



**Misati v Consolidated Bank of Kenya Ltd & 2 others (Civil Case E007 of 2021) [2024] KEHC 169 (KLR) (18 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 169 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL CASE E007 OF 2021  
MW MUIGAI, J  
JANUARY 18, 2024**

**BETWEEN**

**KEPHER ONDERE MISATI ..... PLAINTIFF**

**AND**

**CONSOLIDATED BANK OF KENYA LTD ..... 1<sup>ST</sup> DEFENDANT**

**REGENT AUCTIONERS ..... 2<sup>ND</sup> DEFENDANT**

**CONNECT CREDIT LTD ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**Notice Of Motion**

1. Vide a Notice of Motion dated 20th March, 2023 and filed in court on 21<sup>st</sup> March, 2023 brought under Sections 1A 3, 3A, and 6 (e) of the [Civil Procedure Act](#), Section 97 of the [Land Act](#) and Order 40 of the Civil Procedure Rules 2010 wherein, the Applicant sought the following orders that:
  - a. Spent
  - b. Pending the hearing and determination of this Application, a temporary order of injunction is issued restraining the Defendants, their servants and/or agents from alienating, taking possession of and or otherwise disposing of by way of public auction or private treaty, the whole of that parcel of land known as Mavoko Town Block 3/2426
  - c. Pending the hearing and determination of this Application, an order of inhibition be issued restraining the Machakos County Land Registrar from making entries and/or any dealings on the register affecting the land parcel Mavoko Town Block 3/2426.



- d. An order be issued to declare the sale by public Auction of land parcel Mavoko Town Block 3/2426. On 28<sup>th</sup> February,2023 conducted by the 3<sup>rd</sup> Defendant on behalf of the 1<sup>st</sup> Defendant is void for breach of Section 97 of Land Act,2012
  - e. Costs of this application be on the cause.
2. The grounds upon which the application is premised are on the face of the said Application.

### **Supporting Affidavit**

3. The application was supported by the Supporting Affidavit dated 17<sup>th</sup> March,2023 and filed in court on 21<sup>st</sup> March,2023, sworn by Kepher Ondere Misati the applicant herein, wherein he deposed that he is the registered owner of the land parcel known as Lr No. Mavoko Town Block 3/2426. (subject land) (annexed and marked copy of the certificate of official search).
4. He lamented that the was/is charged in favor of the 1<sup>st</sup> Defendant /Respondent as security for a loan of Kshs. 30 million advanced by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant; and prior to the advancing of the said loan, a valuation of the land was undertaken and the land was valued at Current Open Market of Kshs. 110,000,000/= and at a forced sale value of Kshs. 82,500,000 (annexed and marked copy of the valuation report dated 11/12/2015 by Epiconsults Ltd)
5. It was deposed that 1st Defendant /Respondent in its letter dated 7<sup>th</sup> March,2023 disclosed to him to have conducted a valuation of the charged property and returned values of 40 Million for the Open Market Value and Kshs. 30 million for the Forced Sale Value. (annexed and marked copy of the letter).
6. He deposed that vide the said letter, he learnt that the land was purportedly sold on 28<sup>th</sup> February,2023 at a forced Value of 30 million based on a wrongful/doubtful Valuation Report of 13<sup>th</sup> December,2022 which was obtained in a fraudulent scheme and without regard to his statutory duty of care (annexed and marked copy of the Valuation Report dated 13th December,2022 by Ardhiworth Ltd).
7. He deposed that he is advised by his Advocate that the property was sold at an undervalue being less than 25% sale of the correct current market price of the said property and there is a clear fraud.
8. He lamented further that he is advised by his Advocate on record that the 1<sup>st</sup> Respondent did not validly exercise its Statutory of sale under Section 97 of the Land Act,2012 consequently the purported sale of the suit property is null and void.
9. He is apprehensive that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants will transfer the land to a third party in violation of his statutory rights.

### **Replying Affidavit**

10. The 1<sup>st</sup> Defendant Bank in its Replying Affidavit dated 5<sup>th</sup> June,2023 and filed in court on 9<sup>th</sup> June,2023 sworn by Lilian Ntongai, Debt Recoveries Officer of the 1<sup>st</sup> Defendant Bank herein, wherein she deposed that the Plaintiff filed an interlocutory injunctive application before this court which was heard and determined vide this court's ruling dated and delivered on 8<sup>th</sup> November,2022, in which court dismissed the said injunctive application under the backdrop that the 1<sup>st</sup> Defendant Bank's Statutory power of sale over LR NO. Mavoko Town Block 3/2426(the suit property) had validly accrued.
11. She averred that the 2<sup>nd</sup> Defendant Debtor had taken out a loan facility of Kshs. 30,000,000 from the 1st Defendant Bank and defaulted on the repayment terms subjecting the loan account to arrears.



12. She lamented that 1st Defendant Bank proceeded to realize the suit property which was validly disposed vide public auction on 28<sup>th</sup> February,2023 to the highest bidder for value and for a consideration of Kshs. 30,000,000, which was done in accordance to Section 97 of *Land Act*,2012 and was preceded by series of valid and independent valuation Reports undertaken by the1st Defendant Bank which revealed that the value of the Suit property had been steadily undergoing a decline due to degradation activities on suit land.
13. Depositing that the Plaintiff's application is therefore brought in bad faith, contains fabrications, has failed to disclose material facts to this court but more so deprived of practical significance given that it has been rendered moot and overtaken by events, following the fall of the hammer and surrender of the transfer documents to highest bidder the 1st Defendant Bank avers that the Plaintiff's equity of redemption had been extinguished.
14. It was deposed that the Plaintiff solely, albeit Mistakenly, placed reliance on the pre loan disbursement valuation values dated 11<sup>th</sup> December, 2015 at an Open Market Value of Kshs 110,000,000 and at a Forced Sale Value of Kshs 82,500,000 by M/S Epiconsultants was according to affiant conducted at the point of loan disbursement to the 2<sup>nd</sup> Defendant Debtor and eight (8) years prior to the valid disposal of the suit property on 28<sup>th</sup> February,2023.
15. It was deposed further that the Plaintiff has always been aware of the degradation activities on the suit property due to vast quarrying activities which has left a significant portion of the suit property prone to flooding and thus non-viable for residential or commercial use.
16. It was contended that in November 2021 six years from its initial valuation the 1st Defendant Bank obtained an independent valuation of the suit property through M/S Icon Valuers Limited which valued it at an Open Market Value of Kshs 71,600,000 and Forced Sale Value of Kshs. 53,700,000. (Reference was made to pages 11 and 12 of the 1<sup>st</sup> Defendant annexures)
17. Depositing that a section of suit property has always been prone to severe flooding during rainy and wet seasons. (reference was made to pages 9 of the1st Defendant annexures)
18. It was deposed that the Plaintiff's allegation that the suit property was sold at an undervalue and through a fraudulent scheme falls by the wayside as the sale was done pursuant to the prevailing forced sale value and subject to independent valuation reports of more than twelve months prior to the sale by public auction and that the suit property value had declined overtime.
19. She claimed that it is not sufficient for the Plaintiff to allege fraud or that the suit property was disposed of at under value but rather place demonstrable evidence before this court as to why most recent valuation by M/s Adiworth (real estate) limited ought not be relied upon or carry evidentiary weight before this court.
20. It was lamented that to simply allege that the1st Defendant Bank breached its duty of care or that the sale of the suit property was null and void is a reach and can be of no evidential value without credible evidence before this Court; and that the pre- disbursement report sought to be relied upon by the plaintiff was conducted on 9<sup>th</sup> October,2015 and has not accounted for significant changes and developments on the property at the time of sale.
21. It was deposed that the Plaintiff made no efforts to regularize the 2<sup>nd</sup> Defendant's Debtor's loan default or safeguard his equity of redemption following this court's ruling on 8<sup>th</sup> November,2022; further that following this court's ruling on 8th November,2022 the1st Defendant Bank has complied with its statutory power of sale and an order to invalidate the concluded sale by public auction would be unjust and contrary to the interest of justice.



22. The matter was canvassed by way of written submissions.

## Submissions

### The Plaintiff/applicant's Written Submissions

23. In his submissions dated 12th June, 2023 and filed in court on 15<sup>th</sup> June,2023, counsel for the Applicant raised the following issues for determination:
- a. Whether the 1<sup>st</sup> Defendant Bank owed the Plaintiff guarantor a statutory duty of care in respect of the sale of the charged property.
  - b. Whether the 1st Defendant Bank in exercise of its power to sell violated that statutory duty of care.
24. In analyzing the aforementioned issues, counsel for the Plaintiff opined that the 1st Defendant Bank in exercise of its power to sell the charged property, owes the Plaintiff guarantor a statutory duty of care as is enshrined under Section 97 of the Land Act, which is to effect that a charge who exercises power to sell the charged land owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor.
25. It was contended that Section 97 (3) of the Land Act prohibits the sale of the charged property below 25% of the open market value. Reliance was placed on the case of Patrick Kangethe Edward Vs Co-operative Bank of Kenya limited & Another, the court succinctly held that:
- “Section 97 (1) of the Land Act now places a duty of care on a chargee while exercising its power of sale. That duty to this court includes the duty to ensure that the best achievable price is realized and further that the chargor whose land is sold is not exposed to unnecessary and avoidable expenses and costs”
26. Submitting that there exists a remarkable discrepancy in the valuation report dated 11<sup>th</sup> December,2015; November,2021 and the one for 6<sup>th</sup> December,2022 filed by the 1st Defendant Bank. Opining that it is admitted by the 1st Defendant Bank that land prices do appreciate over, it has not been demonstrated by the 1st Defendant Bank that the condition of the suit land has degraded to reduce its value to 25% of the initial Open Market Value from Kshs. 110 Million to an Open Market Value of Kshs. 40 Million.
27. It was the position of the Applicant that the the 1st Defendant Bank sold the suit land at 25% below correct Open Market Value which according to counsel is a prima facie gross undervaluation, and did not attempt to obtain the best price reasonably obtainable at the time of sale, hence it did not validly exercise its statutory power of sale and was in breach of the duty imposed by Section 97 of the Land Act, 2012. To buttress this position, reliance was made on the case of Julius Onyango Ochuodho and 31 Others vs Kisony Welfare Group Ltd & 8 Others [2021] eKLR, and submitted that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants were in breach of a statutory law and therefore damages will not recompense to the Plaintiff guarantor in the circumstances of such breach hence the need for this court to issue an order restraining the Machakos County Land Registrar from making entries and/or any dealings on the register affecting the land parcel Mavoko Town Block 3/2426.
28. Finally, it was submitted that the Plaintiff guarantor application dated 20<sup>th</sup> March,2023 is merited and the same should be allowed.



## 1st Defendant Bank's Submissions

29. The 1st Defendant Bank, in its submissions dated 7<sup>th</sup> July,2023 and filed in court on 10<sup>th</sup> July,2023, counsel for the 1st Defendant Bank relied the case of Mrao Limited Vs First American Bank of Kenya Limited & 2 Others [2003] eKLR to raise the following issues:

- i. Has the Plaintiff advanced a prima facie case with a probability of success?
- ii. Will the plaintiff suffer irreparable loss which would not adequately compensated by an award of damages? and
- iii. With which party the balance of convenience lies?

30. On has the Plaintiff advanced a prima facie case? counsel relied on court of Appeal in the case of Mrao Limited Vs First American Bank of Kenya Limited & 2 Others [2003] eKLR, which defined a prima facie case in a civil application as follows:

“A prima facie case in a civil application includes but is not confined to a genuine and arguable case”

It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party, so as to call for an explanation or rebuttal from the latter”

31. It was contended that it is not in dispute that the 1st Defendant Bank's duty to value suit property prior to a forced sale lies within the confines of Section 97 of the Land Act,2012. Averting that to give effect to this duty of care Section 97 (2) of the Land Act,2012 mandates the 1st Defendant Bank before exercising a forced sale to ensure a forced sale valuation of the suit property is undertaken by a valuer it buttressing the above position reliance was on the case of Koileken Ole Kipolonka Orumoi Vs Mellech Engineering & Construction Ltd and 2 Others [2018] eKLR, which held thus:

“...the importance of conducting a force sale valuation serves an important legal calling that is, it will inform the reserve price of the property and examine the market in order to obtain the best price reasonably obtained at the time of sale”

32. It was submitted that the 1st Defendant Bank met the required conditions through valuation reports produced by the 1st Defendant Bank by both Icon Valuers Limited and Ardhiworth (Real Estate) Limited. Averting that the 1st Defendant Bank has demonstrated that the suit property was valued twice before its forced sale on 28<sup>th</sup> February,2023.

33. Regarding the suffering of irreparable loss by the Plaintiff, counsel submitted that a court of equity can only grant an interlocutory injunctive relief where an award of damages for harm is said to be inadequate. Contending that in respect to the charged property, the prevailing state of affairs is that the 2<sup>nd</sup> Defendant's loan facility had accrued substantial interest due to its failure to service facility in the manner contractually agreed and that at the point of sale, the forced sale value of the suit property was similar to the 2<sup>nd</sup> Defendant's indebtedness which was to the tune of Kshs. 30,000,000. Reliance was placed on the case of Elite Intelligent Transport Systems Limited Vs Gulf Africa Bank Limited & Another [2020] eKLR, held that:

“With respect to the charged property, parties always contemplate that suit properties will be sold in the event of default; hence damages are adequate remedy. In view of admitted



indebtedness, the balance of convenience is against the Plaintiff as the debt will continue to escalate thus eroding the value of the Defendant's security”

34. Submitting that in the absence of any effort by the Plaintiff and 2<sup>nd</sup> Defendant to offset the outstanding debt that was due to the 1st Defendant Bank, the forced sale completed on 28<sup>th</sup> February,2023 was the best recourse available to the 1st Defendant Bank.
35. On where does the balance of convenience lie, it was the counsel's submission that in addressing the balance of convenience, this Honorable court was called upon to balance the scales of justice and address itself to the higher ideals of justice. the above averment was buttressed in the case of Pius Kipchichir Kogo vs Frank Kimeli Tenai [2018] eklr, where the court observed as follows:

“ Although it is called of convenience, it is really the balance of inconvenience and it is for the plaintiff to show that the inconvenience caused to them would be greater than that which may be caused to the Defendant.

The plaintiffs have not shown that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting it”
36. It was averred that the Plaintiffs application has been overtaken by events and the Plaintiff's main recourse if any lies in the main suit as if this court were to find the sale was invalid, recourse would be an award of damages under Section 99 of the Land Act 2012.
37. Finally, it was the contention of the 1<sup>st</sup> Defendant Bank's that the plaintiff's Application dated 20<sup>th</sup> March,2023 be dismissed and the interim orders granted on 23<sup>rd</sup> March,2023 be vacated accordingly.

#### **Determination/analysis**

38. This Court considered the instant application Replying Affidavit and written submissions by parties through their respective Counsel.
39. The condensed issues for determination are;
  - a. Whether there is legal basis to grant/not grant temporary injunction from alienating, taking possession of and or otherwise disposing of by way of public auction or private treaty, the whole of that parcel of land known as Mavoko Town Block 3/2426 pending hearing and determination of the dispute.
  - b. Whether the dispute on if the 1<sup>st</sup> Defendant/Respondent carried out its legal right of statutory power of sale over Land Parcel Mavoko Town Block 3/2426 was in accordance with the law should be subject to inter partes hearing
  - c. Whether an order of inhibition be issued restraining the Machakos County Land Registrar from making entries and/or any dealings on the register affecting the land parcel Mavoko Town Block 3/2426.
  - d. Whether an order is issued to declare the sale by public Auction of land parcel Mavoko Town Block 3/2426 and the letter dated 28th February,2023 on conduct by the 3rd Defendant on behalf of the 1st Defendant is void for breach of Section 97 of Land Act,2012
  - e. Whether the valuation and/or sale was at undervalue of the suit property or not.



## Court Ruling

40. Pursuant to the Plaintiff/Applicant's Notice of Motion dated 9/12/2021, seeking injunction to preempt statutory power of sale by the Defendant over indebtedness of the loan facility advanced and secured by a legal charge over suit property the Applicant defaulted, despite ongoing negotiations partly complied with the conditions of injunction granted then until later. The Court gave directions on disposal of the application. The Ruling of the Court of 8/11/2022 read in part as follows;
34. From the Further affidavit by the 1st Respondent , it appears that the Applicant has not complied with the conditions that were set for the orders of injunction being granted from December 2021- July 2022.
35. The Court has gleaned through List & Bundle of Documents filed by 1st Respondent, the Loan & Overdraft Facility Agreement is annexed and its terms bind the parties, this Court cannot rewrite the terms of the contract. The Plaintiff does not deny indebtedness due to default in servicing the loan and that as Guarantor the plaintiff is liable to settle the outstanding amount. The statutory notices are annexed as served to the Plaintiff. In the premises, the Application is dismissed with costs to the 1st Respondent.
37. From the totality of the evidence on record, this Court finds that the relief to grant a temporary /interim injunction pending hearing and determination of the application and/ or suit is not tenable as it does not fulfil conditions under Order 40 CPR2010 and *Giella vs Cassman Brown* case supra. The Plaintiff has failed to establish a prima facie case with probability of success. The Plaintiff's claim does not controvert the 1st Defendant's position and the grant of injunction is not available/granted.

## Analysis

41. It is the dismissal of the application vide the Court ruling that jumpstarted the 1<sup>st</sup> Defendant's right of statutory power of sale.
- At this juncture; the Plaintiff/Applicant submitted that prior to taking the loan facility in 2015 valuation of the suit property Mavoko Town Block 3/2426 was conducted by EpiConsults Ltd who confirmed the property was freehold interest & was devoid of permanent development. The property was valued the property at current open market Ksh 110,000,000/- Mortgage value Ksh 88,000,000/- & forced sale value Ksh 82,500,000/-.
42. The Applicant deposed that the 1<sup>st</sup> Defendant conducted statutory power of sale over the property based on gross undervalue and claimed fraud, incompetence and scheming as land continues to appreciate over time. The 1<sup>st</sup> Defendant did not demonstrate the condition that the suit property was degraded to reduce its value to 25% of the initial open market value of Ksh 110,000,000 to an Open market Value of Ksh 40,000,000/-
43. The letter dated 7th March,2023 disclosed to Applicant that the sale of the property was on 28/2/2023 to have conducted a valuation of the charged property and returned value of 40 Million for the Open Market Value and Kshs. 30 million for the forced sale value and the proceeds were to offset the loan debt Auctioneers Fees and Legal Costs.
44. The Applicant submitted that 1<sup>st</sup> Defendant sold the suit property below the correct Open Market Value at gross undervaluation and did not attempt to obtain the best price reasonably obtainable at the time of sale and neglected the duty of care owed to Plaintiff/Guarantor under Section 97 of the *Land Act* was/is in breach of duty thus the sale was/is invalid as provided in the case of Patrick



Kangethe Edward Vs Co-operative Bank of Kenya limited & Another supra; The Plaintiff/Applicant hence established a prima facie case with triable issue(s) as to whether the 1<sup>st</sup> Defendant breached duty of care and proof shall be availed during full trial. See-Julius Onyango Ochuodho and 31 Others vs Kisony Welfare Group Ltd & 8 Others supra.

45. The 1<sup>st</sup> Defendant extensively submitted and attached reports of valuation of the suit property as follows that statutory power of sale was conducted in compliance of the law and/or Section 97 of [Land Act](#) 2012;
46. Vide 1<sup>st</sup> Respondent's Replying affidavit filed on 28/1/2022 they annexed the Legal Charge & Deed of Guarantee & Indemnity, Statement of Account & Demand Notice of 20/1/2021&1/2/2021; the Plaintiff's Restructuring Proposal Acceptance letter by the 1<sup>st</sup> Defendant of 13/7/2021.
47. The 1<sup>st</sup> Defendant complied with Statutory Notices served to the Plaintiff/Guarantor and Connect Credit Company by Registered Post. Copies annexed are Statutory Notice (30 days) under Section 90 (1) & (2) of [Land Act](#) dated 17/2/2021; Statutory Notice (40days) under Section 96 (1) & 90 (3) [Land Act](#) dated 21/5/2021& 45 days Redemption Notice (Rule 15 of Auctioneers Rules) by Regent Auctioneers of 7/10/2021.
48. Thereafter, the Plaintiff/Guarantor applied to Court vide Notice of Motion of 9/12/2021 and Ruling of 8/11/2022 allowed the sale to go on.
49. The 1<sup>st</sup> Defendant in response to Applicant's Application filed Replying Affidavit on 9/6/2023 and the thrust is that the bank complied with Section 97 of [Land Act](#) as series of valid and independent valuation reports were undertaken and are annexed which revealed the value of the suit property Mavoko Town Block 3/2426 had steadily been undergoing decline due to degradation activities which the applicant failed to disclose material facts and deprived the Court of practical significance that led to the [decline] value of the suit property.
50. The 1<sup>st</sup> Defendant contested reliance on the Pre-Loan disbursement valuation report of 11/12/2015 by M/S Epic Consultants Ltd as detailed by the Plaintiff/Applicant. The Report was prepared 8 years ago.
51. The 1<sup>st</sup> Defendant stated that the Plaintiff has always been aware of the degradation activities on the suit property due to vast quarrying activities which left a significant portion of the suit property prone to flooding and thus non- viable for residential or commercial use.
52. The 1<sup>st</sup> Defendant disclosed that in November 2021 M/Icon Valuers Ltd vide their Valuation Report of 25/11/2021 valued the suit property Mavoko Town Block 3/2426 at Open Market Value Ksh 71,600,000/- & Forced Sale Value Ksh 53,700,000/- .At Pg 23 Addendum to Valuation Report partly reads;

For the subject land parcel Title No Mavoko Town Block 3/2426, this could be as a result of mining of sand which deteriorated the condition of the property such that costly rehabilitation of the same would be needed to restore the land by making it good and COVID-19 pandemic which has rendered the real estate industry in Kenya to be depressed and has become a buyer's market

53. The 1<sup>st</sup> Defendant further disclosed that on 13/12/2022 another Valuation Report was sought from M/S Ardhiworth (Real Estate) Limited on valuation the same suit property Mavoko Town Block



3/2426 where Open Market Value was/is Ksh 40,000,000/- & Forced Sale Value at Ksh 30,000,000/- reads in part;

We wish to bring to the attention of the bank that the rear portion of the parcel fronting the adjoining stream measuring approximately 25 acres was characterized by deep sand pits and ravines that were dug out for sand harvesting and river changing its course. These has greatly impeded its utilizability a factor we have taken cognizance of in our valuation hereunder.

54. The 1<sup>st</sup> Defendant took the view that they demonstrated that the duty of care was complied with and the instant application is brought in bad faith and contains fabrications and the interim injunction is not merited as following the fall of the hammer and surrender of the transfer documents to the highest bidder, the Plaintiff's equity of redemption was extinguished on failure to regularize the 2<sup>nd</sup> Defendant's debtor's loan obligations.
55. The 1<sup>st</sup> Defendant deposed that it was not sufficient for the Plaintiff to allege fraud or that the suit property was disposed of at undervalue but rather place demonstrable evidence as to why the Ardhiworth (Real Estate) Limited Valuation Report should not be relied on.

### **Temporary Injunction**

56. In the celebrated case of *Giella –vs- Cassman Brown and Co. Ltd* [1973] [EA 358] the court set out the principles for grant of Temporary injunctions as follows: -
- i) The plaintiff must establish that he has a prima facie case with high chances of success;
  - ii) That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages.
  - iii) If the court is in doubt, it will decide on a balance of convenience.
57. In *Mrao Limited –vs- First American Bank of Kenya Limited* [2003] KLR 125, the Court stated;
- ‘In civil cases, a prima facie case is a case in which on the material presented to the Court, a Tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.....’
- “A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”
58. In *Mureithi vs City Council of Nairobi* [1976-1985] EA 331 Madan JJA referred to *L Diplock in American Cyanamid Co vs Ethicon Ltd* [1975] 1All ER 504 and stated as follows;
- “The object of Interlocutory injunction is to protect the plaintiff against injury by violation of his right of which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favor at the Trial....”
59. The authorities prescribe that an Applicant has the burden of proof to establish a prima facie case, irreparable damage that cannot be compensated by damages and if not the case for the Court consider the grant of injunction on a balance of probabilities.



### **Has the Plaintiff proved a prima facie case?**

60. The Plaintiff/Applicant's issue is that the statutory power of sale was not valid as the suit property was undervalued and was sold in non-compliance of Section 97 Lands Act. No duty of care was observed, the suit property was sold less 25% of the original valuation and the best market price was not obtained as land appreciates with time.
61. In 2015 property was valued the property at current open market value Ksh 110,000,000/- Mortgage value Ksh 88,000,000/- & forced sale value Ksh 82,500,000/-.
62. In 2021 the property was valued Open Market Value Ksh 71,600,000/- & Forced Sale Value Ksh 53,700,000/-.
63. In 2022 Open Market Value was/is Ksh 40,000,000/- & Forced Sale Value at Ksh 30,000,000/-
64. Section 97 Lands Act mandates ensuring the best interest of the Chargor in the exercise of the statutory power of sale and valuation was conducted before the sale confirmed above.
65. The 1<sup>st</sup> Respondent tabled the 2 valuation Reports of 2021 & 2022 of the suit property before sale in compliance with Section 97 Lands Act. If the Plaintiff/Applicant found the suit property undervalued and/or not a true reflection of the value asat the time; Rule 10 of Auctioneer's Rules 1997 allows a party to seek valuation by an independent valuer.

#### 10. Independent valuation of goods attached

A debtor may, at any time before the property seized or repossessed is sold, apply to a court for an order that the property be valued by an independent valuer.

The Auctioneers Rules 1997 also require before the auction that the Court warrant or letter of instruction is accompanied by Valuation Report of valuation carried on the suit property carried out not more than 12 months.

#### 11. Contents of court warrant or letter of instruction.....

1 (b) (x) the reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale.

66. The 1<sup>st</sup> Defendant relied on the latest Valuation report valid as the valuation was carried out within 12 months before the sale/auction. The Plaintiff/Applicant's valuation is of 2015 and would not aid to obtain the best price reasonably obtainable at the time of sale as prescribed by Section 97 of Lands Act.
67. The Plaintiff/Applicant alleged that there exists remarkable discrepancy between valuation conducted in 2015 and 2021/2022 and land appreciates over time. Yet , the 1<sup>st</sup> Defendant did not explain and demonstrate why the suit property herein depreciated and reduced value to less than 25% which was/ is a clear fraud, incompetence or scheming.
68. Against the allegation of fraud is that fraud must be specifically pleaded and proved. The alleged conduct must be set out and proved by the Claimant/Plaintiff/Applicant. Refer;Vijay Morjaria -V- Nansingh Madhusingh Darbar & Another [2000] eKLR; R.G Patel -V-Lalji Makanji [1957] EA 314; Central Bank of Kenya Limited -V- Trust bank Limited & 4 Others [1996] eKLR.
69. Relying on the case of Julius Onyango Ochuodho and 31 Others vs Kisony Welfare Group Ltd & 8 Others 2021 eKLR where it was alleged that the intended sale/auction of property was illegal based



on an illegal charge whereas the 7<sup>th</sup> Defendant ( bank) claimed it was additional facility and hence the issue of fraud was raised.

70. Secondly on allegation that the 7<sup>th</sup> Defendant failed to comply with Section 97 Lands Act in that the Defendants valuation Report did not account for any developments/improvements on the land whereas the Plaintiffs' Valuation Report included developments and occupation by some members of the Welfare Group. The wide margin of the 2 reports thus were a triable issue to be determined at the hearing hence grant of temporary injunction.
71. In the instant case, it is not contested that the Plaintiff /Applicant was/is Guarantor to Loan facility advanced to 2<sup>nd</sup> Defendant. It is not disputed there was default in servicing of the Loan facility, followed by correspondence and meeting on restructuring the loan repayments. It is not disputed that the stator power of sale was halted to allow the Applicant comply with conditional terms of granted injunction. It is not contested that statutory notices were duly issued and suit property advertised for sale.
72. Upon the Ruling of the Court, dismissing application for injunction, the 1<sup>st</sup> Defendant proceeded with sale of suit property. The only contention is that the valuation report relied on drastically reduced the value of the suit property to less than 25% of the value in 2015, instead of appreciating, the suit property depreciated.
73. The 1<sup>st</sup> Defendant presented the Valuation Reports 2021 & 2022 in both Reports land use is depicted as sand mining; 'deep sand pits and ravines that were dug out for sand harvesting and river changing its course' and 'mining of sand which deteriorated the condition of the property such that costly rehabilitation of the same would be needed to restore the land.
74. There was also Corvid 19 pandemic due to lockdowns and curfews limited operations and movement and adversely affected the social and economic aspects of life thus affecting land sale prices.
75. These are plausible explanations advanced by the 1<sup>st</sup> Defendant and were not contested or rebutted by the Plaintiff/Applicant. It is true if all factors are held constant that land continues to appreciate increase in value overtime due to developments on the land itself and/or opening up through means of communication, roads, railways etc or growth of estate, community, townships and facilities, water electricity etc. In this case nether of the above took place in fact, there was economic activity on the suit property sand harvesting that devalued the suit property as shown by the photographs attached. The sand harvesting overtime and the Corvid 19 pandemic adverse impact led to nosedive of purchase prices of land.
76. In *Koileken Ole Kipolonka Orumos vs. Mellech Engineering & Construction Limited & 2 Others* (2018) eKLR held that:

“...the forced sale valuation is not only for purposes of carrying through the public auction or solely for recovering the debt, but reinforces the rights of the charger to have reasonable value for his property. That is why the duty under Section 97(2) of the *Land Act* is statutory and obligatory. It is not left to the whims of the charge and its agents especially the auctioneers”.
77. In *Palmy Company Limited vs Consolidated Bank of Kenya Limited* [2014] eKLR, the Court observed as follows:

“The purpose of a valuation under Section 97(2) of the *Land Act* is twofold. The first one is to obtain the best price reasonably obtainable at the time of the sale, thus protecting the right of the Chargor to property...the second one is to prevent unscrupulous Chargee from



selling the charged property at a price which is peppercorn or not comparable to interests in land of the same character and quality.”

“The onus of establishing on prima facie basis, that the Applicant’s right has been infringed by the Respondent by failing to discharge the duty of care under section 97(1) of the Land Act lies on the Applicant.”

“The court needs cogent evidence and material in order to say that prima facie, there has been an undervaluation of the suit property which is an infringement of section 97(2) of the Land Act by the Respondent as to entitle the court to call for an explanation or rebuttal from the Respondent’

78. In this instant, the sale of the suit property took place and at the fall of the hammer, the Plaintiff’s equitable right of redemption was extinguished. The Plaintiff/Applicant’s remedy unlike the Julius case where sale was impending and thus hearing of the triable issue was to canvassed first, here the sale was complete. In the absence of particulars of fraud by 1<sup>st</sup> Defendant, and/or cogent evidence that Section 97 Lands Act was not complied with I find no triable issue for hearing and determination. Section 99 of Lands Act prescribes a claim for damages if any mala fides is found.

79. In David Mburu Githere vs Jamii Bora Bank Limited [ 2017] eKLR it was held;

The Plaintiffs herein, as submitted by the Defendant wilfully gave the suit property as security and as such it became a commodity for sale and it is therefore subject of sale in case of default. Further, even if the Court was to find in favour of the Plaintiffs at the final determination of the suit, damages would be an adequate remedy. The Plaintiffs thus can find recourse in Section 99(4) of the Land Act which provides that;

A person prejudiced by an unauthorised improper exercise of the power of sale shall have a remedy in damages against the person exercising the power.

### **Disposition**

80. Having considered the Application for temporary injunction pending hearing and determination of the matter, I find that the Plaintiff/Applicant failed to disclose sand mining/harvesting activities on the suit property that contributed to depreciation of the suit property price.

81. No evidence of fraud was presented to the Court either that the Valuation Reports were not professional valuation reports, the authors were not qualified or competent.

82. The Plaintiff/applicant did not apply to have an independent Valuation Report be prepared and presented to Court.

83. The Court finds no triable issue for determination in the absence of any rebuttal by the Plaintiff/Applicant of 1<sup>st</sup> Defendant’s conduct and outcome of sale of the suit property.

84. The application for injunction is dismissed with costs.

**RULING DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 18/1/2024.  
(VIRTUAL/PHYSICAL CONFERENCE)**

**M.W.MUIGAI**

**JUDGE**

