Hussein v First Community Bank Limited (Civil Case E020 of 2023)
[2023] KEHC 22636 (KLR) (19 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22636 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE E020 OF 2023

DKN MAGARE, J

SEPTEMBER 19, 2023

BETWEEN

IBRAHIM SHERO HUSSEIN ..... PLAINTIFF

AND

FIRST COMMUNITY BANK LIMITED ..... DEFENDANT

RULING

Background

1. The applicant is a customer of the Respondent having taken a sharia compliant financing through Musharaka sale and lease back facility for 50,000,000/= with an additional accommodation for Ksh. 7,000,000/=. The same is secured through a legal charge dated 25/1/2019 and registered on 21/2/2019 over land reference number Mombasa block XLVIII/39 and Mombasa block XLVIII/ 40 registered in the name of the Plaintiff/Applicant.

2. The applicant filed an application dated 27/2/2023 seeking the following orders:-

    a. Spent

    b. Spent

    c. In the alternative, this honourable court do issue an interlocutory injunction restraining the defendant, by themselves their agents, servants or employees from attaching, repossessing, auction, or in any other way alienating the plaintiff's parcels of land being Mombasa block XLVIII/39 and Mombasa block XLVIII/ 40 pending hearing and determination of the suit.

    d. An order do issue, that land parcel numbers Mombasa block XLVIII/39 and Mombasa block XLVIII/40, be valued by an independent valuer to ascertain its current market value.

e. An order compelling the defendant to render account to the Plaintiff showing how the sum claimed by the defendant company in respect of the plaintiff's loan at the defendant's company.

f. Costs of this application be provided for.

3. The respondent filed a replying affidavit though a voluminous replying affidavit sworn by Claris Ogombo dated 14/4/2023 the replying affidavit raised several issues and set out a chronology of events as I shall endeavour to summarize, herein below.

4. By a letter of offer dated 27/11/2018, the Respondent bank granted the customer a sharia compliant facility wherein the customer's share was 70,000,000/= while the bank's share was 50,000,000/=. The facility was secured though a first legal charge of 2 parcels of land being land reference number Mombasa block XLVIII/39 and Mombasa block XLVIII/ 40, both registered in the plaintiff's name. the charge was for 50,000,000/= and was registered on 21/2/2019. There was a further accommodation of Ksh. 7,000,000/= given via a letter date 23/11/2019. This was to run for 24 months.

5. The security is the legal charge over the same properties for 50,000,000/=, deed of assignment, corporate guarantee by great Span Marine Services and personal guarantee and indemnity by Praveen Ibrahim Baluchi for Ksh. 7,000,000/=. The ownership of the two parcels is held by Ibrahim Shero Hussein, the Applicant herein from 9/12/2014.

6. On 22/7/2021, there was a Musharaka ending with ownership between the parties herein. The plaintiff wrote a letter of undertaking referring to the agreement of 22/7/2021. The parties also write a service agency agreement for the accrued profits of 1,065,000/=. The bank also bought its share at Ksh.30, 192,981 in the two parcels of land. The parties entered into a further profit purchase for 1,128,318.04 over the suit parcels of land, Mombasa block XLVIII/39 and Mombasa block XLVIII/ 40.

7. This was perfected through a restructuring of the initial loan through a letter dated 20/9/2021, where the agreed values were: -

a. Bank's share Ksh30,192, 981/=

b. Customer's share 54,807,019/=

8. Default occurred and a statutory notice was issued on 11/2/2022. This was for an outstanding amount of Ksh 36,596,143.29. the same was posted to the plaintiff though his last known address of 3278-80100 Mombasa on 2/3/2022. There was another statutory notice issued on 16/5/2022. This was posted to the same address. Both the notices and the certificates of posting were annexed to the replying affidavit.

9. Adomag valuers and associates valued the suit parcels of land as instructed and gave various values for both parcels of land, Mombasa block XLVIII/39 and Mombasa block XLVIII/40: -

a. Current market value 82,000,000/=

b. Mortgage value 65,600,000/=

c. Force sale value 61,500,000/=

d. Insurance value 57,000,000/=

10. There was a search attached to the properties. It does not show the encumbrances but the land certificate shows the same. The auctioneers were instructed on 28/6/2022. They issued a 45 redemption notice for an amount of 35,690,840.75 notification of sale was issued on 29/6/2022. There

was a first advertisement. There was a second advertisement for 21/2/2023. There was a sale and a certificate of sale for Ksh. 62,000,000/=. The purchaser paid 15,500,000/= at the fall of the hammer. This is 25% of the auction amount. The balance was thereafter paid. Totaling to 62,000,000/=.

11. The defendant also filed defence to the matter. According to the bank, the sale is done and dusted. The purchaser has paid the entire purchase price, which has been credited into the Applicant's account, which has nil balance on the Loan.

Applicant's submissions

12. The applicant field submissions dated 16/6/2023where they set out the background to this matter, in their own words. They acknowledge the charge over 50,000,000/= and advancement of 7,000,000/= being working capital. He says he desired to restructure the loan and pay but there was not response by the respondent. He was surprised to receive a notification of payment of money into his account being auction proceeds.

13. They state that they were not served with statutory notices and only received different notices after the sale. However, the different notices were not attached. The rely on the cases of Giella = vs = Cassman Brown & Co. Ltd (1973) EA, 358 and Mrao Limited V First American Bank Limited & 2 Others, [2003] KLR 125 in support of their position that they have raised a prima facie case.

14. The applicant raises three issues, which are really 2, that is,

    a. whether conditions for grant of injunction have been met.

    b. Who is to bear costs.

15. The applicant stated that it is not until 22/3/2023 that they became aware of statutory notices. They dispute that the said notices were sent. He relies on the annextures marked ISH 1a and b. The Applicant's position is that he had not been served with statutory notices and as such the Respondent had no power to exercise the statutory power of sale. Reliance was then placed on the case of Francis Ngarama Kiratu v Equity Bank [2019] eKLR, as doth: -

> " Section 90(2) of the *Land Act* allows a chargee to issue notice in writing to a chargor who is in default under a charge, notifying him of the default and demand payment. If the chargor does not rectify the default, then the chargee has a right to exercise his statutory power of sale by first issuing notice under Section 96(2) of the *Land Act*. In the case of Elizabeth Wambui Njuguna v Housing Finance Company of Kenya Ltd (2006) eKLR, the court in considering Section 90(2) stated:
>
> "....the omission to serve a valid statutory notice is not an irregularity or impropriety to be remedied in damages. It is a fundamental breach of statute; which derogates from the chargor's equity of redemption."

16. Their mainstay is the failure to serve statutory notices and there being no valuation contrary to section 97(20 of the *Land Act*. They state that there were differences in valuation of the properties by grossly understating the property. They relied on the case of East Africa Ventor Co Ltd vs Agricultural Finance Corp. Ltd & another (2017) eKLR on gross understatement of value. In that matter the court stated as doth: -

> " 37. I also find that in the exercise of its power of sale, the 1st Defendant did not comply with section 90(2) (b) and 96 of the *Land Act* and neither did it discharge the duty of care under section 97(2) of the *Land Act* to undertake

valuation of the suit property in order to obtain the best market value of the suit property. In the absence of a Notice to sell under section 96(2) of the *Land Act*, the scheduled sale of the suit property was illegal."

17. The applicant further relied on the case of Koileken ole kipolonka orumoi v Mellech Engineering & Construction Limited & 2 others [2015] eKLR, where Justice F. Gikonyo, stated as doth: -

> " The 2nd Respondent initiated the process of exercising the statutory power of sale and it is incumbent on them to have caused the forced valuation. Some commentators posit that section 97 of the *Land Act* does not specify the time within which the forced valuation should be done except that it is done before the public auction. My view is that it must be done within reasonable time before the sale; not too far before the sale or not too close to the sale, for the exercise serves important legal calling, that is, it will inform the reserve price of the property and examine the market in order to obtain the best price reasonably obtainable at the time of sale. Therefore, the forced sale valuation is not only for purposes of carrying through the public auction or solely for recovering the debt, but reinforces the rights of the chargor to have reasonable value for his property. That is why the duty under section 97(2) of the *Land Act* is statutory and obligatory. It is not left to the whims of the chargee and its agents especially the auctioneers."

18. The applicants Maintained that the order is merited and as such the court should endvour to maintain the status quo. This position was buttressed by the case of Lilian Mercy Mutua t/a Lilian M Gems v Elizabeth Wangechi Olonginda & 3 others [2013] eKLR, where Justice Mukunya held as follows: -

> " The whole point about applications of this nature is to preserve status quo. The status quo is that the applicant has occupation of the disputed land and is in actual occupation of the mine. Truly the balance of convenience favours the applicant."

19. It is the Applicant's considered submissions that should the court decline to issue the orders, they will suffer irreparable harm and that in any case the balance of convenience titles in their favour. It is their case that the decision of Alice Awino Okello v Trust Bank Ltd & Anor LLR No. 625 (CCK) as referred in Kisimani Holdings Limited & another v Fidelity Bank Limited [2013] eKLR supports their position. The truth however, is that upon perusing the case, I have noted that it is not the court's holding but submission by the plaintiff in the former case. The decision is thus misleading.

20. The applicant then prays that the court allows the application with costs.

Defendant's submissions

21. The defendant field a humongous 17 page, 59- paragraph submissions. If for any reason I do not refer to all decisions is not that I have not read but for economy of space. Submissions of this nature should never exceed 6 pages.

22. They set out in extension the Applicant's lamentations and the contents of the replying affidavit, which I have hitherto addressed. They also rely on the decisions of Giella = vs = Cassman Brown & Co. Ltd (1973) EA, 358 and Mrao Limited V First American Bank Limited & 2 Others, [2003] KLR 125. They also rely on the case of Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR. They state that there must be an unmistakable right that has been infringed. It is their submission that indebtedness is admitted and as such the court ought not issue the injunction. Reliance is also placed

on the case of Yusuf Abdi Ali Co Ltd v Family Bank Limited [2015] eKLR, where justice J. KAMAU, posited as doth;

> " In view of the said indebtedness, the court was also not inclined to grant an injunction to restrain the Defendant from realising the subject motor vehicles as its securities. Indeed, the Plaintiff did admit that when it was issued with a demand letter to clear the arrears of Kshs 3,046,560.26..."

23. It is the defendant's case that the plaintiff did no show that the valuation was unfair or unreasonable. The state that in the case of Palmy Company Limited v Consolidated Bank of Kenya Limited [2014] eKLR, Justice F. Gikonyo, posited as doth: -

> " The onus of establishing on prima facie basis, that the Applicant's right has been infringed by the Defendant by failing to discharge the duty of care under section 97(1) of the *Land Act* lies on the Applicant. Other than the report by Prudential Valuers, there is nothing on record to support the claims by the Applicant or to discredit the valuation by Kenstate Valuers. 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 Defendant as to entitle the court to call for an explanation or rebuttal from the Defendant. That approach is necessary to prevent defaulters from filing valuation reports with value way beyond the open market value just to obtain an injunction. Needless to state that having an arguable point, as is the case hare, is not sufficient to establish a prima facie case for the grant of an injunction especially in cases of exercise of the power of sale by a chargee who has shown that the Applicant has defaulted and continue to be in default. It be known that, as long as it is lawfully exercised, the Statutory Power of Sale is not a favour that the chargor extends to the chargee or an infringement on the right of or a foreclosure of the chargor's equity of redemption; it is a statutory remedy which is inextricably tied to the right of the chargee to recover its money-which is property guaranteed under Article 40 of *the Constitution*. The standard I have applied was set out in the case of Mrao Limited V First American Bank Limited & 2 Others, [2003] KLR 125, when the Court of Appeal in stated:-
>
> "So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the court a tribunal property 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."
>
> "...But as I earlier endeavoured to show, and I cite ample authority for it, a prima facie is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.
>
> (26) For purposes of this ruling, and from the material on record, the Defendant ensured that a Forced Valuation is undertaken by a Valuer in accordance with the law. There is nothing from the record so far that suggests the valuation herein was a negation of the duty to obtain the best price reasonably obtainable at the time of sale.

24. They submit that the position justice D. S. Majanja, in the case Silas Misoi Yego t/a Siro Investments v Transnational Bank Limited & another [2020] eKLR, supports their case. The court in the said case held as doth: -

> " In view of the admission of indebtedness by the Plaintiff, he cannot suffer loss that cannot be compensated by damages. The Plaintiff understood that once he defaults, the Bank was entitled to exercise its remedies under section 90 of the *Land Act* which includes sale of the property. Further, section 99(4) of the *Land Act* contemplates that irregular exercise of the power of sale would entitle the Plaintiff to damages. He has not shown the Bank would not in a position to pay any damages that may be found due in the event his suit succeeds....
>
> 34. According to the correspondence between the parties, the Plaintiff has been in default since 2019. He has not met its promise to settle the debt despite several offers by the Bank to accept settlement. The interest rate on loan continues to escalate which will, in all probability, eat into the value of the security. I find that the balance of convenience does not favour the grant of an interlocutory injunction."

25. In what looks like an overkill, the authority of Pius Kipchirchir Kogo versus Frank Kimeli Tenai [2018] eKLR provides a definition of irreparable injury as follows: -

> " irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

26. They submit that the Applicant has not met that threshold. In their submissions, they maintain that the Applicant knew and it is conceivable that by offering the said parcels as security, sale by public auction was expected in case of default. They rely on the case of Beatrice Atieno Onyango v Housing Finance Company Limited & 3 others [2020] eKLR among other cases, which I shall be addressing shortly.

27. Further, the auction having taken place. There is nothing to protect in view of the injunction in section 99 of the *land act*.

Analysis

28. The situation the Applicant finds himself is dicey. The suit property has already been sold. The auction he seeks to prevent has occurred. This increases the factors which the Applicant has to proof to entitle him to be given orders. This is because there is a third party now involved. His involvement is not idle. Before I address the third party, I need to settle the law and the remit of this case.

29. Long ago, in the first decade of independence, a Ugandan court, as per Spry JA settled the aspect of what is required of us when granting an interlocutory injunction in the locus classicus case of Giella = vs = Cassman Brown & Co. Ltd (1973) EA, 358, 360, sets out principles for grant of injunction. The court, stated as follows, though the wisdom of Spry VP, as then he was, as follows: -

> " The conditions for the grant of an interlocutory injunction are now, I think, well settled in east Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant

might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

In a bid to ease our pain, the court of Appeal has since clarified that the three limbs of the case of Giella = vs = Cassman Brown & Co. Ltd (supra) are to be dealt with sequentially. This means, that once there is no prima facie case, the court does not need to deal with the other two aspects or pillars. This was in the case of Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR, where the Court of Appeal was of the view that these tests are sequential. The Court stated: -

"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury 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.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. 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. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable.

In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

Prima facie case

30. The sale is admitted already done. The remedy that remains for the charger lies in damages. Therefore, a claim for injunction does not lie where the court cannot ultimately reverse the sale. This is not the case where damages are an adequate remedy. It is a case, where if the plaintiff had established a prima facie case, the only remedy is in damages.

31. Whether they are adequate or not is a province of another forum. What constitutes prima facie case was defined in the case of Mrao Limited V First American Bank Limited & 2 Others, [2003] KLR 125 to mean: -

> " ... a case in which on the material presented to the court a tribunal property 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.

32. But as I earlier endeavored to show, and I have cited ample authority for it, a prima facie is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right,

and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.

33. I need to point out that lack of prima facie case does not and has never taken to mean that the case is hopeless. This relates to the issuance of an injunction. Is there more that arguable case that an injunction ought to issue? Looking at the question from the reverse, what if I issue the injunction now, and the plaintiff succeeds, what orders will I give, finally. If the plaintiff succeeds in showing the sale was at an undervalued, then the only remedy is to pay damages which will have regard to the losses between the monies sold and the proper forced sale value. If the sale was illegal, then the difference with the market value.

34. This means at no time is the refund to the purchaser an issue. This is because statutory and stare decisis have elucidated this issue that the remedy for a mortgagor who has suffered damages as a result of improper auction, is not to reverse the auction against an innocent purchaser. The remedy lies in damages.

35. The *Land Act* has immunized a purchaser at a sale conducted by a mortgagee in the exercise of the statutory power of sale in the following words in section 99 of the *Land Act*: -

    i. This section applies to—

        1. A person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or

        2. A person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.

    ii. A person to whom this section applies—

        1. Is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;

        2. Is not obliged to see to the application of the purchase price;

        3. Is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

    iii. A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the charger, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

    iv. 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.

36. The 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 charge had not properly realized that statutory power of sale in terms of procedure. In this case, there is no evidence to show that the Purchaser had any notice of any irregularities in the planned sale – and evidence suggests that there were none anyway.

The point is that the purchaser is then inoculated by section 99 from any action to recover the Suit Property from him.

37. In some of the cases like Simon Njoroge Mburu v Consolidated bank of Kenya Ltd (2014) eKLR, Nancy Kahoya Amadiva vs Expert Credit Ltd & another (2015) eKLR and Lawrence Mukiri vs Attorney General & 4 others (2013) Eklr; Twin Buffalo Safaris Ltd. v Business Partners International Ltd (2015) eKLR, The Court had this to say about section 99 and the position of a purchaser

38. In the case of Simon Njoroge Mburu v Consolidated Bank of Kenya Ltd [2014] eKLR:

    i. "That section [99] now statutorily encompasses the right of the charger prejudiced by unauthorized, improper or irregular exercise of the power of sale to have a remedy in damages. In my view, such is where the Plaintiff's remedy lies in this case. In this regard, the Plaintiff would do well to note the powers of the Court in respect of remedies and reliefs set out in under section 104 of the *Land Act*, 2012....

    ii. What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the charger is extinguished. The only remedy for the charger who is dissatisfied with the conduct of the sale is to file suit for general or special damages..."

39. In similar vein, the Court of Appeal had this to say in Nancy Kahoya Amadiva v Expert Credit Limited & Another:

    a. "The 2nd respondent argues that he was an innocent purchaser for value and was not party to the fraud. This brings us to the question; what is the extent of due diligence to be exercised by a purchaser" In Captain Patrick Kanyagia and Another v Damaris Wangeci and others, this court held that there is no duty cast, in law, on an intending purchaser at an auction sale, properly advertised, to inquire into the rights of the mortgagee to sell. This was also reiterated by this court more recently in David Katana Ngomba v Shafi Grewal Kaka [2014] eKLR. In Priscilla Krobought Grant v Kenya Commercial Finance company Ltd and others Civil Appeal No.227 of 1995 (unreported), this court held that a purchaser at a public auction was protected by section 69(B) of the Indian Transfer of Property Act and could only lose the protection if it was proved that there was an improper or irregular exercise of the statutory power of sale of which the purchaser had notice. In the present case, the PURCHASER has not demonstrated that the 2nd respondent had any notice of irregular exercise of the statutory power of sale by the 1st respondent or indeed whether there was any such irregular exercise of the statutory power of sale. As per the testimony of the 2nd respondent before the trial court, the 2nd respondent's action to purchase was based on the advertisement for sale advertised in the newspaper. The 2nd respondent duly participated in the auction and his bid was accepted. We are reluctant to diminish the exercise of the statutory power of sale stemming from statute in the absence of impropriety being attributed to the mortgagee. We are satisfied that the present appeal does not fall within an instance when we are called upon to interfere with the settled principle of law regarding protection of the exercise of statutory power of sale. If we were to interfere with this power, the acceptance of charge as security would in itself diminish with the attendant consequences of limiting access to finance as banks would not readily accept charges as security.

40. Therefore, once a statutory power of sale is legally activated, any irregularity in the sale is only remediable with damages to the mortgagor if it injures him. These damages are also in the nature of special damages. This means, the Plaintiff can estimate the loss with exactitude. They are not at large. However, this court has no role in proving the same. It is up to the plaintiff and his legal advisors to

find the best way to meet that threshold. It will be inhuman for me to raise false hopes in the plaintiff by granting him an injunction that will unnecessarily prolong his misery.

41. It is unfortunate that the sale has happened. However, it is not a surprise to the plaintiff. If it was then, I don't know what it means to be surprised. The Applicant signed several agreements, all of them, provided remedies in case of default. Sale by statutory power of sale is the worst nightmare for most charges. However, it is accepted risk in this market.

    Before I depart, I need to note that the issuance of injunction is an equitable remedy. Therefore, whosoever cometh to equity must as a corollary, come with clean hands. In the case of In Caliph Properties Limited vs Barbel Sharma & Another [2015] eKLR, the Court stated:

    > " Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the 1st respondent in this case betrays him. It does not endear him to equitable remedies. ... He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The 1st respondent has not done that. Consequently, he has not done equity."

42. The applicant has not disclosed that the loan herein was restructured at his request upon the first default. Secondly, he is sketchy as regards to his default. He has annexed a statement showing that in 2023, only 60/- was payed through 'Lipa Na Mpesa'. Despite payment of the sum of Ksh 15,500,000/ = on the auction day, the account still remained in arrears. No effort as done to service the loan.

43. Further, the Applicant stated that he had received statutory notices after the auction but failed to disclose them.

    a. The application raises two issues, that is, whether the applicant has met the threshold for grant of injunction

    b. What reliefs are available to the parties

44. In terms of prima facie case, I have already noted that the sale has taken place. There is no pleading that the loan was cleared, the charge was illegal, the charge and auction were a nullity, the applicant clogged the equity of redemption, by refusing the applicant from making payment before the fall of the hammer, the auction took place during pendency of a valid court order, fraud which the purchaser was party to or such circumstances that the court of equity will frown and the court of law will find untenable.

45. The issue of lack of service of statutory notices falls by the wayside. There is prima facie evidence that notices were served and from the first notice restricting was done. When the subsequent notices were issued, the applicant did nothing. As the old equity adage goes, equity aids the vigilant, not the indolent. In the case of Mohamed Shally Sese (Shah Sese) v Fulson Company Ltd & another [2006] eKLR, the court of appeal sitting in Malindi, Makhandia JA, Stated as doth: -

    > " After all, extension of time is essentially equitable [See Leo Sila Mutiso v Rose Hellen Wangari Mwangi, Civil Application No. NAI. 255 of 1997] and equity aids the vigilant and not the indolent. As it is, the implication is that the applicant and his advocate never communicated for a period of over one year and the applicant took no steps whatsoever to find out about the outcome of the suit. This is simply incredible and hard to believe. Given the emotive nature of land ownership in this part of the country and given further that the applicant had actively participated in the proceedings, it is implausible that he would have

gone for a whole year without as much as finding out from his advocate the fate and outcome of the proceedings."

46. Regarding the issue of undervaluation, the property is still available. There are valuers who may value the same. This can be dealt with as special damages, at its right time. Annexed to the replying affidavit, there is a valid valuation by a professional valuer. There is no rival valuation. Till such turns up, there is no question on the need to re-value. In any case re-valuation cannot be for establishing the basis for sale but damages, if any.

47. Lastly, there is no evidence of repayment of the admitted debt. The case for wrongful exercise has not been made, there is no case made to override section 99 of the *land act*. I proper case, the court may be unable to sustain a sale. As of today no such evidence has been brought impeaching the auction. The applicant is also aware that the sale took place. He is equally aware or made aware who the purchaser was. The orders sought are against that purchaser. The right to be heard is non- derogable. He will be condemned unheard in spite of paying 62,000,000/=.

48. In Republic v National Land Commission & 2 others Ex Parte Archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kahawa West) [2018] eKLR, the court stated as regards the rule of audi alteram partem: -

"

"57. It is my view that fair hearing must be meaningful for it to meet the constitutional threshold. On this aspect, Halsbury's Laws of England, 5th Edn. Vol. 61 page 545 at para 640 states:

"The audi alteram partem rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet. Similar notice ought to be given of a change in the original date and time, or of an adjourned hearing...The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases."

49. Though the rule relates to judicial review, it is the same for such matters. We cannot stop that has taken place in the absence of the purchase who has paid and fully completed dictates of a statute, in this case, section 99 of the *land act*.

50. On the aspect of ordering re-valuation, there is no basis laid. The plaintiff, as of today is still the registered owner pursuant to the interim injunction I issued earlier. He can do a valuation for purposes of pursuing damages, if they pass the first hurdles, of showing any illegality or irregularity. He does not need a court order to prepare for his case.

51. The applicant ought to have filed another valuation and if there is a conflict between them, then there could be basis for re-evaluation for purposes of the issue of damages, if any. If there are major discrepancies. There is also no basis given for ascertaining the market value, when the auction uses the forced sale value.

52. I do not find a prima facie case for grant of injunction to stop transfer and possession of the suit parcels of land by the purchaser, who is not even a party herein. The auction was concluded and the auctioneer has not been said to be in breach of any of the rules they need to comply with. It is not surprising that he is also not party to the suit.

53. Having found that there is no prima facie case capable of succeeding in the aspect of injunction, I do not need to deal with the other limbs.

54. Not all is however lost, whatever balance remained now lawfully belongs and is actually in the applicant's account. The property was purchased at a public auction conducted in the exercise of the statutory power of sale. If the auctioneers caused any loss, then section 26 of the auctioneer's act comes to play. The purchaser is however, not party to the contract between the Applicant and his banker. There is no privity of contract between the parties.

55. My other concern is that the sale has already taken place. The purchaser has paid a humongous amount of money. He has not been sued. The orders that may be issued herein are directed at him. We shall not have heard the purchaser before making adverse orders. In the case of Beatrice Atieno Onyango v Housing Finance Company Limited & 3 others [2020] eKLR, Justice D. S. MAJANJA J., posited as doth: -

    i. "The purpose of the aforesaid 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:

    ii. [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."

56. The mortgagor's equity of redemption is extinguished upon the fall of the hammer in a public auction. Having been extinguished, the plaintiff's property became a fungible. It can only be viewed in terms of money. The actual property cannot be redeemed. The parties can only exchange money. The purchaser and the mortgagor or charger are not supposed to meet. The purchaser is entitled to vacant possession on registration and any outstanding issues are tripartite, between the Chargor, charge and auctioneer.

57. In the case of Euro Bank Limited (In Liquidation) v Twictor Investments Limited & 2 others [2020] eKLR, the court of Appeal, Karanja, Okwengu & Sichale, JJ. A, stated as doth: -

    i. "55. In this case, the sale was by private treaty. There was evidence on record to the effect that the suit property had been advertised twice to proceed by way of public auction but the bidders never met the reserve price, the highest offer having been 5.7 million. In our view, there was nothing sinister therefore with the Bank proceeding by way of private treaty. The irregularities complained of which arose in the cause of the sale should be equated to irregularities arising at a public auction. As stated in the Amadiva case (supra), if the sale was improper, or caused prejudice to the mortgagor, then in our view, the recourse lay in damages and not in cancellation of the Title Deed. In any event, even if the Court was minded to cancel the 3rd respondent's Title Deed, then it should have been restored to the position before the sale, and not revert it to the 1st respondent who had not cleared the loan with the Bank.

    ii. 56. As stated earlier, we hold the view that the conduct of the 3rd respondent was not that of a diligent bona fide purchaser as described in Katende v. Haridar & Company Limited (supra) and we agree with the learned Judge's finding that the dealings in the suit property by both the 2nd and 3rd respondent were marred with irregularities. Nonetheless, having found that the statutory notice was proper, and in view of the provisions of section 52 ITPA (repealed) and

section 69B TPA cited above, we allow the appeal as consolidated and set aside the impugned judgment. In its place we order that the Title Deed issued to the 1st respondent be cancelled. The property to revert to the 3rd Respondent, with the 1st respondent being at liberty to sue for damages."

58. This means where the sale is clearly irregular, the title to the purchaser cant be impeached. This is compounded by the fact that though the Applicant protests non service of the statutory notice and the 40-days notice by the auctioneer, the evidence on record point elsewhere.

59. In the case of Mbuthia v Jimba Credit Finance Corporation & another [1988] eKLR, the court of Appeal posted as doth: -

    i. "That injunction, resulted in keeping a mortgagor whose equity of redemption has been extinguished, in beneficial enjoyment of the property for 2 solid years. Now that the law on which the mortgagor took his stand has been found to provide him no assistance, it is said the injunction must be re-imposed to keep the purchaser out of enjoyment for probably another 2 years so that a defaulting mortgagor may be able "to defend himself in order to see that the sale is at a true market value."

    ii. Although I may be entirely wrong on this, I cannot believe that a Court of Equity would treat its darling, as a bona fide purchaser for value is sometimes called, in that manner. The equitable and beneficent remedy of injunction is said to be a double-edged sword. It is often used to aid rights and to prevent wrongs. It may also be used, albeit unwittingly, as a vehicle of oppression. A reimposition of injunction, at this stage and on the known facts of this case, would be to use this equitable remedy in the latter manner."

        a. A bonafide purchaser for value is therefore a darling of equity. Like all darlings such a purchaser is queen. The queen has his way. The queen gets their land

60. The application thus lacks merit and is accordingly dismissed with costs of 25,000/=. The same shall be paid at the end of the case.

Determination

61. The end result is that I make the following orders: -

    a. The application dated 27/2/2023 is dismissed with costs of Ksh. 25,000/= payable at the end of the case.

    b. Interim orders hitherto issued are vacated forthwith.

    c. The parties to fix the case for pretrial directions.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 19TH DAY OF SEPTEMBER 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Abdalla Busaidy for the defendant

Ms Sizia for the Applicant

Court Assistant - Brian