



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
COMMERCIAL CASE NO. 60 OF 2013

ZUM ZUM INVESTMENT LIMITED.....PLAINTIFF

-VERSUS-

HABIB BANK LIMITED..... DEFENDANT

JUDGMENT

Introduction

1. By a Plaint dated 22nd May 2013 and filed on the same day, the Plaintiff made claim and sought judgment against the Defendant for the following:
 - i) A declaration that the Defendant has unilaterally, unfairly and unlawfully changed the interest rates charged to the overdraft facility to the detriment of the Plaintiff.
 - ii) A declaration that the interest rate charged by the Defendant to the Plaintiff with regard to the overdraft facility which have been charged without notice are unfair, oppressive and excessive.
 - iii) An injunction restraining the Defendant from advertising, selling by public auction or otherwise transferring and or in any manner whatsoever exercising its statutory power of sale with regard to **Plot No. 8408/Section II MN.**
 - iv) Costs
 - v) Interest
 - vi) Further or other relief as the Court may deem fit to grant.
2. The Plaintiff filed an Amended Plaint dated 19th November 2013 in which it abandoned prayers (i) and (ii) above and sought an order of injunction to restrain the Defendant in the following terms:

“An injunction restraining the Defendant from advertising, selling by public auction or otherwise transferring and or in any manner whatsoever exercising its statutory power of sale with regard to Plot No. 8408/Section II MN at a lower value of Kshs. 312,000,000/- which is below the market value of the property.”

3. Briefly, the facts herein are that by a charge dated **18th May 2010**, the Defendant provided an overdraft facility of **Kshs. 60,000,000/-** to **Akaba Investments Limited**, a company described by the Plaintiff as a “sister company”. The facility was secured by a legal charge for **Kshs. 100,000,000/-** over the Plaintiff's property known as **Plot No. 8408/Section II MN** (hereinafter “the suit property”).
4. In or about **July 2011**, the overdraft facility was renewed and varied to **Kshs. 60,000,000/-** and **US\$ 1,800,000.00**. A variation of charge dated **16th August 2011** varying the existing charge from Kshs. 100,000,000/- to Kshs. 60,000,000/- and a Further Charge of US\$ 1,800,000.00 was duly registered over the suit property.
5. Akaba Investments Limited defaulted in repayment of the overdraft facility and by a statutory notice dated **10th September 2012**, the Defendant made a formal demand for payment of **Kshs. 216,951,661.68**.
6. The Defendant intends to dispose of the suit property by exercising its statutory power of sale in order to recover the outstanding debt. The Plaintiff is opposed to the intended sale on the basis that the Defendant intends to sell the property at Kshs. 312,000,000/- which is below the market value of the property.

The Issues for Determination

7. It is not in dispute that the Plaintiff offered the suit property as security to the Defendant for financial facilities availed to Akaba Investments Limited. It is also not in dispute that Akaba Investments Limited is in default of the repayment of the loans advanced to it by the Defendant. It is therefore common ground that the Defendant is entitled to exercise its statutory power of sale of the suit property as it seeks to do.
8. The Plaintiff submits that its only “quarrel with the Defendant is that the Defendant has grossly undervalued the property for purposes of disposing of the same by public auction.” The Plaintiff contends that “to allow the Defendant to dispose of the property at the said gross undervalue of Kshs. 312,000,000/- would result in injustice to the Plaintiff and the same would amount to an illegality as the power of sale would have been exercised capriciously and maliciously to the detriment of the Plaintiff.”
9. The Plaintiff does not object to the Defendant exercising its power of sale over the suit property. The Plaintiff's sole objection is that the suit property should not be sold at a value of **Kshs. 312,000,000/-** which it claims to be below the market value. This, in my view, is the sole issue for the court's determination, that is, whether the selling price of Kshs. 312,000,000/- is below the market value of the suit property and by selling the same at that price the Defendant would be acting capriciously and maliciously to the detriment of the Plaintiff.

The Plaintiff's Evidence

10. The Plaintiff called two witnesses; **George Dan Kiliru**, a valuer who valued the suit property for the Plaintiff and **Abdulkarim Saleh Muhsin**, the Plaintiff's director.
11. Mr. Kiliru produced two valuation reports. The first valuation report dated **16th May 2013** places the value of the suit property at **Kshs. 840,000,000/-**. That value was stated by the valuer to be based on the possible sub-division of the suit property into 700 plots after allowing 20% of the total land to cater for internal road network, open spaces and ancillary/service plots. The price was also stated to have given an allowance of 20% of the total capital value to cater for sub-division cost and cost of servicing the sub-division scheme.
12. The second valuation report by Mr. Kiliru is dated **7th November 2013**. It places the open market value of the suit property in its current status, that is without sub-division, at **Kshs. 560,000,000/=**

and underscores the contents of the previous report of 16th May 2013 that upon successful subdivision the suit property would fetch Kshs. 840,000,000/- in the open market.

13. The Plaintiff's second witness, **Abdulkarim Saleh Muhsin** testified that

the Plaintiff was apprehensive that the Defendant intended to sell the suit property at an undervalue. He testified that the correct value of the suit property should be that given by the Plaintiff's valuer of Kshs. 840,000,000/-.

The Defendant's Evidence

14. The Defendant also called two witnesses; **Patrick Maina Mwangi**, the

Defendant's Assistant Vice President and Head of Credit and **Patrick Munyua Kiambi** who testified on behalf of Tysons Limited, a company that had valued the suit property for both parties at different times.

15. There are on record three valuation reports by Tysons Limited:

- i. The first valuation report is dated **11th November 2009** and places the open market value of the suit property at **Kshs. 260,000,000/-** and the forced sale value at **Kshs. 200,000,000/-** (hereinafter "the first valuation report"). This report was produced by the Defendant to demonstrate that the value of the property had indeed gone up since the property was offered as security.
- ii. The second valuation report is also dated **11th November 2009** and places the value of the suit property at **Kshs. 463,400,000/-** (hereinafter "the second valuation report"). This report was produced by the Plaintiff to demonstrate that the Kshs. 312,000,000/- at which the Defendant intends to dispose of the suit property is below the market value since the same had been valued by the same valuer at Kshs. 463,400,000/- back in 2009.
- iii. The third valuation report is dated **24th April 2013** and places the market value of the suit property at **Kshs. 390,000,000/-** and forced sale value at **Kshs. 312,000,000/-** (hereinafter "the third valuation report"). It is this third report that the Defendant intends to rely on in disposing of the property in exercise of its statutory power of sale.

16. The question that this court must therefore address is whether the Plaintiff has satisfactorily demonstrated that the value of Kshs. 312,000,000.00 is not the best price reasonably obtainable for the suit property.

Analysis/Determination

17. The Plaintiff's case is that the suit property had a value of Kshs. 463,400,000/- in 2009 and a value of Kshs. 560,000,000/- in 2013, if sold as a block. The Defendant on the other hand submits that the suit property was valued at Kshs. 260,000,000/- in 2009 and Kshs. 390,000,000/- in 2013, if sold as a block. The Defendant further states that the forced sale value of the suit property in 2009 was Kshs. 200,000,000/- and Kshs. 312,000,000/- in 2013. The Defendant therefore submits that selling the suit property at Kshs. 312,000,000/- would not be detrimental to the Plaintiff since that is the forced market value of the property.

18. As already discussed, Tysons Limited prepared two valuation reports both dated 11th November 2009. The first valuation report which places the value of the suit property at Kshs. 260,000,000/- was prepared for the Defendant who produced it in court. The second valuation report which places the value of the suit property at Kshs. 463,400,000/- was prepared for the Plaintiff who also availed it to court. The question that begs answer is, how can the same valuer give different values of the same property valued at the same time?

19. That question was put to Mr. Kiambi of Tysons Limited during his

testimony. He explained that the figure of Kshs. 463,400,000/- was based on an assumption that the suit property would be subdivided into several sub-plots and sold as such. Mr. Kiambi explained that the value of Kshs. 463,400,000/- was in respect of the intended subdivided plots and not of the suit property as a block. That the value of the suit property as a block in 2009 was Kshs. 260,000,000/- as indicated in the first valuation report.

20. This case revolves around the value of the suit property and whether the value at which the Defendant intends to dispose of the same is the best price reasonably obtainable. **Section 97 (1) and (2)** of the Land Act, 2012 provides 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.”

21. The Defendant carried out valuation of the suit property and availed the report by Tysons Limited dated 24th April 2013. That report contains both the open market value of the property being Kshs. 390,000,000/- and the forced sale value of Kshs. 312,000,000/-. The Defendant, in my view, complied with **Section 97 (2)** of the Land Act by undertaking the forced sale valuation of the suit property. Once the Defendant has undertaken a forced sale valuation, the burden shifts to the Plaintiff to prove that the value arrived at by the Defendant's valuer was not the best price reasonably obtainable at the time.

22. The Plaintiff discredits the Defendant's valuation report on the basis that Tysons Limited had valued the suit property at Kshs. 463,400,000/- in 2009 and therefore there is no way the same valuer could value it at Kshs. 312,000,000/- in 2013. That is the sole basis upon which the Plaintiff discredits the Defendant's valuation report. The Plaintiff submits that the Defendant's valuer is inconsistent in its valuation of the suit property as the valuer does not recognize the value appreciation that the suit property has attracted since 2009. The Plaintiff therefore urges the court to conclude that since the Defendant's valuer is inconsistent in its valuation of the suit property, the price of Kshs. 312,000,000/- at which the Defendant intends to dispose of the suit property is below the market value and therefore not the best price reasonably obtainable at the moment.

23. I have had an opportunity to carefully analyze the two valuation reports both dated 11th November 2009. There is no dispute that the two were prepared by the same valuer, Tysons Limited. At page 12 of the second valuation report, the valuer states as follows:

“Our specific instructions are to value portion 8408 on the basis of a proposed subdivision scheme into 1324 0.04 acre subplots. The valuation of this portion thus reflects the anticipated values per plot assuming subdivision and NOT the value of the plot as a whole.”

24. That remark is consistent with the testimony of Mr. Kiambi that the value of Kshs. 463,000,000/- was based on the assumption that the suit property would be subdivided and sold as sub-plots and the same was not the value of the plot as a single block.

25. The alleged inconsistency in the two valuation reports by Tysons Limited has been satisfactorily explained. The first valuation report shows the value of the suit property as block as Kshs. 260,000,000/- while the second report shows the value based on proposed sub-division into smaller plots at Kshs. 463,000,000/-. There is no inconsistency in the two valuation reports. The Defendant's valuer has clearly demonstrated a rise in the value of the suit property from Kshs. 290,000,000 in 2009 to Kshs. 390,000,000 in 2013, an appreciation of Kshs. 100,000,000/-. The

forced sale value has also risen by Kshs. 112,000,000/- from Kshs. 200,000,000/- to Kshs. 312,000,000/-. In my view, the Plaintiff's claim that the Defendant intends to sell the suit property at an undervalue simply because the Defendant's valuer has allegedly given a lower value of the suit property than what it gave in 2009 is therefore without basis.

26. **Section 97 (2)** only bestows a duty on the chargee to ensure that a forced sale valuation is undertaken by a valuer, a requirement which the Defendant complied with as per the third valuation report by Tysons Limited dated 24th April 2013. It was then incumbent upon the Plaintiff to show that the valuation by the Defendant's valuer did not result in the best price reasonably obtainable for the suit property. Since the Plaintiff only discredited the Defendant's valuation on the basis that the valuer was inconsistent, the allegation of which I have established to be unfounded, the Plaintiff has not discharged that burden.

27. In my view, the Plaintiff has not demonstrated satisfactorily why this court should disregard the Defendant's valuation report and only rely on the Plaintiff's valuation reports. It is not sufficient for the Plaintiff to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The Plaintiff must satisfactorily demonstrate why the valuation report that the Defendant intends to rely on in disposing of the suit property does not give the best price obtainable at the material time. The Plaintiff needs to show, for instance, that the Defendant'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 way before the time of the intended sale. The Plaintiff has not raised any of such grounds.

28. The Plaintiff produced two valuation reports done by its valuer, Kiliru & Company, to show that the value of the suit property is above what the Defendant intends to dispose of the property at. However, none of those valuation reports shows what the forced value of the suit property is. **Section 97 (2)** requires that a forced sale valuation be undertaken. The forced sale value, therefore, should be the guiding factor to the court in determining whether the intended selling price is an undervalue. In my considered view, the Plaintiff's valuation reports are not the best guide for purposes of arriving at a fair value since the same only contain the open market value and not the forced sale value of the property.

29. In any event, there is no evidence placed before court to prove that the Defendant has given the auctioneer instructions that Kshs. 312,000,000/- be the reserve price during the auction. The Plaintiff's claim that the Defendant intends to sell the suit property at a lower value is therefore, in my view, merely speculative.

Conclusion

30. The standard of proof in Civil cases is on a balance of probability. In this case, the Plaintiff did not discharge the burden of proving that the Defendant's valuation of the property was below the market value. The ground on which the Plaintiff relied to discredit the Defendant's valuation, namely that the proposed value of Kshs. 312,000,000/- is even lower than what the same valuer had arrived at in 2009 (Kshs. 463,400,000/-) has been satisfactorily countered by the Defendant's explanation that the same related to the intended subdivision of the suit property and not its value as a block. The Plaintiff's valuation reports do not contain the forced sale value, which is the mandatory requirement for purposes of statutory power of sale. The balance of probability tilts in favour of the Defendant's valuation and therefore I find no reason why the court should interfere with the Defendant's intended disposal of the suit property.

31. The upshot of this is that the Plaintiff has not sufficiently proved that the selling price of Kshs. 312,000,000/- is below the market value of the suit property and by selling the same at that price the Defendant would be acting capriciously and maliciously to the detriment of the Plaintiff. The Plaintiff's case is dismissed with costs to the Defendant.

DATED and delivered at MOMBASA this 20th day of MARCH, 2014.

MARY KASANGO

JUDGE