



Lollidanga Country Homes & Golf Resort Limited v Credit Bank Limited & another (Civil Case 3 of 2020) [2023] KEHC 1971 (KLR) (9 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1971 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL CASE 3 OF 2020
FN MUCHEMI, J
MARCH 9, 2023**

BETWEEN

LOLLIDANGA COUNTRY HOMES & GOLF RESORT LIMITED PLAINTIFF

AND

CREDIT BANK LIMITED 1ST DEFENDANT

LEAKEY AUCTIONEERS 2ND DEFENDANT

RULING

Brief Facts

1. This application dated May 18, 2022 is brought under Sections 1A and 1B of the *Civil Procedure Act* and Order 40 Rule 2(2), 3(3), 4(1) and 8 of the *Civil Procedure Rules* and Sections 90(2), 96(2), (3) (h) and 97 (1), (2) of the *Land Act*. It seeks for orders of an injunction restraining the 1st respondent from selling by public auction, alienating and/or transferring in any manner at all, land parcel LR No Nanyuki/Marura Block 4/04 Kimuri and to declare the threatened sale by public auction on the suit property as null and void ab initio for failing to conform to the strict letter of the law and/or orders of this court. The applicant further seeks to cite the 1st respondent in contempt of court orders issued on November 16, 2021 and further that its directors and/or employees acting contrary to the said orders be detained in prison for a term not exceeding six (6) months and/or its property be attached.
2. In opposition to the application, the 1st respondent filed a replying affidavit sworn on June 13, 2022.

The applicant's case

3. The applicant states that judgment in the instant case was delivered on November 16, 2021 where the court put the sale of the security by public auction on hold for a period of 90 days to enable the 1st respondent issue the requisite statutory notices as required by law. The applicant states that the 1st respondent ignored the order and advertised the security LR No Nanyuki/Marura Block 4/04 Kimuri



for sale through Philips International Auctioneers for the May 24, 2022. The applicant avers that the 1st respondent did not issue and serve the guarantors or the applicant with fresh notices; neither did the 1st respondent serve a redemption notice upon its guarantors; that no fresh valuation has been carried out as required by the law before the intended sale by public auction is carried out and further that no valid notice was served indicating the extent of the default and the amount payable to rectify the default as required by law. As such, the applicant avers that the 1st respondent is in blatant contempt of the said orders.

The 1st respondent's case

4. The 1st respondent states that pursuant to the judgment delivered by the court on November 16, 2021, the court found that the statutory notice pursuant to Section 90 of the Land Act, the 40 day Notice to sell pursuant to Section 96 (2) of the Land Act and the 45 day Redemption Notice were validly and procedurally issued. The court further held that the Notice to Sell was not served to the guarantors pursuant to Section 96(3)(h) of the Land Act.
5. The 1st respondent avers that contrary to the allegations by the applicant, no law requires a redemption notice to be served upon guarantors. Further, the 1st respondent contends that the court did not direct that the redemption notice be served upon the guarantors. In fact, the court confirmed in its judgment at paragraph 43, that the redemption notice was served upon the applicant. The 1st respondent further avers that the applicant has interpreted the judgment wrongly as there was no requirement that a new valuation be conducted. It avers that a valuation was conducted by Value Line Consulting Limited on June 23, 2021 while the intended sale was supposed to be undertaken on May 24, 2022. The law requires that a valuation report should not be older than 12 months and hence the 1st respondent contends that proper valuation was conducted.
6. The 1st respondent avers that the applicant has always been notified of the outstanding amount as the 90 days' notice under Section 90 of the Land Act dated 14h February 2019 indicates that the outstanding amount is Kshs. 31,577,535.08 as at February 4, 2019. The fresh notice to sell dated December 14, 2021 indicates that the outstanding amount is Kshs. 66,490,832.24 as at December 3, 2021. The Redemption Notice dated March 15, 2022 indicates that the outstanding amount is Kshs. 67,316,832.24 as at February 24, 2022.
7. The 1st respondent states that it is clear from the judgment of the court that it was faulted only for its failure to serve the Notice to Sell upon the guarantors and further avers that it has currently regularized the position by serving the Notice to Sell upon the applicant and the guarantors. Further, the 1st respondent avers that it posted the Notice to Sell on the property in compliance with the requirements set out under Section 96(3)(j) of the Land Act.
8. The 1st respondent contends that after regularizing the procedure it proceeded with its statutory power of sale as directed by the court and served a fresh Redemption Notice dated March 15, 2022 upon the applicant and advertised on the Daily Nation. Before the sale of the suit property, the 1st respondent contends that the applicant stole a march on it and got stay orders on May 19, 2022. The 1st respondent avers that the pattern is thus clear for the applicant to frustrate its right of sale at any opportunity it gets by seeking for injunctive orders.
9. The 1st respondent avers that the sale via public auction was meant to be conducted on May 24, 2022, but it has been put in abeyance which the 1st respondent is apprehensive as it continues to suffer great prejudice because it can neither enjoy the fruits of its judgment nor get the payment for the outstanding sum owed by the applicant being Kshs. 67,316,832.24 as at February 24, 2022.



10. The 1st respondent avers that the judgment of the court was self-executing and once it issued the Notice to Sell to the guarantors on December 14, 2021, the court became functus officio. The 1st respondent states that the applicant only obtained stay orders because it misinterpreted a very clear judgment and is attempting to mislead the court. The 1st respondent further states that the stay of execution issued on May 19, 2022 is only delaying the ends of justice without any just cause.
11. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

12. The applicant submits that the import of the judgment dated November 16, 2021 was that the 1st respondent was to start the process of securing the security afresh. The applicant further relies on Sections 96(1), (2) and (3)(h) of the Land Act and contends that none of the notices under Section 90(1) and 96(2) of the Land Act were served on it and its guarantors before the attempted sale by public auction slated for May 24, 2022.
13. The applicant submits that the notice dated February 14, 2019 bears a certificate of postage dated February 15, 2019. As such, there is no evidence of any notice or service thereof of any notice after the judgment of the court on November 16, 2021. The applicant further submits that the 1st respondent has failed to prove service of any notice under Section (3)(h) of the Act, whose effect is that the 1st respondent has fallen into the same error as before the institution of the main suit.

The 1st Respondent's Submissions

14. The 1st respondent reiterates what it deposed in its affidavit and submits that the applicant is under the wrong perception that the court directed that fresh notices were supposed to be served. A cursory glance of the judgment reveals that the sale was stayed for 90 days for compliance with the law. As such, the 1st respondent contends that 90 days is not sufficient to serve all the notices afresh. The 1st respondent further contends that the court was clear in its judgment that it was supposed to serve any notice which had not been served. The 1st respondent argues that the applicant is engaging the court in semantics and wasting precious judicial time.
15. The 1st respondent argues that the applicant is seeking to have this court interpret its judgment. Moreover, the 1st respondent argues that the applicant has no valid reasons as to why it is alleging that this Honourable court ordered that fresh notices should be served. The 1st respondent contends that where a court's judgment is clear and unambiguous, even the court that gave the judgment should not be called to interpret it. Further, where the order of a court is clear, nothing else, even if within the judgment can be relied on to alter it. To support its contentions, the 1st respondent relied on the case of National Water Conservation & Pipeline Corporation vs Runji & Partners Consulting Engineers & Planners Limited [2021] eKLR. Evidently, the 1st respondent submits that the judgment is clear that the sale was put on hold for a period of 90 days only, for it to comply with the law. By alleging that fresh notices ought to be served, the applicant is essentially alleging that the sale should be put on hold for at least 175 days.
16. The 1st respondent submits that the reason why the court placed the sale in abeyance for 90 days was for it to regularize the legal non-compliance and obviously those defects would have been rectified within the said 90 days. The 1st respondent further submits that if the applicant thought that the 90 days would not be enough, it ought to have made an application for review.
17. The 1st respondent contends that the only notice the court faulted it was the Notice to Sell which was never served to the guarantors. Consequently, the court stayed the sale for 90 days pending compliance



with the law, being service of the said Notice to the said guarantors and afterwards, the 1st respondent contends that it was at liberty to continue with the sale of the property.

18. The 1st respondent submits that a Notice to Sell dated December 14, 2021 has since been served upon the applicant and the guarantors being Amos Gichuki Ngonjo, Simon Matara Gichuhi and Ramadhan Maulidi Juma. As such, having served the Notice to Sell upon the guarantors, the 1st respondent argues that the power of sale has crystallized.
19. On the issue of a fresh valuation, the 1st respondent argues that if the court were to address itself on the issue of valuation, it would be akin to sitting on appeal of its own judgment. The 1st respondent refers to the case of *Raila Odinga & 5 Others vs Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR and submits that the court is functus officio on that issue. Without prejudice to the foregoing, the 1st respondent argues that during the pendency of the suit it conducted another valuation on June 23, 2021 vide Value Line Consulting Limited. The 1st respondent further argues that the said valuation report is not stale considering the intended sale was supposed to occur on May 24, 2022, which was not later than one year from the date of the valuation report.
20. Moreover, the 1st respondent argues that provided that an injunction is not more than one year old at the time the injunction is granted, if such an injunction granted by the court prolongs the valuation report's period to surpass one year that does not mean that a fresh valuation ought to be conducted. The 1st respondent refers to the case of *Patrick Kangethe Njuguna & 2 Others vs Co-operative Bank of Kenya Ltd & 4 Others* [2017] eKLR to support its contentions.
21. The 1st respondent argues that the claim for contempt of the court's order is extremely in bad taste. The applicant has twisted a straightforward judgment as demonstrated and is currently alleging that the 1st respondent is ignoring the court order while in essence it is only enforcing the order of the court. The 1st respondent relies on the case of *Ochola Kamili Holding Limited vs Guardian Bank Limited* (2008) eKLR and submits that the applicant is misusing the court's orders. Further, the 1st respondent submits that the court found that since the applicant failed to repay the outstanding loan amount despite being accommodated severally, the applicant was not deserving for the orders of an injunction. As such, the 1st respondent contends that the issue of injunctions has been well settled and the court is hereby *functus officio*. Therefore, the injunction given on May 19, 2022 ought to be discharged as it was obtained without full disclosure of the facts surrounding the case. Moreover, the 1st respondent submits that considering the applicant wants an interpretation of the court's judgment, a prayer for citation for contempt cannot therefore arise.
22. The 1st respondent relies on Section 27 of the *Civil Procedure Act* and submits that the applicant should bear the costs of the application as it has not approached this court with clean hands. The applicant is insincere as it brought an application for an injunction and citation for contempt when it is clear all the applicant wanted is an interpretation of a clear and unambiguous judgment.

Analysis and determination

23. The applicant seeks for orders of a temporary injunction against the 1st respondent from selling by public auction LR No Nanyuki/Marura Block 4/04 Kimuri and for a declaration that the threatened sale by public auction of the suit property is null and void ab initio for failing to conform to the orders of this court.
24. The background facts are that applicant instituted the matter herein vide a plaint dated July 10, 2020 seeking for orders of an injunction to issue against the 1st respondent to bar them from selling the security and that this court do issue a declaration that the intended auction scheduled for July 14,



2020 on the security is unlawful and void *ab initio*. The matter proceeded to full hearing and the court rendered its judgment on November 16, 2021. The bone of contention is the judgment particularly paragraph 52 which I shall reproduce herein:-

However, having found that the statutory notices were not issued according to law, I hereby put the sale of the security by public auction on hold for a period of 90 days pending the compliance with the law on part of the defendant. Thereafter, the sale of the security may be done.

25. According to the applicant, the judgment required the 1st respondent to serve afresh all the notices. The applicant thus argues that it has not been served with any fresh notices and as such, the intended sale is unlawful. The 1st respondent argues that the judgment was clear that the court gave it a 90 day period for it to regularize its position by serving the Notice to Sell to the guarantors, which it was faulted for not doing.
26. On perusal of the judgment, paragraph 42 the court found that the 1st respondent issued and served the 90 days' notice dated February 14, 2019 and then issued a 40 day Notice to Sell dated May 24, 2019 under Section 96(2) of the Land Act. To prove service, the 1st respondent attached certificates of postage and the court found that the said notices were validly and procedurally issued.
27. The court further noted that the 1st respondent affirmed that it did not comply with Section 96(3)(h) of the Land Act by not serving the guarantors. The court thus determined as follows (paragraph 44):-
In my considered view, I find that the 1st defendant failed to comply with Section 96(3)(h) of the Act by not serving the guarantors and therefore the statutory power of sale did not crystallize. I therefore find that the 1st defendant ought to issue and serve the guarantors pursuant to Section 96(3)(h) of the Land Act.
28. It is therefore very clear that the court found that the notice that was not issued or served was the notice under Section 96(3)(h) of the Act. The applicant contends that the 1st respondent has still not served the guarantors with the said notice. I have perused the annexures by the 1st respondent and noted that it issued a 40 days' Notice to Sell on December 14, 2021 addressed to the applicant and copied to Amos Gichuki Ngonjo, Simon Matara Gichuhi and Ramadhan Maulidi Juma who are the directors of the applicant and pursuant to letter of offer for restructure of credit facility of Kshs. 29,213,335/-, dated December 20, 2017, the guarantors. The 1st respondent has attached four certificates of postage dated 28/12/2021 addressed to Amos Gichuki, Simon Matara Gichuki, Ramadhan Maulidi Juma and the applicant. Additionally, the 1st respondent has shown that it posted the Notice to Sell on the property in compliance with Section 96 (3)(j) of the Land Act. The court found that the Notice to sell had been duly served on the applicant herein.
29. The applicant also argued that no fresh notices have been served to it or the guarantors nor any redemption notice has been served upon the guarantors. It is clear from the judgement that the 1st respondent was given 90 days to regularize its position by issuing and serving the Notice to Sell on the guarantors. Upon perusal of the judgement, it is clear that the court did not state that fresh notices ought to be served afresh. Furthermore, logically speaking a period of 90 days is not sufficient for the 1st respondent to issue all the requisite notices for the notice under Section 9 is for a period of 9 days, the notice under Section 96 is for a further 40 days and the notice under Rule 15 of the Auctioneer Rules is 45 days. It would take about 175 days to carry out this task which the applicant is undoubtedly aware of. Further on the issue of redemption notice being served upon the guarantors, the law does not provide that a redemption notice be served upon the guarantors. Additionally, the court already made a determination that the redemption notice was validly and regularly served upon the applicant.



30. The applicant further contends that no valid notice has been served indicating the extent of default of the amount payable to rectify the default. I have perused the annexures of the 1st respondent and noted that the 90 days' notice dated February 14, 2019 indicated the outstanding amount as Kshs. 31, 577,535.08 as at February 4, 2019. The Notice to Sell dated December 14, 2021 indicated that the outstanding sum as Kshs. 66,490,832.24/- as at December 3, 2021 and the Redemption Notice dated March 15, 2022 indicates that the outstanding sum as Kshs. 67,316,832.24 as at February 24, 2022. The 1st respondent further attached a certificate of postage dated March 16, 2022 as proof of service. Therefore it is evident that the applicant was very much aware of the extent of his default to the 1st respondent.
31. The applicant has further argued that no fresh valuation has been carried out as required by law. The court while rendering its judgment on November 16, 2021, found that the 1st respondent complied with Section 97 of the Land Act by attaching to its pleadings the valuation report. The applicant at the time of hearing only raised issue with the fact that the 1st respondent had not done any valuation of the property. The 1st respondent produced a valuation report by Claytown Valuers Limited and argued that the applicant did not raise any issue on the contents of the report or the qualifications of their valuers. The court found that the 1st respondent had complied with Section 97 of the Land Act. As such, the said issue on valuation was settled in the said judgement.
32. Based on the above background facts, it is my considered view that the 1st respondent has now regularized its position and is at liberty to proceed with its right of sale of the security since the loan is still outstanding. The orders of citation for contempt of court made by the applicant are in my view misplaced since the applicant is still indebted to the 1st respondent and has not made any attempt to repay the outstanding amount. Yet the amount owed to the 1st respondent continues to accrue interest raising the possibility of exceeding the value of the security.
33. In my considered view the judgement of the court delivered on November 16, 2021 is crystal clear and requires no interpretation as suggested by the applicant. I find no merit in application dated May 18, 2022 and I hereby dismiss it with costs to the 1st respondent.
34. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 9TH DAY OF MARCH, 2023.

F. MUCHEMI

JUDGE

Ruling delivered through videolink this 9th day of March, 2023

