



**Watunu v NCBA Bank Kenya PLC & another (Commercial Case E249 of 2023)  
[2023] KEHC 22031 (KLR) (Commercial and Tax) (5 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22031 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E249 OF 2023  
DAS MAJANJA, J  
SEPTEMBER 5, 2023**

**BETWEEN**

**DANSON NJUGUNA WATUNU ..... PLAINTIFF**

**AND**

**NCBA BANK KENYA PLC ..... 1<sup>ST</sup> DEFENDANT**

**PURPLE ROYAL AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Sometime in 2019, the Plaintiff sought and obtained a loan facility of Kshs 7,779,000.00 from the 1<sup>st</sup> Defendant ('the Bank') on the terms of the Letter of Offer dated July 12, 2019 and secured by legal Charges over the properties Kajiado/Kaputei North/62328, Ruiru East/Juja East Block2/9362, Ruiru East/Juja East Block2/29708 and lastly LR No 20301/11 ('the suit properties'). Subsequently and under the Letter of Offer dated April 24, 2020, the Plaintiff took up additional facilities amounting to Kshs 16,000,000.00 secured by Charges over the suit properties.
2. The Plaintiff fell into arrears in repaying the facilities and the Bank exercised its statutory power of sale by selling suit properties Ruiru East/Juja East Block 2/9362 for Kshs 2,250,000.00 on December 16, 2021 and Ruiru East/Juja East Block 2/29708 for Kshs 700,000.00 on June 21, 2022. By the Plaint dated June 5, 2023, the Plaintiff filed this suit claiming that the aforementioned properties were sold at an undervalue and that he was never given any valuation report for Kajiado/Kaputei North/62328. The Plaintiff further avers that he is not aware of the purchase price for Ruiru East/Juja East Block2/29708 and how much went to the principal loan balance. He contends that the true market price is Kshs 950,000.00 and the forced sale value is Kshs 712,500.00. Further and as regards Ruiru East/Juja East Block2/9362, its true market price is Kshs 5,500,000.00 while its forced sale value is Kshs 4,125,000.00.



3. The Plaintiff also claims that recently, the Bank served him with a notice of sale by auction of property LR 20301/11 stating the amount owing to the Bank is Kshs 16,667,831.74 as at May 2, 2023 indicating the property was to be sold by public auction on June 7, 2023. That the Bank has valued the property at Kshs 15,000,000.00 which is incorrect as its true value is Kshs 28,000,000.00 while the forced sale value is Kshs 21,000,000.00 and not the amount contended by the Bank.
4. The Plaintiff avers that all the three suit properties that have been sold were undervalued but the loan still stands at Kshs 16,667,837.74. The Plaintiff contends that the Defendants have failed to conduct proper forced valuation and have instead undervalued the suit properties to his detriment and contrary to the laws. The Plaintiff is therefore apprehensive that the Defendants shall sell the property LR 20301/11 at the current undervalued amount.
5. Based on the aforesaid allegations in the Plaint, the Plaintiff has filed the Notice of Motion dated June 5, 2023 under, inter alia, Order 40 Rule 1 of the Civil Procedure Rules seeking the following orders:
  1. Spent\*
  2. Spent\*
  3. That the Honourable Court be pleased to order the Respondents, their agents, servants or persons acting from their authority be restrained from repossessing/auctioning/interfering with the subject property being LR No 20301/11 pending the hearing and determination of this Suit.
  4. That the Honourable Court be pleased to order the 1<sup>st</sup> Respondent to provide the current and updated statement of the loan account and all documentation of the previous sale of the charged properties pertaining to the loan
  5. That the court order an independent valuation of the suit property be conducted by a registered valuer jointly appointed by the parties or by the Honorable Court pending the hearing and final determination of the main suit.
  6. That the cost of this Application be in the suit
6. The application is supported by the facts on its face and the supporting affidavit sworn by the Plaintiff on June 5, 2023. It is opposed by the Bank through the replying affidavit of its Principal Legal Counsel, Stephen Atenya, sworn on June 23, 2023. The Bank has also supplemented its arguments by filing written submissions.
7. In opposition to and in response to the Plaintiff's case I have summarised above, the Defendants contend that they have complied with law in the exercise of the Bank's statutory power of sale. The Bank states that the sale of the suit properties; Ruiru East/Juja East Block 2/29708 and Ruiru East/Juja East Block 2/9362 was guided by a valuation report dated October 22, 2021. It denies that the suit property Kajiado/Kaputei North/62328 has been sold.
8. The Bank contends that from those sales, even assuming no other costs were deducted, the Bank could only have cumulatively recovered Kshs 2,950,000.00 and there would still be need to sell the fourth property, LR No 20301/11, to satisfy the shortfall. That assuming the Plaintiff's values were to be relied on, the sale of the suit properties at the forced sale values fronted by the Plaintiff would only have fetched Kshs 4,837,500.00 meaning the sale of LR No 20301/11 is inevitable unless the Plaintiff cleared the balance, which has not done so to date.



9. The Bank states that a dispute on value of the three properties sold in 2021, should not be a basis for stopping the yet to be conducted sale of the fourth property LR No 20301/11 which the Bank has instructed an ex-facie qualified professional to value. That the valuation report dated April 20, 2023 has been shared with the Plaintiff and that there is no reason for the Bank or the Plaintiff to doubt the valuation. Further, a difference in opinion as to the values, is not a ground for stopping a sale that is otherwise being conducted in accordance with the law. The Bank submits that at any rate, the difference in the values is a mathematical exercise which will be easily concluded after the trial and as such the Plaintiff can be compensated by way of damages. That therefore, it is not an irreparable injury for which an injunction should be granted.
10. As regards the statements of account sought, the Bank avers that the Plaintiff has never requested for them and therefore the court's intervention is premature. In any event, the Bank states that it has provided the statements and an order should not be issued.

### **Analysis and Determination**

11. The court is being called upon to determine whether the Plaintiff has made out a case for an injunction the Bank from exercising its statutory power of sale in respect of the suit property being LR No 20301/11, whether the Bank should provide an updated statement of account and all documentation of the previous sale of the suit properties and whether an independent valuation of the suit property LR No 20301/11 should be conducted by a registered valuer jointly appointed by the parties or by the Court.
12. The conditions the Plaintiff must fulfil were settled in *Giella v Cassman Brown & Co Ltd [1973] EA 358*. First, the applicant must show a prima facie case with a probability of success. Second, 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 and third, if the Court is in doubt, it will decide an application on the balance of convenience. In *Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No 77 of 2012 [2014] eKLR* the Court of Appeal clarified that the three conditions are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. 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, then the court will consider the other conditions. As to what constitutes a prima facie case, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 Others [2003] eKLR* explained as follows:

'A prima facie case in a civil application includes but is not confined to a 'genuine and arguable case.' It is a case 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 as to call for an explanation or rebuttal from the latter.
13. The gist of the Plaintiff's case is that three of the suit properties were sold at an undervalue and he is apprehensive that the fourth property, LR No 20301/11 has also been undervalued and is likely to be sold as such. Section 97 of the *Land Act, 2012* imposes on a chargee, in this case the Bank, a duty of care to the chargor, in this case the Plaintiff, to obtain the best price reasonably obtainable at the time of sale and in that regard, it is required to ensure a forced sale valuation is obtained.
14. The Bank commissioned valuation of the suit properties and they were valued by Landmark Realtors Limited and a valuation report dated October 22, 2021 produced for properties Ruiru East/Juja East Block 2/9632 and 29708 which placed their forced sale values at Kshs 2,250,000.00 and Kshs 600,000.00 respectively. The property LR No 20301/11 was valued by Dansal & Associates Limited



and a valuation report dated April 20, 2023 produced indicating its forced sale value at Kshs 15,000,000.00. The Plaintiff has also commissioned and produced valuation reports dated 06.01.2023 for suit properties Ruiru East/Juja East Block 2/29708 and 9362 by ProLand Realtors Limited which indicate forced sale values of Kshs 950,000.00 and Kshs 4,125,000.00 respectively.

15. It is evident that the two reports by the two different valuers give different valuations for the same properties. The valuation of property is based on professional and expert opinion of a duly qualified valuer based on certain set objective criteria and standards hence a valuation cannot be disregarded merely because there is a difference in professional opinion. I therefore agree with the Bank that a difference or dispute in valuation is not sufficient to stop a chargee from exercising its statutory right of sale especially when damages would be an adequate remedy.
16. It is common ground that the Bank has sold two properties. In the event the Plaintiff is aggrieved by the value placed by the Bank on those properties resulting in an undersale, the Plaintiff is at liberty to seek damages which is the statutory remedy provided for in section 99 of the Land Act, 2012. It cannot be a ground for restraining the sale of the subsequent property on the same ground.
17. As regards the proposed sale the property LR No 20301/11, there is no dispute that the Bank's statutory power of sale has arisen. The Plaintiff does dispute that it is indebted to the Bank and is in arrears and in breach of his obligations under the respective Legal Charges. The Plaintiff does not also deny that he has received the statutory notices from the Defendants. Even if he was to ultimately prove that the said property would be sold at an under-value, that would not be a sufficient reason to warrant the grant of an interlocutory injunction as he has not contended that the Bank is unable to compensate him for any undervalue of the suit properties (see Omega Foundation v Chase Bank of Kenya KSM HCCC No 69 of 2018 [2018] eKLR). The Plaintiff has not made a case for an injunction as its claim can clearly be remedied by an award of appropriate damages. This prayer therefore fails.
18. Turning to the question whether the court should order an independent valuation of the suit properties, I hold that the duty to value the charged property is put on the chargee. In the event the suit property is sold at an undervalue, the Bank bears full liability for compensating the chargee. There is no reason for the court to interpose the Bank's duty to obtain a valuation in accordance with the law. In this case, the Bank has commissioned the valuations hence a further or independent valuation is not necessary. This prayer also fails.
19. The Plaintiff has also sought an updated statement of account which has since been produced by the Bank as part of its deposition. As regards the prayer for documents pertaining to sale of the 'suit property', the Plaintiff does not state which of the suit properties he is referring to as the Bank has annexed a Certificate of Sale dated June 21, 2022 for suit property Ruiru East/ Juja East Block 2/29708. However, I would presume he is referring to property LR No 20301/11 which the Bank has denied selling but which it desires to sell as the Plaintiff remains indebted to it.

### **Disposition**

20. The Plaintiff's application dated June 5, 2023 is dismissed. The Plaintiff shall pay the Defendants costs of the application.

**DATED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**D. S. MAJANJA**

**JUDGE**

Ms Akinyi instructed by Kinyua Mbaabu and Company Advocates for the Plaintiff.



Mr Kongere instructed by Muriu Mungai and Company Advocates LLP for the Defendants.

