



Nairobi Upperhill Hotel Limited v Keysian Auctioneers & another (Commercial Case E330 of 2023) [2023] KEHC 22170 (KLR) (Commercial and Tax) (15 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22170 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E330 OF 2023
DAS MAJANJA, J
SEPTEMBER 15, 2023**

BETWEEN

NAIROBI UPPERHILL HOTEL LIMITED PLAINTIFF

AND

KEYSIAN AUCTIONEERS 1ST DEFENDANT

NATIONAL BANK OF KENYA LIMITED 2ND DEFENDANT

RULING

1. The plaintiff, in the notice of motion dated July 26, 2023 made, *inter alia*, under order 40 rule 1 of the *Civil Procedure Rules*, seeks an injunction to restrain the 2nd defendant ("the bank") from exercising its statutory power of sale in respect of LR No 209/12544 - Upper Hill, Nairobi ("the suit property") by sale by public auction.
2. The parties have filed depositions in support of and in opposition to application. Their respective advocates have made brief oral submissions. I have considered them and take the following view of the matter.
3. It is not in dispute that the plaintiff is not the registered proprietor of the suit property. It is owned by Geoffrey Wahome Muotia who has filed another suit; HCOMM No E193 of 2023, Geoffrey Muotia v National Bank of Kenya seeking an injunction restraining the bank from exercising its statutory power of sale. I dismissed the application for injunction on June 30, 2023.
4. I agree with counsel for the bank that the plaintiff, qua borrower, does not have any standing to agitate this suit in respect of a property in which it lacks a proprietary interest. This was explained by the Court of Appeal in *Venture Capital & Credit Ltd v Consolidated Bank of Kenya Ltd* [2004] 1 EA 357 where it held that, "where the suit property does not belong to the applicant, and the owner is not a party to



the suit and has not challenged the intended exercise of the statutory power of sale by the bank, the applicant has not shown that if the injunction is not granted, the appeal, if successful will be rendered nugatory so that even if the suit property is sold, the applicant will not lose any proprietary right to the property and in the circumstances, if the appeal succeeds damages would be the only relief appropriate to the applicant if it is not said that the respondent's bank has no means to pay compensation that may be ordered." (see also Nairobi *Mamba Village v National Bank of Kenya* [2002] 1 EA 197).

5. I have already dealt with the issues raised by the plaintiff in respect of the process leading upto sale of the suit property in the ruling delivered in HCOMM No E193 of 2023. In that ruling, I held the bank was entitled to exercise its statutory power of sale whereupon I dismissed the chargor's application. As to the plaintiff's complaint that there are errors in the description of the suit property I hold that since the suit property will be re-advertised again, the errors will be corrected.
6. The plaintiff did not comply with the terms of the ex-parte injunction granted in the first instance. In view of the inconvenience and costs occasioned to the defendants by these proceedings, it is ordered to pay costs of the aborted sale.
7. I dismiss the plaintiff's application dated July 26, 2023. The plaintiff shall pay the defendants' costs assessed at Kshs 300,000.00. The costs shall be paid within 14 days in default of which they are at liberty to execute.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF SEPTEMBER 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Genda instructed by Genga and Associates Advocates for the Plaintiff

Mr Mutua was instructed by G. Mutua Molo and Company Advocates for the Defendants.

