



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 10 OF 2021**

**SON HARDWARE LIMITED.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**DEVELOPMENT BANK OF KENYA LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**JOSEPH. M. GIKONYO T/A GARAM**

**INVESTMENTS AUCTIONEERS.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

This ruling is on the Notice of Motion dated 16<sup>th</sup> July, 2021 filed by the Plaintiff/Applicant. The said motion seeks the following orders;

- (a) That pending the hearing and determination of this suit, an order of injunction do issue restraining the Respondents, their servants or agents from registering, presenting for registration or in any way completing the transfer of NGONG/NGONG/33632.
- (b) Costs of the application.

The grounds for seeking the above prayers are that;

- (a) On 6<sup>th</sup> July, 2021, the Defendant in a purported exercise of the first Defendant's statutory point of sale, illegally and unlawfully sold the Plaintiff's property known as NGONG/NGONG/33632;
- (b) The sale was in stark contravention of the law in that;
  - (i) No statutory Notice was served before the auction.
  - (ii) No valuation was undertaken before the auction.
  - (iii) No notification of sale was given by the Bank before the sale
- (c) The security was sold at gross undervalue
- (d) Non- compliance with mandatory provisions of **Sections 90, 97(2) and 96(2)** of the **Land Act** renders the sale unconstitutional.

The application which is under **Order 40 Rules 1 and 2** of the **Civil Procedure Rules** is also supported by an affidavit sworn by Peter M. Juma in which he explains how the Plaintiff charged the suit property valued at Kshs. 31, 134, 934 and was advanced a loan of Kshs. 10, 000,000/-. It fell into arrears.

Later the first Defendant instructed the second Defendant to sell the suit premises and to recover the advanced sums. The Plaintiff went to the High Court to challenge the intended sale of the suit property (page 9 of the record). The Plaintiff's application was dismissed. Also dismissed was an Appeal to the Court of Appeal against the dismissal by the High Court.

Annexed to the supporting affidavit are nine annexures which include the following;

1. Bill of Quantities for the Plaintiff's construction on the suit land.

2. Charge documents for L.R. NGONG/NGONG/24258 and 33632.
3. Deed of assignment
4. Instructions to sell the suit property by Auction.
5. Order of High Court at Kajiado in HCCC 44 of 2018 requiring the Applicant to deposit Ksh. 10 million.
6. Memorandum of Appeal in Civil Appeal No. 129 of 2019.
7. Advertisement dated 21<sup>st</sup> June, 2021 for sale of the suit property.
8. Copy of Bank Statement showing sale of the suit property.
9. Notice of redemption dated 6/7/2021 issued to the Plaintiff giving it 45 days to redeem the suit property.

The Plaintiff's application is opposed by the Defendants in two ways.

Firstly they filed a Notice of Preliminary Objection dated 21<sup>st</sup> September, 2021 urging that the Notice of Motion is Res Judicata because both the High Court and the Court of Appeal have heard a similar application on merit and dismissed it in Kajiado HCCC 44 of 2018 and Nairobi Civil Application No. 3 of 2019 (UR 3/19) respectively.

Secondly, one Silas Aluku, a legal officer of the first Defendant has sworn a replying affidavit with ten (10) annexures which include a copy of the application before the High Court, a copy of the order dismissing the application, a copy of the ruling by the Court of Appeal, two copies of statutory notices issued by the first Defendant to the Plaintiff dated 26/7/2017 and 17<sup>th</sup> November, 2017, a valuation report of the suit property dated 17<sup>th</sup> June, 2021, a certificate of official search dated 21/1/2020, a certificate of sale dated 6/7/2021 among other documents.

In summary, it is the Defendants' case that the current application has no merit for the above reasons.

I have carefully considered the Notice of Motion dated 16<sup>th</sup> July, 2021 including the affidavits and the annexures. I find that it has no merit for two (2) reasons.

Firstly, I find the application to be Res Judicata having been heard and dismissed by a Court of equal status on 18/12/2018.

Secondly, I find that contrary to the deposition by the applicant that there was no statutory notice issued to it before sale, the Respondents have demonstrated that they issued the requisite notice.

Finally, even after the applicant was given ample time to avail evidence of payment of the loan, no such evidence was forthcoming.

For the above reasons, I find that the Applicant has not established a prima facie with a probability of success. The balance of convenience does not favour the applicant either.

I dismiss the application dated 16<sup>th</sup> July, 2021 with costs to the Respondents.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 24TH DAY OF JANUARY, 2022.**

**M.N. GICHERU**

**JUDGE**