that:-

“the current position would, then appear to be that the court has unfettered discretion to review its own decrees or orders for any sufficient reason”

6. The applicant further submitted that after being notified of the new valuation report and its ramifications, it moved the court appropriately for review of the consent order without unreasonable delay and with justifiable grounds and in the interest of justice court should exercise discretion in favour of allowing a review. The applicant further argued that the court ought to take judicial notice that the real estate industry in terms of property values was adversely affected by the Covid-19 pandemic on the economy and tying the applicant to a previous valuation report which was incorrect in terms of the market value was prejudicial to its rights. The applicant urged the court to allow the application for review and submitted that the court ought to either direct the new valuation report be used to sell the subject property or in the alternative direct that a new valuation be done in regard to the subject property.

7. The respondent on its part submitted that the valuation report being faulted by the applicant was done by a valuer duly appointed by both parties and argued that the alleged new facts being that the new valuation report indicated the market value of the subject property at Kshs. 150,000,000 with a forced sale value of Kshs.112,500,000 did not give the basis of the new report and/or why the said facts were not within valuer’s knowledge at the time of the earlier valuation. The respondent argued that in the absence of the said information, the court could not ascertain or deduce how the new facts if any were arrived at. The respondent further submitted that the valuer did not take into account any input by the respondent and that the respondent was not afforded an opportunity to give its input before the new valuation was made. The respondent cited the Court of Appeal case of **Kenya Commercial Bank Ltd -vs- Benjoh Amalgamated Ltd & Another (1998) eKLR** where the court cited with approval the case of **Brooke Bond Liebig (T) Ltd -vs- Mallya (1975) EA 266** where Law, JA stated as follows:-

*“The circumstances in which consent judgment may be interfered with were considered by this court in **Hiran –vs- Kassam (1952) 19 EACA 131**, where the following passage from Seton on judgments and Orders, 7th edition, Vol.1 P124 was approved.*

“ Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming underthem --- and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court -- or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reasons which would enable the court to set aside an agreement”.

8. The respondent argued that the law is clear in circumstances under which a consent may be reviewed which can only be in such circumstances as would warrant the setting aside of a contract and/or agreement. The respondent submitted that a consent order or judgment has a contractual effect and could only be set aside or reviewed on grounds that justified setting aside a contract and thus the instant application must fail.

9. The respondent finally argued that justice requires that the suit property be sold at its true value and should not be undervalued to ensure a successful sale. That it would prejudice the owner of the property if it is sold in a hurry as was being sought by the applicant. The Respondent argued that the applicant never showed any effort it took to sell the property and obtained offers below the market valuation such that a review of the valuation is necessitated. The Respondent urged that the application be dismissed.

10. After reviewing and considering the pleadings and the rival submissions of the parties, the issue that arises for determination is whether the applicant has made out a case to warrant the court to review and/or set aside the consent order dated 24th May, 2017. The applicant has predicated his application on Order 45 of the Civil Procedure Rules which provides for review of orders, judgment/decrees. The basis of the applicant’s application simply put is that the valuation report dated 19th August, 2019 had a fundamental error and or gross mistake in terms of the market value of the suit property and that owing to the apparent over valuation of the subject property the same had remained unsold in the auction market on several occasions due to its overvaluation.

11. The court record shows that on 24th May, 2017 the consent dated 22nd May, 2017 was duly adopted as an order of the court. The consent was to the effect that the subject property L.R No. Naivasha/Municipality Block 5/227 would in the first instance be sold to pay off the debt. The consent never addressed the issue of a valuation report but only the sale of the said subject property and that in the event of default or absence of full settlement of the debt by 5th July 2017 the charged properties which included Nakuru/Municipality Block 10/42 would be sold as per clause 5 of the consent. Further, the court record shows that on 24th June, 2019 the parties herein entered into another consent which was adopted as an order of the court to the effect that a joint valuer, later confirmed to be Knight Frank Kenya Limited conducts a valuation report in regard to the two charged properties. On 17th October, 2019 the parties confirmed that the valuation done and the court made an order in the following terms:-

“Now that the parties have a valuation a report that is agreed, the Bank can proceed to obtain a purchaser for the property on the basis of the valuation report or the plaintiff can obtain a purchaser on the basis of the report. The position is that the dispute that came before the court is dissipated and this matter is accordingly marked as settled.”

12. The consent order recorded and adopted by the court on 24th May 2017 was in terms of the consent letter dated 22nd May 2017 duly signed by both counsel for the parties. The consent never made any provision for the valuation of the charged properties. The main thrust of the consent was that the chargee would in the first instance have the property Naivasha Municipality Block 5/227 sold before the property Nakuru Municipality Block 10/42 could be sold. Though both properties were charged to the applicant to secure the loan facility, the

rationale appears to have been that the Naivasha property was sufficient to redeem the loan. The consent nonetheless provided that in the event of default and/or shortfall in the redemption of the liability to the applicant, the Nakuru property was liable to be sold.

13. The consequent valuation that the parties conducted was to ensure that the property was not sold at an under value. The valuation was not made part of any consent and certainly not the consent filed on 24th May 2017 and I fail to see how that consent order can be the subject of an application for review. The consent order did not in any manner fetter the chargee's power of sale. Indeed even the chargor agrees that the chargee has a right to exercise its power of sale and the consent order the subject of this application for review did acknowledge the chargee has the right to sell the property charged to recover its money.

14. Sections 97 and 98 of the Land Act, 2012 places a duty of care on the chargee while exercising a power to sell charged land. Section 97(1) and (2) Land Act, 2012 provide as follows:-

97 (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.

Section 98 (5) provides as follows:-

(5) In a sale by a private contract, the chargee shall be entitled to rely on a valuation carried out by a valuer who is registered with the institute of Surveyors of Kenya and the report shall in the absence of a manifest error, be conclusive in relation to the market price:

Provided that the valuation report shall at the time of sale be not more than 6 months old.

15. The law in my view has sufficient safeguards to ensure the charged property is not sold at an undervaluation. In the instant matter the chargor itself had, and continues to have the option to source and/or to procure a purchaser, if possible at the market value that was given by the valuer in the September 2019 report. It has to be admitted that property prices fluctuate depending with the attendant circumstances and market forces and that explains the requirement that a chargee who seeks to exercise a power of sale obtains a recent and/or current valuation of the charged property.

16. While I hold the view that Order 45 of the Civil Procedure Rules has no application in the circumstances of this matter, I equally hold that the applicant is not bound by the valuation report issued in September 2019 by Knight Frank Valuers Ltd. The chargee at any rate would need to procure a current valuation report as a report that is over 2 years old would not qualify as current valuation under the provisions of the Land Act, 2012.

17. I may mention that this matter was marked as settled on 17th October 2019 and technicality, save for the current application that sought a review of the consent order recorded and adopted on 24th May 2017, there is no pending suit between the parties. The application in my view was unnecessary.

18. For the reasons that I have given hereinabove, I find no merit in the Defendant's application dated 3rd May, 2021.

19. I order the same dismissed with each party bearing their own costs for the application.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 27TH DAY OF JANUARY 2022.

J M MUTUNGI

JUDGE