



REPUBLIC OF KENYA



**Maina & another v Equity Bank Limited & 2 others (Commercial Case E324 of 2023)
[2023] KEHC 23538 (KLR) (Commercial and Tax) (13 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23538 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E324 OF 2023
DAS MAJANJA, J
OCTOBER 13, 2023**

BETWEEN

**FLORENCE WAITHERERO MAINA 1ST PLAINTIFF
PATRICK GITHINJI NDICHU 2ND PLAINTIFF**

AND

**EQUITY BANK LIMITED 1ST DEFENDANT
ROBERT WAWERU MAINA T/A ANTIQUE AUCTIONS 2ND DEFENDANT
ATHI RIVER SHALOM COMMUNITY HOSPITAL LIMITED 3RD
DEFENDANT**

RULING

1. The plaintiffs are the registered proprietors of L.R No. 13868/11, IR No. 120297 situated in Karen Plains within Nairobi County (“the suit property”). On diverse dates between the years 2011 and 2016, Solex Building Contractors Limited (“the Borrower”) was advanced various banking facilities by the 1st defendant (“the Bank”) which facilities were secured by a First Charge, Further Charge, Second Further Charge over the suit property and Personal Deeds of Guarantee and Indemnity by the plaintiffs. When the Borrower’s loan accounts fell into arrears, the Bank decided to exercise its statutory power of sale. On October 12, 2022, it sold the suit property to the 3rd defendant (“the Purchaser”) by way of a public auction for a sum of Kshs. 58,000,000.00.
2. By a plaint dated July 24, 2023, the plaintiffs filed this suit claiming that the suit property was sold to the Purchaser at an undervalue and that the valuation report dated May 28, 2022 that placed the reserve price of the suit property at Kshs. 57,750,000.00 was prepared with an intention of grossly undervaluing the suit property and selling it clandestinely to the Purchaser without the knowledge



and involvement of the plaintiffs. That the valuation report dated September 12, 2022 prepared on instructions of the plaintiffs returned a forced sale value of Kshs. 70,000,000.00 and that the offer of Kshs. 58,000,000.00 and other offers of less than Kshs 80,000,000.00 were previously rejected in the past by the Bank and the plaintiffs.

3. For these reasons, the plaintiffs urge that the sale of the suit property was fraudulent and illegal in that no auction took place at the advertised venue on the October 12, 2022, the conditions of sale set out in the advert dated October 11, 2022 required the successful bidder to pay a Deposit of 25% at the fall of the hammer but the Purchaser only deposited 10% 5 days after the purported auction, the suit property was undervalued to secure the illegal predetermined sale and that no bid numbers were issued which is a clear manifestation that the purported bidders were ineligible to participate in the auction.
4. The plaintiffs go further to state that the purported “highest bidder” did not comply with the set out conditions of sale. That it did not pay the balance of the purchase price within 90 days contrary to the law and the conditions of sale and that since there was no auction as deemed by the law, whatever transpired on October 12, 2022 was not a public auction but a fraudulent process incapable of conferring any title or proprietary right to the Purchaser. The plaintiffs claim that there was no lawful criteria through which the Purchaser was identified or sourced as the higher bidder and that the Auctioneers Rules on the sale by public auction were not complied with. Further, that section 97 (1) of the *Land Act* and Rule 11 (1) b (x) of the *Auctioneers Rules* were not complied with in that the value of the suit property and its reserve price was not entered into the notification of the sale. The plaintiffs further allege that the Stamp Duty on the sale is yet to be paid and that the Auctioneer and the Bank extended the completion period to the Purchaser thereby favouring the Purchaser. That there was clear collusion between the Purchaser and the Auctioneer and that the purchase price is so low and is evidence of fraud. The plaintiffs contend that the statutory power of sale was not a remedy available to the Bank as it had already applied for the remedy of entry into the suit premises and obtained an order for entry. That the two remedies cannot be exercised contemporaneously in view of section 90(3) (d) and (e) of the *Land Act*.
5. Based on the grounds advanced, the plaintiffs pray that the purported auction allegedly conducted on the October 12, 2022 be set aside and that an injunction do issue restraining the defendants from alienating, dealing or transferring or completing the transfer, in any manner whatsoever of the suit property. They urge that by law, the purported sale, which is in every respect fraudulent and illegal cannot extinguish the plaintiffs equity of redemption. That the suit property houses the plaintiffs’ matrimonial home and that they face the imminent threat of being evicted and rendered homeless based on the illegal and fraudulent sale. That if the suit property is sold and transferred to third parties, it will be taken out of their reach and shall expose them to further demands by the Bank to settle the amount which may remain outstanding loss and untold suffering.
6. The plaintiffs contend that the suit property is of unique character and in a peculiar location within Karen. That it is a crystallization of their sweat of many years of toil and is of great sentimental value to them and their family and impossible to replace in the event of a forced sale and cannot be adequately compensated by damages. In as much as they state that there are no previous proceedings between them and the Purchaser in respect of the sale of the suit property through the purported public auction on the October 12, 2022, the plaintiff and the 1st and 2nd defendants have however been in court proceedings, namely HCCC No. 37 of 2018 which is not in respect of the same matter.
7. Together with the Plaint, the plaintiffs have also filed a Notice of Motion dated July 24, 2023 made inter alia, under Orders 40 Rules 1(a), 2, 4 and 10 of the *Civil Procedure Rules* seeking an injunction to restrain the defendants from alienating, dealing or transferring or completing the transfer, in any manner whatsoever of the suit property. The application is grounded by the facts set out on its face



and the supporting affidavit of the 1st plaintiff sworn on July 24, 2023. It is opposed by the 1st and 2nd defendants through the replying affidavit of the Bank's Legal Manager, Kariuki King'ori sworn on August 9, 2023 and Grounds of Opposition of the same date. The Purchaser has also opposed the application through the replying affidavit of its director, Dr Fredrick Aila Onyango, sworn on August 17, 2023. The parties have also filed written submissions in support of their respective positions taken on the application.

8. The plaintiffs' case in the application is based on the facts I have already summarized above.
9. The Bank opposes the application and avers that the application is res sub judice HCCC No. 37 of 2018 and that the prayers sought are res judicata since the court in that case affirmed the Bank's right to exercise its power of sale. It avers that the plaintiffs remain indebted to the Bank even after the sale of the suit property as their debt at the time of the sale was Kshs. 122,492,907.60 which continues to grow while attracting interest and other charges.
10. According to the Bank, the valuation of suit property was conducted in a legal and transparent manner. It urges the Court to take Judicial Notice of the effect the Covid-19 pandemic on the economy and land prices in general as is evident from the four valuation reports conducted by the Bank prior to and after 2020. That the valuation conducted at the request of the plaintiffs quoting a forced sale value of Kshs. 70,000,000.00 is inexplicably exaggerated as there have been no new developments on the suit property to justify that sum. That the said valuation report dated September 12, 2022 was not shared with the Bank prior to the sale hence it is no bound by the contents thereof.
11. The Bank maintains that that the plaintiffs have failed meet the conditions for grant of an interlocutory injunction set out in *Giella v Cassman Brown* [1973] E.A 358 and that the application ought to be dismissed.
12. The Purchaser opposes the application and supports the position taken by the Bank. It points out that once the plaintiffs offered the suit property as security for the loan granted to the Borrower, it became a commodity for sale. Further, that the court has held in its previous rulings that the Bank's statutory power of sale is not impaired, that the issue of service of statutory notices and valuation had been raised and fully determined in previous rulings where the 1st and 2nd defendants were able to demonstrate that the Borrower had defaulted and the Bank had issued the requisite notices entitling it to exercise its statutory power of sale.
13. The Purchaser states that the auction conducted on October 12, 2022 was regular and was done following the crystallization of the Bank's right to exercise its statutory power of sale as chargee and a lawful advertisement was duly placed in the newspapers as admitted by the plaintiffs. That the Purchaser's managers, Mr. Jackton Onyango, attended the Public Auction conducted on October 12, 2022 and that the Purchaser fully paid a deposit being 10% of the amount of the purchase money as per the conditions of sale. That the Purchaser has successfully applied for and obtained a loan facility for purposes of financing the payment of the balance of the purchase price and which loan can only be disbursed upon the successful transfer and registration of the suit property to the Purchaser. That in the circumstances, and contrary to the allegations by the plaintiffs, the Purchaser has since obtained an extension to effect payment of the balance of the purchase price to the Bank upon registration of the transfer thereof. In view of the foregoing, the Purchaser avers that there was no fraud neither was the auction unlawful or illegal as alluded to by the plaintiffs.
14. The Purchaser states that even if this Court were to find, upon hearing of the case, that there were irregularities or impropriety in the sale by auction as alleged by the plaintiffs, monetary compensation by award of damages would be sufficient and reasonable remedy.



15. For these reasons, the defendants urge the court to dismiss the application with costs.

Analysis and Determination

16. Apart from the substance of the injunction, the defendants have raised the issue that the application and the suit are res sub judice and res judicata HCCC No. 37 of 2018 (“the previous suit”). I propose to deal with this issue first. The plaintiffs do not deny that they were involved in the previous suit with the 1st and 2nd defendants and that the plaintiffs sought an injunction against them to stop the sale of the suit property in a scheduled auction that was set to be held on August 28, 2019. The court in the previous suit declined this application through its ruling dated October 1, 2019. It was held that the plaintiffs did not dispute the arrears owed to the Bank and that the plaintiffs more than once wrote to the Bank making proposals for the repayment of the amount owed to the Bank. The issue also raised by the plaintiffs, that the suit property is of sentimental value to them, was deemed to not be a basis for granting the injunction as the plaintiffs offered their property as security for the loan granted to the Borrower and having done so, that property became a commodity for sale.
17. The plaintiffs are seeking a similar order for an injunction in this suit. The Court of Appeal, in *Uburu Highway Development Limited v Central Bank of Kenya & 2 others* NRB CA Civil Appeal No. 36 of 1996 [1996] eKLR held that,

“.....once an application for injunction within a suit has been heard and determined under the principles laid down in *Giella v. Cassman-Brown*, a similar application cannot be brought unless there are new facts, not brought before the court earlier after exercise of due diligence, which merit a re-hearing and possible departure from the previous ruling.”

The grounds the plaintiffs rely on in seeking the injunction in the present application include impugning the auction that was held on October 12, 2022 and the valuation report May 28, 2022 that was the basis of the sale of the suit property to the Purchaser. These are clearly new facts that were not present in the previous suit and were never heard or determined therein. This finding collapses any claim that the instant suit is res judicata the previous suit or indeed res subjudice.

18. What is clear though, is that the court cannot permit the plaintiffs to re-litigate the right to the Bank to exercise its statutory power of sale. That issue having been determined, constitutes an estoppel on record and the plaintiffs are debarred from re-litigating those issues that have been determined or launching a collateral attack on what has already been determined.
19. In order to succeed in an application for an interlocutory injunction, the plaintiffs must satisfy the conditions established in *Giella v Cassman Brown & Co. Ltd (supra)*. First, they must show a prima facie case with a probability of success. Second, they must establish that they will suffer irreparable injury, which would not adequately be compensated by an award of damages. 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. 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.



20. As stated, the plaintiffs mainly impugn the valuation of the suit property prior to the suit property's sale and they further impugn the subsequent auction held on October 12, 2022. I agree with the plaintiffs' submission that under section 97 of the Land Act the Bank, as a chargee, has a duty of care to the chargor, in this case the plaintiffs, 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.
21. It is not in dispute that on instructions of the Bank, Acumen Valuers Limited valued the suit property and prepared a valuation report dated 28.05.2022 placing the forced sale value at Kshs. 57,750,000.00. The plaintiffs, on their part, commissioned Acima Consult Limited which produced a valuation report dated 12.09.2022. It returned a forced sale value of Kshs. 70,000,000.00. It is evident that the two reports by different valuers give different valuations for the suit property and it is on this basis that the plaintiffs contend that the suit property was undervalued and therefore the subsequent sale was a nullity.
22. Valuation of property is based on professional and expert opinion of a duly qualified valuer hence a valuation cannot be disregarded merely because there is a difference in professional opinion. The courts have always held 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. Therefore, even if it is demonstrated that the suit property was undervalued, the plaintiffs bear the burden of proving that the Bank is incapable of compensating them (see Omega Foundation v Chase Bank of Kenya KSM HCCC No.69 of 2018 [2018] eKLR).
23. In this case, the plaintiffs do not contend that the valuer who undertook the valuation on the Bank's instructions was unqualified. Furthermore, the plaintiffs have not outlined any irrelevant factors considered by the valuers in undertaking the valuation. The Bank has also explained the reason for the drop in the price as being the Covid-19 pandemic. This court has previously taken judicial notice of how the pandemic impacted negatively on the economy, more so property market prices (See Cedarwood Hotels & Resorts Investment Company v Kenya Commercial Bank Limited & another 2022] KEHC 15000 (KLR). I therefore cannot dismiss the Bank's explanation as to why there was a difference in the valuation prices pre and post 2020.
24. From the material on record, I hold that the Bank complied with its statutory obligation by ensuring that a forced sale valuation of the suit property is undertaken by a valuer in accordance with the law. There is nothing from the record so far that suggests the valuation was a negation of the duty to obtain the best price reasonably obtainable at the time of sale. In any case, if the plaintiffs are able to demonstrate at trial that the Bank undervalued the suit property, such difference is finite and therefore the Bank can always be ordered to refund and/or compensate the plaintiffs. This ground therefore fails.
25. The other ground advanced by the plaintiffs is that the public auction that was conducted on October 12, 2022 was illegal and unprocedural. Bearing in mind that the issue whether the Bank had the right to sell the suit property has already been determined, the ground fails. Any proven irregularity in this instance can be ameliorated by an award of damages against 1st and 2nd defendants. This is because once the suit property had been knocked down and sold in a public auction by the Bank in exercise of its statutory power of sale, the plaintiffs' equity of redemption of the plaintiff was extinguished and since the suit property passed at that instance, the court cannot issue an injunction completing the process of sale and transfer (see Jacob Ochieng' Muganda v Housing Finance Company of Kenya Ltd, NRB CA No. NAI 453 of 2001 (UR 241/2001) and Bomet Beer Distributors Ltd & another v Kenya Commercial Bank Ltd & 4 others NKR HCCC No. 147 of 2004 [2005] eKLR).
26. I reject the plaintiffs' repeated argument that the suit property is sentimental to them and that losing it cannot be compensated by an award of damages because of its unique and peculiar nature. It appears



the plaintiffs are still in denial about what the court in told them in the suit about the suit property; that once they offered the suit property as security for the loan granted to the Borrower, it became a commodity for sale and damages are foreseeable. There is no property, however sentimental or peculiar, that is incapable of being valued and damages awarded for it.

27. Finally, the plaintiffs have always been in arrears. I reject the submission that they were always capable of repaying the debt but that the Bank clogged their right of redemption. The court in the previous suit found that the plaintiffs were served with the requisite notices which prompted them to write to the Bank and make proposals for the repayment of the debt to the Bank. Since they failed to make any payments, they cannot therefore blame the Bank for exercising its statutory power of sale.

Disposition

28. The plaintiffs' application dated July 24, 2023 is dismissed with costs to the defendants.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF OCTOBER 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

