



REPUBLIC OF KENYA



**BWM Precast Housing Development Limited v Kingdom Bank Limited & another  
(Civil Case E012 of 2021) [2023] KEHC 20863 (KLR) (20 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20863 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL CASE E012 OF 2021  
MW MUIGAI, J  
JULY 20, 2023**

**BETWEEN**

**BWM PRECAST HOUSING DEVELOPMENT LIMITED ..... PLAINTIFF**

**AND**

**KINGDOM BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**J.K. WANDERI AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Background**

1. This Court granted orders as per the Ruling delivered on 15/2/2022 as follows;  
  
‘Secondly, there was/is already a valid Valuation Report emanating from mutual and valid Consent of parties presented in Court where the parties appointed Tysons Limited to conduct Valuation. In the absence of any evidence of misconduct, fraud, undue influence, coercion, illegality or any act or omission by Tysons Limited or parties to the Consent to invalidate the Consent and or resultant Valuation Report, the Report by Tysons Limited is the most appropriate in the circumstances.’
2. This Court finds the Report by Tysons Limited the Valuation Report is the report to be relied on during conduct of statutory power of sale over the suit property LR 15324.’

**Certificate Of Urgency of 4/10/2022**

3. The 1<sup>st</sup> Defendant Kingdom Bank Limited filed Certificate of Urgency on 4/10/2022 dated 28<sup>th</sup> September, 2022 and deposed as follows;



4. Pursuant to this Court's Ruling of 15/2/2022 the Court found the Government Valuer's Report was not in compliance with Section 97(2) of Land Act and the statutory power of sale was to rely on the Tysons Limited valuation report as was agreed on by consent of the parties.
5. The 1<sup>st</sup> Defendant has severally tried to have the suit property disposed by way of public auction pursuant to the report by Tyson Limited as ordered by Court, but the applicant has been unable to, given that all prospective buyers indicate that the value of the property has been overstated.
6. The loan amounts are equally accruing which amounts the plaintiff herein has made no effort to settle and the 1<sup>st</sup> Defendant may never be able to dispose off the property to recover the amounts owed to it while the plaintiff continues to enjoy quiet possession over the suit property.
7. It is paramount that this Court be pleased to issue a condition order directing that the Government Valuer conducts another valuation over the property that meets Section 97(2) of the Land Act.
8. The 1<sup>st</sup> Defendant/Applicant is suffering and will continue to suffer undue prejudice and substantial loss if this Court does not set aside and/or review its order issued on 15<sup>th</sup> February, 2022 and issue direction that the Government Valuer conducts another valuation that meets Section 97(2) of the Land Act.

#### **Notice Of Motion Dated 28/09/2022**

9. The Applicant filed Notice Motion on 4/10/2022 and sought the following orders;-
  - a. Spent
  - b. That this Court set aside and/or review the Order issued on 15<sup>th</sup> February, 2022 by this Court directing that the Government Valuer conducts another valuation to ascertain the market value and the force sale value over the suit property being LR 15324 (I.R. 54310), situated at Machakos County in compliance with Section 97(2) of the Land Act.
  - c. That the costs of this application be provided for.
10. The application is based on the following grounds;
  - a. On 15<sup>th</sup> February 2022 this Court issued an order allowing the Valuation Report by Tyson limited to be used by the Applicant herein during the conduct of statutory power of sale over the suit property LR 15324.
  - b. This Court found that the valuation report by the Government Valuer was not in compliance with Section 97(2) of the Act as it only determined the market value of the suit property but did not state the Forced sale value of the suit property.
8. The Supporting Affidavit Jackson Kimathi head of Legal department of the 1<sup>st</sup> Defendant Bank deposed that the Bank through 2<sup>nd</sup> Defendant severally tried to have the suit property disposed by way of public auction pursuant to the Tysons Valuation Report as per the Ruling of this Court of 15/2/2022 and it was unsuccessful and buyers contended the property was overvalued.
9. The Supporting Affidavit by the 2<sup>nd</sup> Defendant J.K.Wanderi Auctioneers deposed that pursuant to the Court Ruling of 15/2/2022 the suit property mortgaged herein was severally advertised for public auction and the statutory power of sale was not achieved. Prospective buyers indicated the property was /is overvalued. Prospective buyers raised queries and discontent regarding the valuation of the suit property as indicated by Tysons Limited did not match the geographical location of the said suit property LR No 15324.



### Plaintiff's Replying Affidavit Filed On 24/10/2022

10. The Plaintiff herein on 24/10/2022 filed their Replying Affidavit sworn on 20/10/2022 by one Jack Liu, Director of the Plaintiff deposing *inter alia* that;
- a. The 1<sup>st</sup> Defendant conducted a valuation through Amazon Valuers Limited of the suit property LR 15324 indicating the market value was Kshs 190,000,000/- and the forced value as Kshs 142,500,000/- which was clearly an undervalue of the suit property.
  - b. The Plaintiff conducted a valuation of the suit property through Orion Valuers which indicated the market value of the property as 275,000,000/-
  - c. By Consent on 29<sup>th</sup> June, 2021 the parties agreed a joint valuation should be conducted by Tyson Limited who valued the suit proper at the market value of Kshs.265,000,000/- while the forced value at Kshss 210,000,000/-
  - d. When the matter came for hearing on 27<sup>th</sup> July, 2021 the 1<sup>st</sup> Defendant Advocate proposed that the Government Valuer conducts an independent valuation to ascertain the market value and forced sale value of the suit property since he 1<sup>st</sup> Defendant was apprehensive that the valuation done by Tyson Limited had been overstated.
  - e. The consent on 28<sup>th</sup> July, 2021 the parties recorded a consent for the Government Valuer to conduct the valuation of the suit property.
  - f. Through a letter dated 30<sup>th</sup> August 2021 the Director Land Valuation wrote to the Deputy Registrar Machakos Law Courts assessing the suit property at Kshs 215,000,000/- and thereafter the Court determined which valuation report ought to be relied on during the statutory power of sale by the 1<sup>st</sup> Defendant.
  - g. The Court found that the valuation report by the Government Valuer was not in compliance with Section 97(2) of the *Land Act* as it only determined the Market value of the suit property but did not state the forced sale value of the suit property.
  - h. In response to paragraph 14 of the 1<sup>st</sup> Defendant's supporting affidavit, there is absolutely no material or reason presented to the Court in the subject application to warrant a disturbance of the Ruling delivered by the Court on 15<sup>th</sup> February, 2022.

### Plaintiffs Submissions Dated 2/03 2023

11. It is submitted that to buttress this position the 1<sup>st</sup> Defendant relies on the case of *Draft and Develop Engineers limited v National Water Conservation and Pipeline Corporation*, Civil Case No. 11 of 2011 as cited in the case of *Anthony Gachara Ayub v Francis Mabinda Thinwa* [2014] eKLR, the High Court corrected stated that;-

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the



face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal”.

12. To buttress this position the Plaintiff relies in the case of *Sadar Mohamed v Charan Singh & another* as cited in the case of [Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers](#) [2016] eKLR where it was held that:

“Any other sufficient reasons for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter).”

12. Similarly, in the case of *Ajit Kumar Rah v State of Orisa & Others* as cited in the case of [Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers](#) [2016] eKLR where the Supreme Court of India while discussing the scope of review had this to say:-

“The power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule”

#### **Defendant’s Submissions Dated 6/02/2023**

14. On behalf of the defendant it is submitted that the 1<sup>st</sup> defendant has met the threshold for review of the Court’s orders of 15<sup>th</sup> February, 2022 as follows:-
- a. Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed or the order made.
15. The 1<sup>st</sup> defendant has severally tried to have the suit property disposed by way of public action pursuant to the report by Tyson limited as ordered by court but has been unable to , given that all prospective buyers indicate that the property has been over-valued- an annexure JK-7 referred to.
16. The 1<sup>st</sup> defendant has now placed before this Court evidence that the Valuation conducted by Tysons Limited is grossly overstated vide the various letters from the Auctioneers stating that despite conducting various auctions and marketing of the property bidders could only raise Kshs 162,000,000/- as the highest bid.
- b. Any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.
17. It is further submitted that the facts and reasons (inability to auction off the property for being grossly overvalued) stated above are sufficient cause and while noting that the plaintiff still in default of the



facility, which debt is accruing interest daily at the contractual rate, continues to enjoy the quiet possession of the suit property.

18. The question of unreasonable delay was dealt with in the case of *Jobber Mohsen Ali & another v Priscillar Boit & another* E&L No. 200 of 2012 [2014] eKLR where it was stated that;

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter.”

### **Determination**

19. The Court considered the instant application and Replying Affidavit oral and written submissions by parties and the only question for determination is whether a review of the Ruling of 15/2/2022 is merited or not in the circumstances of this matter.

20. Review is provided for in law by;

Order 45, Rule 1 CPR 2010 provides;

Application for review of decree or order

- (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

21. The Respondent objected to the application for review on grounds that the instant application was filed after unreasonable delay, and the application fails to meet the legal threshold of a review.
22. The Respondent deposed the Applicant failed to establish the new and important matter or evidence after the exercise of due diligence that was not within their knowledge.
23. There is no error on the face of the record as alleged to warrant a review of the Court’s Ruling of 15/2/2022.
24. The Respondent was of the view that an issue(s) ventilated before the Trial Court ought not to be reconsidered as they are the subject of an appeal and not review and this Court is functus officio



25. The Respondent asserted that the documents used /presented with the instant application explaining delay in filing the Review Application, are not new documents but were documents used before the Application was filed.
26. The Applicant stated that the review was filed following discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the Applicant or could not be produced at the time when the decree was passed or order made.
27. This Court finds that the application for review is merited as the issue of reliance on the Tysons Limited Valuation Report to exercise the statutory power of sale the result would not have been apparent before the Court's Ruling of 15/2/2022 as at the time there were 3 Valuation Reports and the issue for determination was which Valuation was to be used during the public auction.
28. The issue raised by both Defendants and relying on the Tysons Valuation Report was/is that the public auction was not effected as prospective buyers indicated the property was /is overvalued. Prospective buyers raised queries and discontent regarding the valuation of the suit property as indicated by Tysons Limited did not match the geographical location of the said suit property LR No 15324.
29. From the above circumstances, and the requirements outlined by Order 45 Rule 1 [CPR](#) 2010, The Applicant was /is aggrieved by the Court Ruling of 15/2/2022 as the Tysons Valuation Report did not enable the Bank carry out its statutory power of sale over suit property as shown by annexed correspondence, namely, Letter dated 8/4/2022 by Garam Investments Auctioneers; that advertisement was placed in the print media on 5/4/2022 and the Prospective could not raise the mandatory 10% bidding deposit. Letter dated 31/5/2022 by Sheflo Auctioneers obtained an offer of Ksh 165,000,000/- and whether the said offer would be accepted. Clearly, way below the Tysons Valuation Report of is Kshs.265,000,000.00 while the forced sale value is Kshs.210,000,000.00.
30. This Court is satisfied that the delay in filing the application for review was explained by the Applicant as occasioned by pursuit of public auction using the Tysons Report as proved by correspondence above which confirms attempts to have the suit property auctioned after this Court's Ruling of 15/2/2022.
31. The 1<sup>st</sup> Defendant /Applicant has a sufficient reason to pursue the review as the public auction of the suit property is not feasible relying on the Tysons Valuation Report , yet the loan amounts continue to accrue interest and there is imminent danger the loan amounts will surpass the actual value of the suit property, hence prejudicing the Applicant Bank.
32. The 1st Defendant/Applicant is suffering and will continue to suffer undue prejudice and substantial loss if this Court does not set aside and/or review its order issued on 15th February, 2022 and issue directions that the Government Valuer conducts another valuation that meets Section 97(2) of the [Land Act](#) to ascertain the market value and the force sale value.
33. Where an application for review is filed and it is merited the doctrine of *functus officio* is not applicable.
34. In [Mombasa Bricks & Tiles Ltd & 5 others v Arvind Shah & 7 others](#) [2018] eKLR, the Court observed doctrine of *functus officio* and *res judicata* and stated as follows:-

“I understand the doctrine, like its sister, the *res judicata* rule to seek to achieve finality in litigation. It is a way of a court saying, ‘I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level’. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits. It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and



every other consequent, complementary, supplementary and necessary facilitative processes. As was held by the court of Appeal in *Telkom Kenya Ltd v John Ochanda*, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file.”

35. The thrust of the 1<sup>st</sup> Defendant/Applicant’s application is the fact that the bank’s legal right to exercise statutory power of sale is not realized due to the Tysons Valuation Report this Court ordered to be used in the sale of the suit-property as it is stated to be overvaluation of the property.
36. The issue of default in servicing the loan facility and legal charge entered into in 2015 over the suit property is not denied by the Plaintiff. What is in contention is sale by public auction of the suit property to realize the amount in default interest and cost.
37. In *David Mburu Gitbere v 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 unauthorized improper exercise of the power of sale shall have a remedy in damages against the person exercising the power.”
38. This Court considered the 3 Valuation Reports and determined the Tysons Limited Valuation Report was the compliant one to be used for public auction. That issue is moot. Due to the new developments indicated above which facts are not controverted by the Respondent that the public auction is hindered due to overvaluation of the property, the court in balancing both parties’ legal rights shall not revert back to the 3 valuation Reports or either of them, in any case the Valuation Reports are of more than 6 months -1 year and hence new/fresh valuation are required. The Court orders new valuation report by each of the parties to aid in the public auction.

### **Disposition**

1. Application for review upheld.
2. The Tysons Limited Valuation Report set aside.
3. Each party to undertake Valuation within 90 days and both Valuation reports to be used in the public auction.
4. Each Party to bear own Costs.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 20<sup>TH</sup> JULY 2023.  
(VIRTUAL/PHYSICAL CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**

In the presence of:

No appearance - for the Plaintiff

No appearance. for the Defendants

Patrick - Court Assistant

