



**Wambua & another v Family Bank Limited & another (Commercial Case E364 of 2023)
[2024] KEHC 2437 (KLR) (Commercial and Tax) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2437 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E364 OF 2023**

AA VISRAM, J

MARCH 7, 2024

BETWEEN

PRISCA NZULA WAMBUA 1ST PLAINTIFF

ANTONY MASENO ANABAKA 2ND PLAINTIFF

AND

FAMILY BANK LIMITED 1ST DEFENDANT

LINKED STAR VENTURES LTD 2ND DEFENDANT

RULING

1. I have considered the Notice of Motion application dated 16th August, 2023, together with affidavit in support sworn on even date, the supplementary affidavit sworn on 16th October, 2023 and the replying affidavits of the 1st and 2nd Respondents sworn on 21st August, 2023; 25th August, 2023; and the further affidavits sworn on 18th September, 2023; together with the submission of the parties and the applicable law.
2. The Applicant stated the notices upon which the bank proceeded to sell were issued in 2018. The Applicant paid the sum of Kshs. 6,000,000/= and the auction was cancelled accordingly. The Applicant argued that the bank was accordingly estopped from carrying out the sale. Counsel submitted that as a matter of fact, the notices were withdrawn.
3. Counsel for the Applicant contended that after a period of 5 years, the same notices cannot be applied to the statutory power of sale. Too long a period has passed, and this could not have been the intention of Parliament.
4. Counsel argued that the bank valued the property on two occasions and placed the same at Kshs. 55,000,000/= with a reserve price of Kshs. 42,000,000/= approximately. The property was sold for



- Kshs. 35,000,000/= . This was an undervalued sale and is not acceptable. He contended that the present value of the property is approximately Kshs. 67,000,000/= and that the same has been lost.
5. Finally, Counsel argued that the auction was attended by only the bank and the purchaser. He contended that the facts around the same indicate that it was a ‘pretend auction’. The court ought to intervene and preserve the rights of the parties in the circumstances.
 6. The Applicant however admitted the debt and has stated that the amount remains owing to the bank. He could not state the precise amount, but stated that the last payment was made approximately one year ago, on 22nd August, 2023. The amount paid was subject to a court order, and was in the sum of Kshs. 1,000,000/=, representing about 5% of the total value of the loan. Prior to this payment, the last payment made by the Applicant was however over 4 years ago.
 7. Accordingly, based on the above, the Applicant was of the view that fresh notices ought to be issued in respect of the current outstanding debt, which had not been done.
 8. In opposition to the application, the 1st Respondent contended that there is no evidence that the bank withdrew the notices as purported by the Applicant. The facility had not been paid up at the time that the notices were issued, which was approximately Kshs. 33,000,000/=.
 9. The 2nd Respondent associated itself with the submission of the 1st Respondent and pointed out the Applicant was in default of the facility. The power to sale, accordingly, arose in accordance with the law.
 10. Counsel brought the court’s attention to the fact that the Applicant is in breach of the security and ought not to benefit from an injunction. Further, that the 2nd Respondent is a protected purchaser and has paid a portion of the purchase price. Further, the Applicant has sought general damages, and the Applicant still has a remedy with regard to the same.
 11. Looking at the record, it is evident, and the Applicant admitted, that he was served with the statutory notice dated 27th February, 2018 under section 90 of the [Land Registration Act](#). The same has never been remedied.
 12. Further to the above, I note that the Section 96 Notice, the 40 -day Notice to Sell was issued to the Applicant on 28th May, 2018, by way of registered post. I am satisfied the same was served in a reasonable manner.
 13. Finally, the 45 days’ Notice to Redeem under the Auctioneers rules was served on 27th July, 2018, by registered post, and physical service.
 14. A newspaper advertisement was accordingly placed and the auction took place pursuant to the same on 3rd August, 2023.
 15. Based on the record before me, I am satisfied that the relevant notices were duly served on the Applicant. Evidence of the same has been marked as Exhibits SW3 and may be found at pages 54 to 67 of the 1st Respondent’s replying affidavit sworn on 25th August, 2023. There is no evidence on record to the effect that the notices had been withdrawn as alleged by the Applicant.
 16. As regards the question relating to issue of fresh notices, to my mind, once a Statutory Notice calls in the entire debt, receipt of part payment by the Chargee does not waive the validity of the Notice nor does any requirement arise for the Chargee to issue fresh Statutory Notices, should there be default



in the future. This is in line with the Decision of the Court of Appeal in Mbutia vs. Simba Credit Finance Corporation & Another [1988] eKLR where it held;

“It is plain that Section 74 did not impose on the Chargee, the giving of more than one notice and there is no sound policy reason why he should be obliged to give fresh notice to the Chargor any time a sale was suspended to accommodate him. If such were a legal requirement, no chargee in his right mind would suspend a projected sale as a matter of favour or indulgence to a defaulting mortgage”.

17. Guided by the law above, I am satisfied that the statutory notices issued in 2018 were valid, and there was no requirement to issue fresh notices.
18. As regards the issue relating to the sale price and valuation, I am guided by Section 97 of the Land Act, 2012, which provides that the Chargee has a duty of care to the Chargor to obtain the best price reasonably obtainable at the time of sale and in that regard, it is required to ensure a forced sale valuation is obtained. Further, Under Rule 11(b)(x) of the Auctioneers Rules, a professional valuation of the reserve price must be carried out not more than 12 months prior to the proposed sale. The collective effect of these provisions is that the Bank is required to obtain a forced sale value of the property within the year of the intended sale.
19. In the present matter, the bank valuation was carried out on 2nd June, 2023, and the sale took place on 3rd August, 2023, within the prescribed period as set out above.
20. Further, my understanding of Section 99 of the Land Act, is that once a sale has taken place, the purchaser is protected. The purpose of the said provision is to extinguish the Chargor’s equity of redemption and protect the purchaser from any action to set aside the sale. In Joyce Wairimu Karanja v James Mburu Ngure & Another KBU HCCA No. 118 of 2017 [2018] eKLR, Ngugi J., held that:-
 - “(30) This section seems quite clear that a purchaser of property sold in the exercise of a chargee’s statutory power of sale is protected even in cases where the person had actual notice that the chargee had not properly realized that statutory power of sale in terms of procedure. In this case, there is no evidence to show that the Appellant had any notice of any irregularities in the planned sale – and evidence suggests that there were none anyway. The point is that the Appellant is then inoculated by section 99 from any action to recover the Suit Property from her.”
21. In the present matter, given that the sale has already taken place, the Applicant’s right to redeem the property has been extinguished by the auction sale. Accordingly, in the event there is any merit to the claim that the property was sold at undervalue, the remedy available remains as a claim against the bank in damages. The same is not however a merited ground for the grant of an injunction.
22. Applying my mind to the facts as set out above, I am satisfied that the Applicant has not met the threshold for a grant of injunction as set out in Giella v Cassman Brown [1973] EA 358, namely:
 - a. Establish his case only at a *prima facie* level,
 - b. Demonstrate irreparable injury that cannot be compensated by way of damages if a temporary injunction is not granted, and
 - c. Ally any doubts as to (b) by showing that the balance of convenience is in his favour.



- 23. In particular, I am satisfied that the Applicant has failed to make out a *prima facie* case under the first limb, in accordance with *Mrao Ltd v First American Bank of Kenya Limited and 2 Others* [2003] eKLR , namely “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.”
- 24. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles, which the Applicant is expected to surmount sequentially. Having failed to pass the first hurdle, the Applicant may not leap frog to the next and that brings the matter to an end.
- 25. Based on the reasons as set out above, I find that the application dated 16th August, 2023, is without merit. The same is accordingly dismissed with costs.
- 26. The file is marked as closed.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 7TH DAY OF MARCH 2024.

ALEEM VISRAM, FCI Arb

JUDGE

In the presence of;

-For the 1st Plaintiff
-For the 2nd Plaintiff
-For the 1st Defendant
-For the 2nd Defendant

