



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**HCC. NO. 370 OF 2015**

**DAULA MOHAMED OMAR.....PLAINTIFF/APPLICANT**

**V**

**FIDELITY COMMERCIAL BANK LIMITED.....DEFENDANT/RESPONDENT**

**JUDGEMENT**

1. This Court has heard both the Plaintiff and the Defendant Counsel on the Application dated 27<sup>th</sup> June, 2016 whose substantive prayer is for an order that;

· *A temporary Injunction do issue restraining the Defendant whether by itself, its agents, employee, its auctioneers or advocates or whomsoever from selling, advertising for sale or disposing of the suit property NAIROBI BLOCK 92/123 by public auction or private treaty pending the hearing and determination of this application.*

2. As I understood it, the main reasons put forward why this Court should grant the Order are:-

(a) The Applicant has paid Ksh.70,000,000/- of the Ksh.130,000,000/- due to the Defendant Bank.

(b) The Applicant has found a buyer who is willing to purchase property known as Nairobi Block 92/347 at Ksh.60,000,000/- which shall be applied towards payment of the balance.

(c) The Defendant has not issued any Statutory Notice for the intended sale upon the Plaintiff.

(d) The Defendant intends to sell the suit property at under price of Kshs. 70,000,000/- yet the property has been valued at Ksh.130,000,000/=.

3. At the heart of this matter is the Consent Order entered between the parties herein on 11<sup>th</sup> April,2016 in the following terms:-

1. The outstanding loan balance for following loan accounts between FIDELITY COMMERCIAL BANK (“hereinafter referred to as “the Bank”) and RICHFIELD INTERNATIONAL TRADING LIMITED and DAULA MOHAMED OMAR (hereinafter referred to as “the Plaintiff) is hereby agree to be in the sum of Kshs.130,000/=.

a. Account No.001000\*\*\*\* in the mane of Daula Mohamed Omar;

b. Account No.001000\*\*\*\* in the name of Richfield International Trading Limited;

c. Account No.001000\*\*\*\* in the name of Richfield International Trading Limited;

d. Account No.001TLKS14305\*\*\*\* in the name of Daula Mohamed Omar;

e. Account No.001TLKS14305\*\*\*\* in the name of Richfield International Trading Limited;

f. Account No.001TLKS14305\*\*\*\* in the name of Daula Mohamed Omar; and

g. Account No.001TLKS14305\*\*\*\* in the name of Daula Mohamed Omar;

2. The sum of Kshs.130,000,000/= will be settled as follows:

a. Payment of a deposit of Kshs. 13,000,000/= receipt whereof the Bank hereby acknowledges; and

b. The balance of Kshs.117,000,000/= (hereafter referred to as “the balance”) to be paid within SIXTY (60) days with effect from 16<sup>th</sup> February 2016 which shall be on or before 29<sup>th</sup> April 2016.

3. The balance shall be paid upon an undertaking by the Bank’s Advocates that the same shall be released to the Bank upon receipt by the Plaintiff’s Advocates a Discharge of Charge over the Plaintiff’s properties known as NAIROBI/BLOCK 92/123 and MAINLAND NORTH/SECTION 11/11327.

4. The Plaintiffs and Mr. YAHYA OMAR person guarantee dated 14<sup>th</sup> May 2012 be and are hereby discharged upon payment of the loan balance.

5. In the event the sum of Kshs.130,000,000/= is not fully paid, or an appropriate professional undertaking is not received from Iseme Kamau & Maema Advocates, within the agreed period of sixty (60) days from 16<sup>th</sup> February 2016, then the Bank will be at liberty to advertise the Plaintiffs charged properties for sale by way of public auction in exercise of its Statutory Power of Sale which has accrued.

6. In respect to the outstanding amounts for Account Numbers 001000\*\*\*\* & 001000\*\*\*\* in the name of Richfield International Trading Limited respectively, the same are negotiated separately by the Bank and the Plaintiffs.

7. The matter be mentioned before the Honourable Court after the THIRTY (30) day period for confirmation and/or further directions in regards to Nairobi Commercial & Admiralty Civil Case Number 370 of 2015 (hereafter referred to as “the High Court Case”) and the Thika Chief Magistrate’s Civil Case Number 753 of 2015 (hereafter referred to as “the Chief Magistrate’s Court Case”)

8. Parties be at liberty to apply.

4. It is admitted that the Plaintiff has defaulted in repayment of the agreed sum.

5. It is also agreed that the Defendant has advertised LR NAIROBI/BLOCK 92/123 for sale by Public Auction. The sale is due later today at 11.00am.

6. There is however no agreement on the interpretation to be given to clause 5 for the said consent which reads:-

5. *“In the event the sum of Kshs.130,000,000/= is not fully paid, or an appropriate professional undertaking is not received from Iseme Kamau & Maema Advocates, within the agreed period of sixty (60) days from 16<sup>th</sup> February 2016, then the Bank will be at liberty to advertise the Plaintiffs charged properties for sale by way of public auction in exercise of its Statutory Power of Sale which has accrued”.*

7. The Plaintiff asked me to find that the term of the consent meant that in the event of default the Defendant was entitled to exercise its Power of Sale but would be required to comply with the requirements of Sections 90 and 96(2) of the Land Act 2012 and Rule 15 of the Auctioneers Rules in respect to giving of Notices.

8. The Defendant is of a contrary view. That by the parties accepting that the Statutory Power of Sale had accrued the parties acknowledged that there was compliance with the Law in respect to the giving of all Statutory Notices and there would be no need for the Notices to reissue.

9. I have reflected on the matter and without taking a final position on it, I am not persuaded that the construction given to the clause by the Plaintiff is the correct one. Essentially, this is a default clause in which the Bank is granted liberty to advertise the Plaintiff’s charged property for sale by way of Public Auction in exercise of its Statutory Power of Sale which has accrued. In the context what would the words ***“the Statutory Power of Sale has accrued”*** mean? The clause allows the Defendant to advertise the charged properties for sale by way of Public Auction. Advertisement of the charged properties does not include working backwards to issue fresh Statutory Notices. By giving the Bank the liberty to proceed with an event that comes towards the end of the realization process, can it not be reasonably presumed that the parties acknowledged that all the steps required in Law that preceded Advertisement had been complied with?

10. A meaning assigned to the word ***‘accrue’*** in the Blacks Law Dictionary (19<sup>th</sup> Edition) is *“to come into existence as an ***enforceable claim or right***”*. The parties expressly agreed that the Statutory Power of Sale of the Defendant had accrued. Put differently, the Statutory Power of Sale had become enforceable. It could only become enforceable if all the Statutory Notices and steps had been complied with. It is for this reason that the parties agreed that in the event of default, the Defendant was at liberty to merely complete the process by advertising the charged property for sale by way of Public Auction.

11. The interpretation that readily presents itself does not favour the Plaintiff.

12. Section 97 (2) of the Land Act requires a Chargee, before exercising the right of sale, to ensure that a forced sale valuation is undertaken by a Valuer. Section 97(2) reads:

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

This duty on the Chargee is obligatory (See **David Gitome Kuhiguka Vs. Equity Bank Ltd** [2013] eKLR.

13. It is said that the Defendant intends to sell the property at a gross undervalue. At the time of arguing the Application, I pointed out to the Plaintiff's Counsel that the Valuation Report he sought to rely on to make this point was incomplete. 14 out of 17 of its pages were missing. It is not for me to speculate on the contents of those missing pages and the impact it may have had on the Plaintiff's case. The inevitable finding I make is that the incomplete document could not carry the Plaintiff's arguments any far. The allegation of gross undervaluation was not satisfactorily proved and I need not consider the answer by the Defendant that the remedy for sale at an under value is damages.

14. The Plaintiff made reference to a valuation undertaken at the behest of the Defendant in the year 2013 in which the market value of Ksh.70,000,000/= was placed on the property. The allegation is that the value does not reflect the current true forced sale value of the charged property. He/she who asserts must prove. It may well be that a valuation undertaken in the year 2013 is not reflective of the current values. But a party making that assertion must provide some evidence in proof. Unfortunately for the Plaintiff, the evidence she sought to rely on was incomplete and unsatisfactory (see paragraph 13 of this decision). That evidence was incapable of demonstrating that the Bank has failed in the duty imposed on it by section 97(2) of the Land Act.

15. The Plaintiff has had a challenge making out a Prima Facie case and I am therefore obliged not to grant an Order for Injunction.

16. This Court is not insensitive to the effort by the Plaintiff in settling the claim. In fact, prior to the arguing of the Application, the Court had urged the parties to relook at their hard line positions so as to avert the impending auction. Parties came back to me without an agreement and insisted that the Application proceeds to hearing.

17. I am afraid, I cannot find any reason in Law or equity to stop the intended Auction. The Notice of Motion dated 27<sup>th</sup> June 2010 is hereby dismissed with costs.

**Dated, signed and delivered in court at Nairobi this 30<sup>th</sup> day of June, 2016.**

**F. TUIYOTT**

**JUDGE**