



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 708 of 2006**

**MAINA MUCHORI .....PLAINTIFF**

**VERSUS**

**EQUITY BANK LIMITED .....1<sup>ST</sup> DEFENDANT**

**DALU COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT**

**FELISTA WAIRIMU MWANGI .....3<sup>RD</sup> DEFENDANT**

**RULING**

The application for my determination is the one dated 20<sup>th</sup> December 2006 filed by the plaintiff seeking injunctive reliefs against the defendants. The relationship is that the plaintiff guaranteed the 3<sup>rd</sup> defendant Kshs.6 million, which was advanced by the 1<sup>st</sup> defendant. It is alleged that the borrower did not repay the loan but instead went underground. The 1<sup>st</sup> defendant then made process to recover Kshs.3 million which to the bank is the amount which was owing as at 21<sup>st</sup> September, 2005.

It is alleged that the property of the plaintiff was auctioned by the bank but a transfer has never been done. It is also alleged that the 2<sup>nd</sup> defendant who is the purchaser has not paid the 75% of the purchase price. The plaintiff contends that the property is a prime property in Juja road in Pangani estate, with a value of Kshs.43 million.

The plaintiff contends that on 18<sup>th</sup> December 2006 he went to see **Mr. Ngari** of the bank who informed him that his house had been sold in October 2006 to a company called Dalu & company Limited and a down payment of Kshs.4,125,000/= was paid. And the purchaser was given 90 days to raise the balance. The house was sold to the purchaser for Kshs.16,500,000/= while its value is Kshs.40 million. The applicant attached a valuation report in evidence to that proposition.

The plaintiff further depones that to sell the suit property for Kshs.16.5 million is a big joke as the bank's valuation, gave it over Kshs.23 million. And such act is oppressive which must not be allowed.

There are several issues which are central to the determination of this application;

- (1) Through a letter of offer dated 6<sup>th</sup> May, 2005 and 26<sup>th</sup> November 2005 the bank advanced to the 3<sup>rd</sup> defendant a loan of Kshs. 6 million.
- (2) The loan was secured by a charge over the suit property and a guarantee by the plaintiff.

(3) That as at 21<sup>st</sup> September, 2005 the amount outstanding was Kshs.3,048,279/- in which the bank issued to the principal debtor and guarantor demand letters.

(4) That the charged property was sold to the 2<sup>nd</sup> defendant on 18<sup>th</sup> October, 2006 at a public auction for Kshs.16.5 million. The bank claims that was the best price at the auction and therefore represented the market price and or value.

(5) The bank claims that the sale of the charged property at a price of Kshs.16.5 million was done against the backdrop of various attempts to sell but the market response in which the valuation report dated 7<sup>th</sup> July 2006 of the charge property was considered.

No doubt there was a debt outstanding in the books of the bank due to the 3<sup>rd</sup> defendant, herein and as a result the property was liable for realization by the bank. The question is whether the realization of the property by the bank was done properly. On 6<sup>th</sup> October 2006, the property was advertised in **Kenya Times** by **Shelfo Auctioneers**. The intended sale was to take place on 18<sup>th</sup> October 2006 opposite Othaya Post office in Othaya town in Central Province of Kenya.

According to the description in the said advertisement the property is all that piece of land known as L.R. No.209/2389/80 Pangani Estate in Juja road in Nairobi, developed with a five storey residential-cum commercial building. Before the said auction the bank instructed **M/S Acumen** valuers to value the suit property for purposes of assessing the correct and current market value. The said valuers gave a valuation report dated 7<sup>th</sup> July 2006 and according to their opinion, the property had a market value of Kshs.25 million and a forced sale value of Kshs.18 million.

I have considered the application and all the relevant documents submitted by the parties before me. My take of the matter is that the plaintiff has disclosed various issues that entitles him the grant of an equitable remedy and/or injunction.

Firstly the auction was done through an advertisement in the Kenya times Newspapers on 6<sup>th</sup> October, 2006. And that the auction took place in Othaya in Nyeri town. I do not understand why a property in Nairobi should be auctioned in Othaya in Nyeri. The said town/village is in Central Province while the property is in different province. The bank does not disclose why the auction sale was done in a manner to attract suspicion and bad faith. There is no justification whatsoever why the sale of a property would be done in a different location from where the property is located. The fact that a debt is owing or admitted cannot be a reasonable justification to hide the sale of a charged property in a discreet place far from the location of the property. There is no evidence to show that the plaintiff resides in Othaya in Nyeri District.

Secondly it was not the interest of the plaintiff to advertise the suit property in the manner it was done. I also do not think that it was in the interest of the bank to take the auction place to Othaya in, Nyeri District. By taking the auction to Othaya, the bank reduced the exact and actual value of the property. And in any case there is no reason why the auction was done in Othaya. The only reasonable inference that can be drawn is that there was hidden under-hand dealings or that the bank was by all means inclined to clog and/or fetter the rights of the plaintiff to redeem his property.

In my humble opinion the conduct of the bank in allowing the auctioneer to auction the suit property in a small village far from the location of the property is an act manifestly amounting to gross abuse of its statutory power of sale. The existence of debt and the admission of a debt is not a justification to deal with the property in a manner contrary to law and equity. I think it is illegal and inequitable to advertise the suit property in the way it was done and schedule the auction in Othaya in Nyeri. I am therefore satisfied that the bank acted in bad faith and exercised powers which were not available to it.

The other issue which shows the bank acted in bad faith is that on 7<sup>th</sup> July, 2006, it undertook an exercise to determine the value of the suit property. It got an expert opinion from its own valuer but the property was sold for less than the figure suggested in the valuation report. It is not open, to the bank to throw

away the property of debtors simply because there is a debt owing and/or outstanding. I know of no law that says that the bank can act in a capricious manner simply because the debt has been admitted.

In my view it was prudent for the bank to reject the sale price and cause the property to be re-advertised so that better bids could be obtained. I do not think the bank acted in good faith by;

- (1) Allowing the auction to take place in Othaya in Nyeri and
- (2) Accepting a price below the market value or forced sale value.

In my understanding the law places greater responsibility on the banks to act in good faith when the statutory power is being exercised. The statutory power donated to the chargee is a weapon and a shield at the same time. In my view the power was not properly and legally exercised therefore the plaintiff is entitled to the intervention and protection of the law.

All in all I am persuaded that the plaintiff has brought itself within the realm of **Giella vs Cassman Brown**. He is as a matter of law entitled to the grant of the orders sought. I therefore grant him prayers No.2 and 3 in the application dated 20<sup>th</sup> December, 2006. Costs shall be in the cause. I direct parties to list the suit for hearing on priority basis.

Dated, signed and delivered at Nairobi this 21<sup>st</sup> day of February, 2008.

**M. A. WARSAME**

**JUDGE**