



REPUBLIC OF KENYA



KENYA LAW

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**Ghannam v SBM Bank (K) Limited & another (Commercial Case E091 of 2023)
[2023] KEHC 17340 (KLR) (Commercial and Tax) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17340 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E091 OF 2023**

DAS MAJANJA, J

MAY 12, 2023

BETWEEN

SAMY GHANNAM PLAINTIFF

AND

SBM BANK (K) LIMITED 1ST DEFENDANT

KEYSIAN AUCTIONEERS 2ND DEFENDANT

RULING

1. Before the court for determination is the Plaintiff's Notice of Motion dated 7th March 2023 filed, inter alia, under Order 40 Rule 1 of the Civil Procedure Rules and sections 103, 104 and 105 of the [Land Act](#), 2012. The Plaintiff primarily seeks an order restraining the 1st Defendant ("the Bank") from selling his property, Unit 44 situated on LR No. 195/228 (IR No. 140311), Karen Hills Estate, Nairobi ("the suit property"), in exercise of its statutory power of sale. The application is supported by the Plaintiff's affidavit and supplementary affidavit sworn on 7th March 2023 and 22nd March 2023 respectively. It is opposed by the Bank through the affidavit of its officer, Egidia Mecha, sworn on 10th March 2023.
2. The Plaintiff also filed an application dated 22nd March 2023 seeking an order that the court appoint an independent government valuer to value the suit property to ascertain the market and forced sale value of the suit property and file the report with the court. The Plaintiff also supported the application by his own affidavit sworn on 22nd March 2023.
3. I directed that both applications be determined together. The parties have filed written submissions in support of their respective positions.
4. It is not in dispute that the Plaintiff is the registered owner of the suit property which he charged to the Bank by the Charge dated 30th April 2014 to secure certain credit facilities under its staff loan scheme.



The Plaintiff does not deny that it defaulted in servicing the loan facilities when the Bank's predecessor was placed under receivership.

Plaintiff's Case

5. The gravamen of the Plaintiff's case is set out in the Plaintiff's case dated 7th March 2023. He states that following default, the Bank proposed and he accepted to begin sourcing buyers for the suit property. He signed an "Open Mandate Letter to Sell" the suit property with Palm Holding Properties and as a result received an offer to purchase the suit property from one TDT for the price of Kshs. 167,500,000.00 but the sale did not materialize. He also engaged his advocates who executed a sale agreement dated 28th November 2019 with a prospective purchase for Kshs. 200,000,000.00. Due to the COVID 19 pandemic, the sales did not materialize. The Plaintiff further states that the Bank accepted his offer contained in the letter dated 31st March 2022 to sell the suit property at a reserve price of Kshs. 120,000,000.00 but the Bank gave a time line of 3 months which he considered unrealistic.
6. Despite the economic effects of the COVID 19 pandemic, the Plaintiff states he made efforts to aggressively market the suit property and as a result he got an interested purchaser willing to purchase the property for between Kshs. 130,000,000.00 to Kshs. 150,000,000.00. The Bank accepted his proposal to extend the window to effect the transaction on the condition that the purchaser pays a 10% deposit by 8th March 2023. The proposed sale fell through when the proposed purchaser came across an advertisement for the sale of the suit property at a cost of Kshs. 100,000,000.00. He also came across an online advert by Musilli Homes offering the suit property for sale at Kshs. 150,000,000.00 being the market value and Kshs. 90,000,000.00 being the distress sale value.
7. The Plaintiff states that based on a current valuation report, the market value of the suit property is Kshs. 150,000,000.00 while the forced sale value would be at least Kshs. 112,500,000.00 being 75% of the market value pursuant to section 97(3) of the Land Act. He contends that the purported offer of Kshs. 90,000,000.00 was below the market value in line with section 97(3) of the Land Act. The Plaintiff argues that the Bank owes it a duty of care to obtain the best price reasonable obtainable at the time of sale and in this case and based on the facts outlined, there exists a rebuttable presumption that the Bank is in breach of that duty.
8. The Plaintiff further states that on 21st February 2023, it was served with a 21-day redemption notice by the 2nd Defendant ("the Auctioneer") together with a Notification of Sale dated 8th March 2023. He complains that the forced sale price was reserved at Kshs. 75,000,000.00 which was in contrast to the forced sale value offered by other agents and which was 50% of the market value. The Plaintiff states that it instructed Redfem Valuers Limited to undertake an independent valuation of the suit property and in its report dated 28th February 2023, it placed the market value at Kshs. 160,000,000.00 and the forced sale value at Kshs. 120,000,000.00. It avers that by purporting to sell the suit property at the proposed forced sale value, the Bank is in breach of section 97 of the Land Act. It is on this basis that the Bank wishes to sell the suit property at an undervalue that it seeks the relief sought in its applications.

Defendants' Case

9. The Bank opposes the application and urges that the Plaintiff has not made out a case for the grant of an injunction. It avers that the Plaintiff is indebted to it to the extent of Kshs. 211,094,827.54 which sum continues to attract interest. It states that this suit is an abuse of the court process as the Plaintiff has filed previous suits over the same subject matter. That he filed HC Comm No. E353 of 2019, *Samy Ghannam V SBM Bank Kenya Limited* where he sought to restrain the Bank from selling the suit property at an auction scheduled for 15th October 2019. The suit was settled through a consent adopted by the court on 15th October 2019 suspending the sale, directing the Plaintiff to complete a



sale by private treaty within 30 days from that date and to settle the outstanding loan balance from the proceeds of sale. The consent further stated that, “in default, the Defendant shall proceed with the public auction of the property without any recourse to the court.” The Bank avers that the Plaintiff failed to comply with the consent order whereupon it proceeded to sell the suit property for the price of Kshs. 83,000,000.00 with the successful bidder paying the 10% deposit.

10. The Plaintiff then filed another suit, HC Comm No. E210 of 2020, Samy Ghannam V SBM Bank Kenya Limited wherein he sought to declare the auction conducted on 19th May 2020 null and void. The application was heard by Odero J., who dismissed it by a ruling dated 5th February 2021 (see Samy Ghannam v SBM Bank Kenya Limited & Another [2021] eKLR). The Plaintiff proceeded to apply for an injunction pending appeal in the Court of Appeal; Civil Application No. NAI E055 of 2021 which the Court dismissed on 23rd July 2021 (see Samy Ghannam V SBM Bank Kenya Ltd and 2 Others [2021] eKLR).
11. As the transfer of the suit property to the successful bidder did not materialize, the Bank proceeded to advertise the suit property for sale in the Daily Nation of 21st November 2022 and 13th February 2023. It also proceeded to carry out a valuation of the suit property through Accurate Values Limited who in their report dated 19th July 2022 established the open market value at Kshs. 100,000,000.00 and the forced sale value at kshs. 75,000,000.00. The Bank denies that knowledge of any purported offers of sale of the suit property online by “Musili Homes”.

Analysis and Determination

12. The main issue for consideration is whether the Plaintiff has made out a case for grant of an order of injunctive relief as ordained in *Giella v Cassman Brown* [1973] EA 348. It is now trite and the parties have submitted as much that in order to succeed in an application for an interlocutory injunction order, a party must demonstrate that it has a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in their favour. The court must apply these three condition as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially (see *Nguruman Limited v Jane Bonde Nielsen and 2 Others* NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR). This means that if an applicant does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, the court will consider the other conditions.
13. The first hurdle the Plaintiff must surmount is to establish a prima facie case with a probability of success. The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 Others* [2003] eKLR explained that it 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.”
14. The Plaintiff does not dispute that it is indebted to the Bank. It also does not dispute that he has been served with the requisite statutory notice hence the Bank’s statutory power of sale has arisen. The core of the Plaintiff’s case is that he is apprehensive that the suit property will be sold at an undervalue.
15. As the Bank has shown, this is not the first time the Plaintiff had raised the issue of undervaluation of the suit property. Odero J. in the ruling dated 5th February 2021 considered the issues and observed as follows:



(18) The Plaintiff avers that a valuation which he himself commissioned conducted by Redfem Valuers on 8th October 2019 returned a valuation of Kshs. 200,000,000/- for sale by private treaty. It is on this basis that the Plaintiff claims that the property was sold at an undervalue. However the Applicant cannot demand that the property be sold for an amount which meets his approval. Through the consent entered into between the parties on 15th October 2019 the Bank granted to the Applicant an opportunity to dispose off the suit property by way of private treaty. The Applicant therefore had the opportunity to realize a purchase price of Kshs. 200 million or even more if achievable. However, the Applicant failed to sell the property by private treaty. The words of the consent were clear that in event of default the Bank would proceed to sell the suit property by way of public auction. The Applicant having agreed to the consent cannot now turn round and begin to cast aspersions on the sale by public auction.

19. In the case of *Palmy Company Limited v Consolidated Bank of Kenya Limited* [2014]eKLR the Court held as follows:-

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."

20. In *Zum Zum Investment Ltd v Habib Bank Ltd* [2014]eKLR the Court stated as follows:-

"... 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." [own emphasis]

The fact that the sale of auction did not fetch a price which was pleasing to the Applicant does not make that sale illegal and/or unprocedural. I find no evidence that the 1st Respondent Bank in any way breached its duty of care as chargee in exercising their statutory rights of sale.

16. In its ruling dated 23rd July 2021 dismissing the application for injunction pending appeal, the Court of Appeal observed as follows:

"The applicant was granted a loan facility by the 1st respondent and he offered as a security for the loan the suit property. When the loan went into arrears there was a threat by the 1st respondent that it would exercise statutory power and sell the property. The applicant filed a suit at the High Court asking for an injunction to restrain the 1st respondent from



exercising that statutory power of sale. The suit was compromised by a consent where the parties agreed that the applicant would meet his obligations on servicing the loan in default of which the 1st respondent be at liberty to exercise that power of sale. The applicant did not meet his part of the bargain and the suit property was sold by public auction to the 2nd respondent on 19th May, 2020. In those circumstances we cannot discern any arguable point in the intended appeal"

17. It is clear from entirety of the facts, nothing has changed apart from the fact that the Bank has undertaken a re-valuation of the suit property in order to comply with the provisions of Rule 11(b) (x) of the Auctioneers Rules. Under this provision the Chargee is required to secure a professional valuation of the reserve price of the charged property not more than 12 months prior to the proposed sale. It must be recalled that by valuing the suit property, the Bank is complying with statutory requirements and in this case, there is no suggestion that the valuation undertaken by the Bank is unprofessional or fraudulent. A valuation is professional opinion and merely because another valuer takes a different view of the value of the property, is in my view, not a sufficient ground to impugn a proposed sale.
18. Based on the competing valuations of the suit property, the Plaintiff seeks an order for appointment of an independent government value the suit premises. I hold that there is no basis for granting the said order as section 97 of the *Land Act* imposes on the Chargee the duty of care to obtain the best possible price in the circumstances. In doing so, the Chargee is obliged to value the suit property before sale. If there is breach of that duty, then the Bank is liable to pay damages which is the statutory remedy provided for in section 99(4) of the *Land Act*. The court cannot interpose that duty and transfer it to a third party merely because there is a dispute regarding the valuation of the suit property.
19. Ultimately, the Bank has complied with all the statutory prerequisites to enable it sell the suit property. The Plaintiff has not established a prima facie case with a probability of success. In line with the dicta in *Nguruman Limited v Jane Bonde Nielsen and 2 Others (Supra)*, the inquiry comes to an end.
20. Before I conclude this matter, I note that the Plaintiff had filed previous suit in respect of the same subject matter. It failed to comply with Order 4 rule 1(1)(f) and 2 of the Rules which provides as follows:
[Order 4, rule 1.] Particulars of plaint
1 (1) The plaint shall contain the following particulars—
 - (f) an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint.
 - (2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1) (f) above
21. The Plaintiff at paragraph 5 of the Plaint, “The Plaintiff avers that there is no suit or proceedings pending before any other court between the parties herein over the same subject matter.” The disclosure required under Order 4 rule 1 aforesaid is not only of any pending suit over the same subject matter but also a previous suit. Obviously the Plaintiff failed to disclose that there had been two previous suits over the same matter as required. It is the duty of the Plaintiff to make full disclosure and failure to do so, while not necessarily fatal, would disentitle him to an interim injunction.



Disposition

22. The Plaintiff's applications dated 7th March 2023 and 22nd March 2023 are hereby dismissed with costs to the Defendants. The interim orders in force are discharged and the sum of Kshs. 500,000.00 deposited in court shall be paid over to the 1st Defendant to the credit of the Plaintiff.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Maina instructed by JP Advocates LLP for the Plaintiff.

Mr Kazungu instructed by OMK Advocates LLP for the 1st Defendant.

