



REPUBLIC OF KENYA



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**Chomba & another v Kenya Women Microfinance Bank Limited & 3 others (Civil Case E027 of 2023) [2024] KEHC 13712 (KLR) (16 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 13712 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
CIVIL CASE E027 OF 2023  
SN MUTUKU, J  
SEPTEMBER 16, 2024**

**BETWEEN**

**MARY NYAWIAR CHOMBA ..... 1<sup>ST</sup> APPLICANT**

**KINGS GROUP OF SCHOOLS LIMITED ..... 2<sup>ND</sup> APPLICANT**

**AND**

**KENYA WOMEN MICROFINANCE BANK LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**NARAN LAKHAMAN VEKARIA ..... 2<sup>ND</sup> RESPONDENT**

**SYAM DEVSHI KERAI ..... 3<sup>RD</sup> RESPONDENT**

**LYDIA WAWERU T/A PURPLE ROYAL AUCTIONEERS ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

**The application**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Applicants have brought this Notice of Motion application dated 6<sup>th</sup> November 2023, seeking the following orders:
  - i. Spent.
  - ii. That this Honourable Court be pleased to issue an order restraining the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, their employees, servants, agents or any other person claiming through them, or either of them, from any further developments in the suit properties Kajiado/Kaputiei-North/22309 and 23249 pending the hearing and determination of this Application inter partes.
  - iii. That this Honourable Court be pleased to issue an order restraining the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, their employees, servants, agents or any other person claiming through them,



or either of them, from any further developments in the suit properties Kajiado/Kaputiei-North/22309 and 23249 pending the hearing and determination of this suit.

- iv. That this Honourable court be pleased to issue an order directing the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to allow access to the 1<sup>st</sup> Applicant into the property for purposes of conducting a valuation for the purposes of this proceedings.
  - v. That costs of this Application be provided for.
2. The grounds in support of the application are contained on the face of the application and in the supporting affidavit sworn on the 11<sup>th</sup> February 2023. In summary, the 2<sup>nd</sup> Applicant applied and was granted a loan facility by the 1<sup>st</sup> Respondent amounting to Kshs 40,000,000 on 22<sup>nd</sup> October 2015. In July 2016, the 1<sup>st</sup> Applicant topped up the loan with a further Kshs 7,457,136.18. The facility was secured by a charge created over the properties mentioned above registered in the name of the 1<sup>st</sup> Applicant. The 1<sup>st</sup> Applicant also signed a Deed of Guarantee and Indemnity between the 1<sup>st</sup> Respondent and herself to secure the said loan on 1<sup>st</sup> July 2016.
  3. The loan fell in arrears in 2017. The 1<sup>st</sup> Respondent sold the properties to realize security. The Applicants sought nullification of the statutory notices served on them and recalculation of interest, but they lost the suit.
  4. The Applicants claim that the properties were sold at Kshs 25,000,000 which is an undervaluation. They claim that they had valued the properties on 2<sup>nd</sup> December 2017 at Kshs 60,000,000 and Kshs 62,500,000 and therefore it could not have depreciated in value in September 2022 when the property was sold. They claim that the 1<sup>st</sup> Defendant was required to obtain the best price reasonably obtainable at the time of sale and that the sale was carried out almost one year after the valuation which was unreasonable.
  5. The application is opposed by the Respondents. I have noted that in their respective submissions, the Respondents are referring to Replying Affidavit in opposition to the application. These Replying Affidavits are not in the Court file. I have checked in the CTS but I have not found any Replying Affidavits filed by the Respondents.
  6. Following the directions of this court, the application was canvassed through written submissions. Parties have filed their respective submissions.

### **Applicants' Submissions**

7. The Applicants' submissions are dated 1<sup>st</sup> February 2024. The Applicants invited the court to determine whether the 1<sup>st</sup> Respondent has discharged its duty to the Applicants to obtain the best reasonable price obtainable at the time of the sale. They relied on the principles of *Giella vs Cassman Brown*[1973] E.A 358 submitted that they have demonstrated that the land had earlier been valued at Kshs 62,000,000 and that in 2021, the 1<sup>st</sup> Respondent had valued it at Kshs 34,000,000 with no explanation given for the undervaluation; that this offends the safeguards set out in section 97 of the [Land Act](#) which requires the 1<sup>st</sup> Respondent to get the best price; that the 1<sup>st</sup> Respondent conducted its own valuation without involving the Applicants yet the Applicants involved the 1<sup>st</sup> Respondent when they conducted the earlier valuation.
8. On whether there is a risk of irreparable damages that are not repressible by way of costs, the Applicants cited various authorities including *Isack M'Inanga Keibia v Isaya Theiri M'Lintari & another* [2015] eKLR and *Peter Butali & 2 others v District Land Registrar & 4 others* [2013] eKLR to support their



arguments that land is a valuable and unique asset and that damages would not constitute an adequate remedy.

9. On the principle of balance of convenience, the Applicants submitted that it lies in preserving the property and that the court needs to take whichever course that appears to carry the lower risk of injustice. They urged that the Application is meritorious and should be allowed.
10. The Applicants submitted in support of prayer 4 of the application that due to the variance in the valuation done by the Applicants and the 1<sup>st</sup> Respondent, there is a dispute as to the value of the property and therefore this court ought to allow the orders sought to facilitate the Applicants to access the property with the 1<sup>st</sup> Respondent to conduct a joint valuation to satisfy the Court that the sale met the threshold of section 97 of the *Land Act*.
11. On the issue of the equity of redemption, the Applicants submitted that the 1<sup>st</sup> Respondent has argued that the Applicants' equity of redemption was extinguished upon the fall of the hammer and that the Applicants have no remedies touching on the suit property but the purchaser, who is supposed to be protected by the equity of redemption, has sought to be expunged from the suit and that under section 97 of the *Land Act*, a sale can be declared void in appropriate cases.

#### **1<sup>st</sup> and 4<sup>th</sup> Respondents' Submissions**

12. The 1<sup>st</sup> and 4<sup>th</sup> Respondents agreed with the Applicants on the historical background of this matter and submitted that upon default in repayment of the loan by the Applicants, the 1<sup>st</sup> Respondent decided to exercise its statutory power of sale. It was submitted that the initial move to dispose of the suit property was thwarted by the Applicants by challenging the sale on the strength of a valuation report dated 6<sup>th</sup> September 2017, the same valuation report the Applicants seek to rely on in this matter.
13. It was submitted that the said valuation report was impeached by the court (Nyakundi, J) who stated that the said valuation report cannot be relied on because it was done without involvement of the 1<sup>st</sup> Respondent; that in order to proceed with the sale of the suit property the 1<sup>st</sup> Respondent commissioned and received a new valuation report dated 18<sup>th</sup> October 2021 and sold the suit property on 17<sup>th</sup> August 2022 to the successful bidder, being the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
14. The 1<sup>st</sup> and 4<sup>th</sup> Respondents have raised the following issues for determination:
  - a. Whether the 1<sup>st</sup> Defendant complied with the mandatory statutory requirements before exercising its statutory power of sale?
  - b. Whether there was undervaluation attributed to the 1<sup>st</sup> and 4<sup>th</sup> Respondents in the exercise of the power of sale?
  - c. What consequences should an application of this kind suffer?

#### **Whether the 1<sup>st</sup> Respondent complied with the mandatory statutory requirements before exercising its statutory power of sale?**

15. On this issue, it is submitted that the 1<sup>st</sup> Respondent complied with the law and served all requisite statutory notices under sections 90 (1), 96(20 and 97(2) of the *Land Act* on the Applicants after they defaulted in the repayments of the loan facility and that the 4<sup>th</sup> Respondent also complied with Rule 15 of the Auctioneers Rules by giving notification of sale and redemption notice upon the Applicants.
16. It was submitted that the only bone of contention emanates from the alleged non-compliance with section 97(2) of the *Land Act*. The 1<sup>st</sup> and 4<sup>th</sup> Respondents relied on Zum Zum Investment Limited v



Habib Bank Limited [2014] eKLR where the court has this to say in respect of a similar issue arising before the court:

“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.”

17. It was submitted that the valuation report dated 18<sup>th</sup> October 2021 was a product of an objective inspection carried out on the suit property on 14<sup>th</sup> October 2021; that the valuation report was prepared by a qualified and registered valuer in keeping with the *Valuers Act*, 1984 and that at the time of the valuation, the Valuer held a valid Annual Practicing Certificate duly issued in accordance with the *Valuers Act* and therefore the 1<sup>st</sup> and 4<sup>th</sup> Respondents complied with the mandatory statutory requirements before exercising the power of sale.

**Whether, there was undervaluation, attributed to the 1<sup>st</sup> and 4<sup>th</sup> Respondents in the exercise of the power of sale?**

18. It was submitted that there was full inspection of the suit property on 14<sup>th</sup> October 2021 before the valuation was conducted; that the valuation report dated 18<sup>th</sup> October 2021; that the reasons behind the value returned have been given in the report to the effect that the suit property had been vandalized with the two buildings missing windows leading to the discounting of the building improvements by 50% of the market value to fact in the vandalism; that there was no impediment to the sale of the suit property if the need to do so arose; that there was a general slack in demand for real estate given the depressed economy -exacerbated by the prevailing Covid-19 pandemic at the time.
19. It was submitted that should the court be inclined to allow the request for an independent valuation, this would prejudice the 1<sup>st</sup> Respondent as such valuation will only show the current value devoid of the prevailing conditions at the time of the valuation process carried out by the 1<sup>st</sup> Respondent and that there was no undervaluation.

**What consequences should an application of this kind suffer**

20. While citing *Samo Security Limited & another v SBM Bank Kenya Limited* [2021] eKLR and *Ongori v Housing Finance of Kenya Limited & another (Civil Case 248 of 2018)* [2022] KEHC 268 (KLR) (Commercial and Tax) (31 March 2022) (Ruling), to the effect that the remedy for a mortgagee who has suffered damages as a result of improper auction is not to reverse the auction against an innocent purchaser but in damages, they submitted that the Applicants have misapprehended the law that they are entitled to an interim relief, restraining any further developments on the suit property by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents or any person acting on their behalf and urged that this court should not allow the orders sought. They urged that this application be dismissed with costs.



## **2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Submissions**

21. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' submissions dated 20th May 2024 have raised two issues for determination, namely:
- a. Are the parties the registered proprietors of the suit properties?
  - b. Whether the injunction and the access orders can be granted by this Honourable Court?

### **Are the parties the registered proprietors of the suit properties?**

22. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' submissions relate to their being wrongly sued in this matter. They have submitted on this issue that they are not the owners of the suit properties and that they only participated in the bidding process and neither did they buy the suit properties nor are they the current registered proprietors of the suit properties.
23. They have submitted that the Applicants have not produced any evidence to prove ownership of the suit properties the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents; that under section 26(1) of the *Land Registration Act*, the registration of a person and the certificate of title held by such a person as the proprietor of the property is conclusive proof that such person is the owner of the property. They stated that the fact that their names are indicated on the memorandum and certificate of sale is not conclusive proof of ownership and that the Applicants have not discharged the evidentiary burden of proof that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are the registered proprietors of the suit properties. They have submitted that the Applicants have not raised any reasonable cause of action against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
24. They have relied on *D.T. Dobbie Kenya Co. Ltd v Joseph Mbaria Muchina & Leah Wanjiku Mbugua* [1980] eKLR and *Stephen Kibowen v Agricultural Finance Corporation* (2016) eKLR, among other authorities to support their submissions on this issue.

### **Whether the injunction and the access orders can be granted by this Honourable Court?**

25. They cited *Giella v. Cassman Brown* case on the criteria to be satisfied by a party seeking an interlocutory injunction and *Mrao Ltd v. First American Bank of Kenya Ltd & 2 others* [2003] eKLR which defines prima facie case to mean "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 as to call for an explanation or rebuttal from the latter."
26. They submitted that the Applicants have not adduced any evidence before this Court to demonstrate that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are involved in the auction process nor have they produced any ownership documents with respect to the suit properties and that there is no cause of action arising against the two. They relied on *Werrot & Co. Ltd & 3 others v Andrew Douglas Gregory & 2 others* (1998) eKLR affirmed in *Elisheba Muthoni Mbae v Nicholas Karani Gichohi & 2 others* [2013] eKLR where the test to who a necessary party to a suit is stated as twofold:
- a. There must be a right to some relief against such party in respect of the matter involved in the proceedings in question, and,
  - b. It should not be possible to pass an effective decree in the absence of the party...



27. They have submitted that the Applicants will not suffer irreparable loss should the court decline to grant the injunction sought. They relied on *Simon Njoroge Mburu v Consolidated Bank of Kenya Ltd* [2014] eKLR and section 99(4) of the *Land Act* which provides that:

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

28. It is their submission that the Applicants will not suffer irreparable loss, and should any loss occur, the Applicants can be compensated by an award of damages if their claim is successful. It is further submitted that the balance of convenience tilts in not granting the injunction because the Applicants have not discharged the evidentiary burden of proof. They submitted that they are successfully bid for the suit properties but did not purchase it as the property was transferred to bonafide third party purchase who is not a party to this case.

29. It is submitted that this Honourable Court should not grant access orders for the reasons that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are not the owners of the suit property and any access will amount to trespass and such orders cannot be enforced.

30. They asked this court to dismiss the applicant and award costs to them.

### **Analysis and determination**

31. I have read the pleadings and parties submissions. It is not disputed that the Applicants took a loan facility from the 1<sup>st</sup> Respondent. It is not disputed that they defaulted in servicing the loan facility. It is not disputed that the 1<sup>st</sup> Respondent, after complying with the law by servicing the required mandatory statutory notices instructed the 4<sup>th</sup> Respondent to auction the suit properties in exercise of its statutory power of sale. What is in dispute is the claim by the Applicants that the suit properties were undervalued and sold at a low price compared to its true value. The Applicants are relying on a valuation report that the 1<sup>st</sup> Respondent claims was rejected by this Court (Nyakundi, J).

32. The parties have cited the applicable principles in granting interlocutory injunctions. A party seeking an injunction must demonstrate a prima facie case; that he stands to suffer irreparable loss and the balance of convenience is in his favour. The Applicants claim to have demonstrated that they deserve the orders they are seeking. The Respondents argue the opposite.

33. I have considered the arguments by the 1<sup>st</sup> Respondent that they complied with the mandatory requirements before exercising their statutory power of sale; that the suit property was fully inspected before valuation was done and that the valuation was conducted by a qualified valuer who found the property vandalized leading to the discounting of the buildings by 50% hence the value attributed to the property and that the Applicants will not suffer any loss since the remedy for a mortgagee who has suffered damages as a result of improper auction is not to reverse the auction against an innocent purchaser but in damages.

34. I have also considered the arguments of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents that they are wrongly sued because they are not the owners of the suit properties and that the Applicants have not demonstrated reasonable cause of action against them.

35. After careful consideration of this application, the applicable law and the authorities cited by the parties, it is my finding that the Applicants have not met the threshold for grant of the injunctive orders they are seeking. I have noted that some issues being raised in this application are better left in abeyance pending the full determination of the suit lest this court make pronouncements that may prejudice any party at this interlocutory stage.



36. The issues raised by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents can only be fully canvassed and determined after full hearing where evidence will be subjected to cross examination.
37. At this stage it is my finding, and I so hold, that the Applicants have failed to persuade the court to grant them the orders they are seeking. consequently, the Notice of Motion dated 6<sup>th</sup> November 2023 is hereby dismissed with costs to the Respondents.
38. Orders accordingly.

**DATED, SIGNED AND DELIVERED THIS 16<sup>TH</sup> SEPTEMBER 2024.**

**S. N. MUTUKU**

**JUDGE**

