



REPUBLIC OF KENYA



KENYA LAW
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**BWM Precast Housing Development Limited v Kingdom Bank Limited & another
(Civil Case E12 of 2021) [2022] KEHC 147 (KLR) (15 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 147 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL CASE E12 OF 2021
MW MUIGAI, J
FEBRUARY 15, 2022**

BETWEEN

BWM PRECAST HOUSING DEVELOPMENT LIMITED PLAINTIFF

AND

KINGDOM BANK LIMITED 1ST DEFENDANT

J.K. WANDERI AUCTIONEERS 2ND DEFENDANT

RULING

PLEADINGS

NOTICE OF MOTION DATED 11/06/2021

1. Spent
2. That pending the hearing and determination of this application interpartes and/or this suit, an injunction be issued restraining the defendants themselves, advocates, auctioneers, their agents, servants or any of them or otherwise from advertising of offering for sale, or purporting to sell or in any alienating, selling, transferring, charging, licensing or otherwise dealing with the land reference number 15324 (IR No. 54310) or otherwise howsoever dealing with the aforesaid property.
3. Costs of this application.
4. The application was/is based on the following grounds;
 - (1) At all material times the Plaintiff was/is a customer of the 1st Defendant Bank and is registered owner of the suit property LR 15324 (IR 54310). By letter of offer dated 5th April 2015, the 1st Defendant granted the Plaintiff Mortgage loan facility of USD 1,000,000 and also vide Supplementary letter issued and dated 22nd May 2015 which amended Collateral and



Conditions Precedent Clauses of the Letter of Offer. The loan facility was secured by the suit property LR 15324 (IR 54310) vide a Legal Charge.

- (2) The Plaintiff intended to construct housing units that comprised of 2, 3, & 4 bedroom units and commercial units which was hindered by lack of payments by Government of pending Invoices and the negative impact of the Corvid 19 pandemic on businesses across the world.
- (3) The Plaintiff confirmed receipt of the statutory notices; 40-day notice, 45 redemption notice by the 2nd Defendant and took issue with the Valuation of the suit property as required by Section 97 (2) of the Land Act which was highly undervalued.
- (4) The Plaintiff therefore sought the remedy of interim /temporary injunction to forestall the statutory power of sale by the 1st Defendant seeking restructure of the loan facility and/or the valuation of the suit property in compliance with Section 97(2) of Land Act.

PLAINTIFF'S SUBMISSIONS

5. It was stated that in the case of *Palmy Company limited –vs- consolidated bank of Kenya limited [2014] eKLR*;

“The purpose of a valuation under section 97 (2) of the Land Act is twofold. The first one is to obtain the best price reasonably obtainable at the time of the sale, thus protecting the right of the Chargor to property ... the second one is to prevent unscrupulous chargee from selling the charged property at a price which is peppercorn or not comparable to interests in land of the same character and quality.”

6. In the case of *Brade Gate Holdings Ltd & Another –vs- Jamii Bora Bank Limited [2018] eKLR*, it was decided that since there were two different valuations conducted by the parties and two different figures were gotten, valuation would be done afresh by an independent valuer or by valuers appointed by each of the parties to the suit.
7. The parties herein appointed a joint valuer, Tyson Limited who received joint instructions dated 29th June, 2021 from the Advocate of both parties involved to conduct valuation on the suit property. Upon valuation, they found the suit property had a Market Value of Kshs.265,000,000/- and a forced sale value of Kshs.210,000,000/-.
8. The Plaintiff submitted that the joint valuation report by Tyson limited should be the one relied on by the Court for the following reasons:-

- (1) The valuation report by the Government Valuers did not adhere to Section 97(2) of the Lands Act 2012 because it did not give the Forced sale Value of the suit property, the section states that:-

The case of *Zum Zum Investment Limited V Habib Bank Limited [2014] eKLR* states that:-

“Section 97(2) requires that a forced sale valuation be undertaken. The forced sale value, therefore, should be the guiding factor tot the Court in determining whether the intended selling price is an undervalue.”

By failing to give the forced sale value and only gave a value, the valuation report by the Government valuer cannot be relied on.



- (2) In the valuation report by Amazon Valuers, for the defendants, it is stated that no structural improvements were done on the suit property whereas there was a perimeter wall erected around the suit property. This is evidence in page 4 of the Amazon Valuer's Valuation Report.
 - (3) Furthermore, the valuation by the Government Valuers stated that the parcel of land was devoid of any permanent development at the time of inspection, however in the photos on page 7 shows the property having a perimeter wall. In the Tyson report on page 7 it is well captured that the property is secured by a high concrete wall. The Tysons valuation in assessing the value, the boundary wall was given a figure of 15,000,000/- and it is thus submitted that the valuation by the Government Valuer did not put into consideration the value of the perimeter wall.
9. The Court to rely on the Joint valuation report by Tyson Limited because the information on it is correct and it complies with Section 97 of the Land Act 2012.

RESPONDENT'S REPLYING AFFIDAVIT FILED ON 23RD JUNE 2021.

10. The 1st Defendant opposed the plaintiff's application for injunction on the following grounds;
- (1) The Plaintiff offered the suit property as security charged for the loan facility and on the basis of letters of offer and registered charged documents the 1st Defendant advanced the facility of USD 1,000,000 to the Plaintiff.
 - (2) The Plaintiff defaulted in loan repayments and several demand letters requests and reminders were sent to the Plaintiff urging regularization of the loan facility account. As at June 2021, the outstanding amount is USD 1,082,673.71 & Ksh 50,666.66.
 - (3) The 1st Defendant on 23rd July 2020 issued the statutory notices under Section 90 (1) (2) & (3) of Land Act and on 2nd December ,2020 statutory notice under Section 96 (2) & (3) of the Land Act and on 12th April 2021 the Redemption Notice by the 2nd Defendant.
 - (4) In compliance with Section 97(2) of the Land Act, the 1st Defendant instructed Amazon Valuers to undertake valuation of the suit property
 - (5) Title Number LR 15324 (IR 54310), open market value was/is Ksh 190,000,000/- and forced sale value Ksh 142,000,000/- The Valuation Report is of 30th March 2021.
 - (6) On 15th June 2021, the Court granted the Plaintiff reprieve by granting temporary injunction on condition the Plaintiff paid the 1st Defendant Ksh 10,000,000/- by 1pm same day in default the said orders would lapse.
 - (7) The Plaintiff contested under valuation of the suit property and subsequent valuations were conducted by parties on orders of the Court.
 - (8) The issue before Court is the Valuation to be relied on in carrying out the statutory power of sale.

RESPONDENT'S SUBMISSIONS

11. As rightly put, the crust of contention in the instance suit is on the different valuation reports that have been presented before the Court on the subject matter Title Number; 15324 (IR No. 54310) and which of the different valuation reports should the Court adopt and treat as admissible.
12. While the issues before this Court were largely on the default by the Plaintiff to repay a loan advanced to it by the 1st Defendant, the Plaintiff has admitted to owing the 1st Defendant the said monies.



13. That pursuant to Section 97(2) of the Land Act, the 1st Defendant is obligated before exercising the right to sale the charged property to ensure that a forced sale valuation is undertaken over all the charged property.
14. The first valuation of the property was conducted by Amazon Valuers on 30th March, 2021 over property Title Number, 15324 (IR No. 54310) and the findings was that the valuation of the property was Kshs.190,000,000/- while the forced sale value was Ksh.142,500,000/-. This valuation that conceived the Plaintiff's case.
15. On 28th June, 2021, when the matter came up before this Court for directions, the Plaintiff through its Advocates re-emphasized that the property had been undervalued and requested the court does issue an order for a joint valuation of the property and which valuation should be done and concluded before the scheduled sale. The said request was put on hold until 29th June, 2021 pending instructions from the defendants.
16. On the 29th June, 2021, by consent of both the Plaintiff and Defendant, the Court ordered for a joint valuation which was to be conducted by Tyson Limited. Of course, any of the parties, having entered into a consent is obligated to draw the draft consent for signing by the parties.
17. On 29th June, 2021, based on the recorded consent, the 1st Defendant, through its Advocates, drew the said consent, signed it, forwarded it to the Plaintiff's advocates who equally signed it and the same was sent out to Tyson Limited.
18. Tysons limited, as instructed went ahead and undertook the valuation of the property and concluded that the Market Value over property Title Number; 15324 (IR No. 54310) is Kshs.265,000,000.00 while the forced sale value is Kshs.210,000,000.00
19. When the matter came for mention before the Court on 28th July, 2021, parties confirmed that the joint valuation had been undertaken, however, the 1st Defendant was apprehensive that the valuation done by Tysons Limited had been overstated and requested that another valuer undertakes valuation of the property.
20. In fact, the defendant's advocate proposed that the property be valued by a Government Valuer, a proposal that the Plaintiff did not oppose on condition that the 1st Defendant undertakes the costs of the valuation.
21. By consent, the Court ordered that the property be valued by the Government Valuer to ascertain the Market and Forced value.
22. Based on the foregoing, the Deputy Registrar issued instructions to the Office of the Chief Registrar to undertake the valuation over the property Title Number; 15324 (IR No. 54310), which valuation was done at the cost of the 1st Defendant.
23. Vide a letter dated 30th August, 2021 the Director, land valuation wrote to the Deputy Registrar, Machakos Law Courts forwarding the valuation report at a market value of Kshs. 215,000,000.00.
24. That the Valuation done by Tyson Limited and the Government Valuer, was undertaken by consent.
25. The defendants being dissatisfied by the valuation, undertaken by Tysons limited, a private entity, requested that the Government Valuer, who is impartial to undertake the valuation. The request was not opposed by the Plaintiff. In fact, the Plaintiff gave one condition; that the 1st defendant undertakes to pay for the costs of the valuation.



26. A consent was further recorded before this court and between the parties and that the Courts have over and over again emphasized on the consequences of recording consents. The Plaintiff was well aware of the effects of the consent and had it had an issue with the valuation being undertaken by a Government Valuer, the Plaintiff ought to have opposed the request to have the property valued by a Government Valuer. The Plaintiff did not. The Plaintiff in fact agreed to the valuation and rubber stamped it by entering into a consent.
27. In *SNI v AOF [2020] eKLR*, with the authority of Harris JA in the case of *Frank Phipps & Pearl Phipps –vs- Harold Morrison SCCA 86* of 2008 stated:-

“As a general rule, an order obtained by the consent of the parties is binding. It remains valid and subsisting until set aside by fresh proceedings brought for that purpose. *Kinch v Walcott and Others [1929] A.C. 482* “The bringing of fresh proceedings would normally be guided on the obtaining of the consent order by fraud, mistake or misrepresentation.”

In the case of *Wildung v Sanderson (1897) 2 CL 534* the court of

“A consent judgment or order is meant to be the formal result and expression of an agreement already arrived at by the parties to the proceedings embodied in an order of the court. The fact of its being so expressed puts the parties in a different position from the position of those who have simply entered into an ordinary agreement. It’s of course, enforceable while it stands, and a party affected by it cannot if he concludes, he is entitled to relief, simply wait until it is sought to be enforced against him, and then raised by way of defence. The matters in respect of which he desires to be relieved. He must, when he has completed obey it, unless and until he can get it set aside in proceedings duly constituted for this purpose.”

28. That the Plaintiff has disputed the Government Valuers Report’s claiming that the same does not meet the standards under Section 97 of the Land Act, 2021. In its submissions, the Plaintiff suggests that the Government Valuer did not state the forced marked value of the property.

Section 97(3) of the Land Act provides;

If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and are being sold in the open market-

- (a) There shall be a rebuttable presumption that the chargee is in breach of the duty imposed by subsection (1); and
 - (b) The chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the chargee at an undervalue being less than twenty –five per centum below the market value shall not be taken to mean that the chargee has complied with the duty imposed by subsection (1).
29. To assist the Plaintiff, who has otherwise chosen to play ignorance, paragraph 3 of the Government valuers report loosely interpreted is that if that if the market price is Kshs. 215,000,000.00, then the forced sale value cannot be anything below 75% of the said market price. This is to say, that the forced value cannot be anything before Kshs.161,250,000.00.

DETERMINATION

30. The Court has considered the pleadings and submissions by Learned Counsel on behalf of the parties. The issues that emerge for determination are;



- a) Should temporary injunction be granted in the circumstances of the case?
- b) If the statutory power sale is to be conducted, then which of the Valuation Reports should be relied on?

Should temporary injunction be granted in the circumstances of the case?

31. Order 40(1) (a) and (b) of the [Civil Procedure Rules 2010](#) provides:

“Where in any suit it is proved by affidavit or otherwise—

- (a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

32. In *Giella –versus- Cassman Brown & Company Limited (1973) E A 358*, the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction:

“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.”

33. The test for granting of an interlocutory injunction was also considered in the *American Cyanamid Co. –versus- Ethicom Limited(1975) A AER 504* where three elements were noted to be of great importance namely:

- i. There must be a serious/fair issue to be tried,
- ii. Damages are not an adequate remedy, and
- iii. The balance of convenience lies in favour of granting or refusing the application.”

34. The Court of Appeal in *Mrao Ltd versus First American Bank of Kenya & 2 others [2003] KLR 125* defined an arguable case as; -

“A genuine and arguable case a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

35. The Plaintiff is the legal and legitimate owner of the suit property, Title Number LR 15324 (IR 54310) and willingly offered the suit property as security of Loan facility advanced by the 1st Defendant bank of USD1,000,000/-. The Plaintiff and 1st Defendant duly executed letter of offer dated 5th April 2015,



and Supplementary letter issued and dated 22nd May 2015 which amended Collateral and Conditions Precedent Clauses of the Letter of Offer. The Legal Charge was executed by parties and registered over the suit property. Both parties' were/are bound by rights and obligations under these Contracts.

36. The Plaintiff/Applicant and/or Borrower serviced the facilities as shown by the annexed Statements of Account housed at Pg 41-46 of the Respondent's Replying Affidavit of 23rd June 2021 and marked JK-3. The Plaintiff serviced the loan facility consistently from 2015 -2017 and thereafter defaulted until the Plaintiff and made payment on 15th July 2019, and thereafter intermittently upto 18th May 2020.
37. The 1st Defendant by registered post served the statutory demand under Section 90 (1) (2) & (3) Land Act on 23rd July 2020, for 90 days. Marked JK-4. The 1st Defendant referred to approved application for restructuring the Loan Facility which the plaintiff defaulted on. The outstanding debt was/is USD 996,654 and arrears of USD 45,775.95.
38. The 1st Defendant by registered post served the statutory demand under Section 96 (2) (3) (c) Land Act on of 2nd December, 2020, for 40 days
39. The 2nd Defendant served the Redemption Notice under Rule 15b of Auctioneers Rules 1997 of 2nd December, 2020, for 45 days marked JK-5. Despite the Statutory Notices and demands for the outstanding amount USD 1,056,808.54, the amount remains unpaid. The Plaintiff did not contest receipt of statutory notices.
40. In *ELC 559 of 2017 Thika – Geoffrey Kinuthia Mungai & Anor vs Progressive Credit Ltd* where the Court relied on *Nguruman Ltd vs Jan Bonde Nielson & 2 Others C.A.77 of 2012*;

“We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see it is that on the face of it, the person applying for an injunction has a right which has been violated or is, threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima-facie case. The Applicant need not establish title; it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima-facie case in on a balance or, otherwise put, on a preponderance of probabilities.”

41. This Court finds that the Plaintiff entered into Contract/Agreement with 1st Defendant for loan facility, serviced the loan facility for 3years and thereafter defaulted. The 1st Defendant granted restructuring of the repayment of loan facility and the Plaintiff defaulted the restructured loan facility repayments. The Plaintiff was served and received the requisite statutory notices and failed to redeem the facility and security, suit property charged with the 1st Defendant bank.
42. The Plaintiff attributed default to non-payment by Government of pending Invoices and the negative impact of the Corvid 19 pandemic on businesses across the world.
43. The non-payment of invoices by Government was not a condition precedent to servicing of the loan, the Plaintiff serviced the loan facility from 2015-2017. Whereas, the Court judicially notices that the Corvid 19 by national lockdowns and curfews that brought operations to an abrupt halt and hence had adverse impact on social and economic processes and/or circumstances, this Court finds that the Statement of Accounts confirm the Plaintiff's default as at 2017, way before the onset of Corvid 19 pandemic in March 2020. Secondly, the 1st Defendant gave the Plaintiff reprieve by granting restructure of the loan facility repayment and the Plaintiff defaulted.



44. On 15th June 2021, the Plaintiff approached the Court for grant of interim injunction, the Court granted the Plaintiff reprieve by granting temporary injunction on condition the Plaintiff paid the 1st Defendant Ksh. 10,000,000/- by 1pm same day in default the said orders would lapse. There is no evidence that the Plaintiff made effort to pay any part of the amount or full amount thereafter or any amount to date so as the Court would exercise judicial discretion in the Plaintiff's favor. From the above, the Court finds that the Plaintiff's rights are not violated or threatened with violation, a prima facie case is not established to warrant grant of interim/temporary injunction. This position is fortified by the case of;

44. *Habib Bank A. C. Zurich –vs- Pop in Kenya Limited and Others* [1995] eKLR, where it held;

“...in the ultimate analysis this is a suit brought by chargors to restrain a charge from exercising its statutory power of sale under the charges executed by them as security for money advanced to them and receipt of which they have unequivocally acknowledged. Default is not denied. Service of statutory notice is admitted. I have always understood the law to be that a court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage.”

(b)If the statutory power sale is to be conducted, then which of the Valuation Reports should be relied on?

45. The Plaintiff contested the Valuation of the suit property Title Number LR 15324 (IR 54310) by 1st Defendant through Amazon Valuers on grounds it was under valuation and not in compliance with Section 97 of Land Act.

46. The Plaintiff relied on *Palmy Company Limited –vs- Consolidated Bank of Kenya Limited* supra that prescribes that valuation is mandated by Section 97 (2) of Land Act to obtain the best price and protect the Chargor's right to the property at the time of sale.

47. The Plaintiff also relied on the case of *Brade Gate Holdings Ltd & Another –vs- Jamii Bora Bank Limited* supra, where valuation is contested then it would be conducted afresh by an independent valuer or by valuers appointed by each of the parties to the suit.

48. It is the Plaintiff's assertion that after raising issue with under valuation of the suit property with regard to the Report by Amazon Valuers, by Consent in Court, the parties herein appointed a joint valuer, Tyson Limited who received joint instructions dated 29th June, 2021 from the Advocates of both parties involved to conduct valuation on the suit property. Upon valuation, they found the suit property had a Market Value of Kshs.265,000,000/- and a Forced Sale value of Kshs.210,000,000/-. This Report according to the Plaintiff, should be relied on in conduct of the auction of the suit property.

49. The Respondent submitted that the Valuation Report that should be relied on in the exercise of statutory power of sale should be as follows;

(i) After, the Plaintiff refused reliance on the Amazon Valuers, the Plaintiff presented by Origin Valuers dated 18th May 2021 that gave the suit property market value at Ksh 275,000,000/-.

(ii) On 29th June 2021, the Plaintiff and Defendant reached by Consent a joint Valuation and agreed to the valuation to be conducted by Tysons Limited. The Consent is attached to



Defendant's bundle signed by Karanu Kanai & Co Advocates for the Plaintiff and Nyaanga & Mugisha Advocates for the Defendant. The market value was/is Ksh 265,000,000 and Forced Sale value at Ksh 210,000,000/

- (iii) On 28th July 2021, the 1st Defendant was apprehensive that the valuation by Tysons Limited was overstated and requested valuation by Government Valuer. By Consent, the Court ordered the valuation by Government Valuer to ascertain market and forced sale value.
 - (iv) On 30th August, 2021, the Director, Government Land Valuer presented the Report and valued the suit property at Ksh 215,000,000 as per letter of 30th August, 2021 and Valuation Report of 17th August 2021.
50. The Respondent indicated that the Chief Government valuer's letter of 30th August 2021 stated in part as follows;
- “We would like to clarify that the reserve price value of the subject property should not be less than 75% of the market value above.”
51. The Respondent sought reliance on the Government Valuer Report as per parties' consent while the plaintiff sought reliance on Tysons Limited Report.
52. The Court recognizes the parties' right to pursue compliance of Section 97 of Lands Act in the manner provided as follows;
- Rule 10 of Auctioneers' Rules 1997 provides as follows;
10. Independent valuation of goods attached
- A debtor may, at any time before the property seized or repossessed is sold, apply to a court for an order that the property be valued by an independent valuer.
53. The parties' through learned counsel pursued valuation of the suit property Title Number LR 15324 (IR 54310) and secured 4 separate Valuation reports. The Report by Amazon Valuers by 1st Defendant was opposed by the Plaintiff on alleged under valuation. The Plaintiff's Valuation Report by Origin Valuers was opposed the 1st Defendant for alleged over valuation.
54. By Consent of Parties' through respective Counsel parties' agreed on joint valuation by Tysons Limited whose market value was/is at Ksh 265,000,000/- and forced sale value at Ksh 210,000,000/-.

Consents have been long settled in Kenya by the Court of Appeal in *Flora N. Wasike vs Destino Wamboko (1988) eKLR*, thus;

“...if a consent order is to be set aside, it can only be set aside on grounds which would justify setting of a contract entered into with knowledge of the material matters by legally competent persons...”

In *Samson Munikah Practising as Munikah & Company Advocates vs Wedubeh Estates Limited (2007) eKLR*, Court of Appeal held;

“having considered the background to this matter and especially the long Affidavit of Mr. Munika, together with its annexures we are unable to say that the consent was freely entered into. Indeed, we find that the consent was tainted with illegality, undue influence and the whole transaction as against public policy as the Respondent and its legal advisers wanted to use the court process to achieve



what was illegal. We are of the view that had the learned judge considered all these other aspects of the consent judgment he would have reached a different decision”.

55. In the case of *Hirani vs Hirani 1952 19 EACA* which held a consent contrary to public policy of the Court can be set aside.
56. Applying the above standards to determine a valid Consent or a Consent that should be set aside, the Consent of 29th June 2021 was duly executed by parties through learned Counsel on record. Parties agreed to independent valuation of the suit property Title Number LR 15324 (IR 54310) by Tysons Limited, a renowned professional valuer estate and managing agents firm and the Valuation Report was presented to parties and the Court. No aspersions were cast on the conduct or process of valuation or non-independence or misconduct of the personnel involved in the valuation process.
57. In *Zum Zum Investment Limited versus Habib Bank Limited [2014] eKLR* the court held; -
“It is not sufficient for the Plaintiff to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The Plaintiff must satisfactorily demonstrate why the valuation report that the Defendant intends to rely on in disposing of the suit property does not give the best price obtainable at the material time.”
58. In *Central Kenya Ltd versus Trust Bank Limited & 4 others [1996] eKLR* the court observed; -
“The appellant has made vague and very general allegations of fraud against the respondents. Fraud and conspiracy to defraud are very serious allegations. The onus of prima face proof was much heavier on the appellant in this case than in an ordinary civil case.”
59. This Court is guided by the principles outlined by the case-law above on valid and legal grounds to impugn a valuation report.
The only reason, the 1st Defendant gave is that the suit property was overvalued. Hence sought another valuation by the Government Valuer whose Report gave the market value of the suit property as Ksh 215,000,000/- and did not state the forced sale value save for stating it ought to be ‘the reserve price value of the subject property should not be less than 75% of the market value above’ but did not provide figures.
60. Section 97 of Lands Act mandates that ;
(2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.
(3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market—
(a) there shall be a rebuttable presumption that the chargee is in breach of the duty imposed by subsection (1); and
61. The Valuation Report by the Government Valuer is not in compliance with Section 97 (2) of the Act; it only determines the market value of the suit property at Ksh 215,000,000/- but did not state the Forced sale value of the suit property. Any calculations made thereafter even if correct cannot be adopted by this Court as it is not the figure indicated by the Valuer as required by Section 97 (2) of Land Act.



62. 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.
63. The Report is in compliance with Rule 10 of *Auctioneers' Rules 1997*, valuation by independent Valuer, Section 97 (1) of Lands Act as follows;
- A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.
64. The Valuation by Tysons Limited fulfils the Chargor's duty to the Chargee to obtain the best price reasonably obtainable at the time of sale. It is appreciated that land continues to appreciate in value and hence subsequent and future valuations are normally bound to increase value of land except in certain special circumstances.

DISPOSITION

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 L.R. 15324.

DELIVERED SIGNED & DATED IN OPEN COURT ON 15TH FEBRUARY 2022 (VIDEO CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MS OMARI H/B MR MUGISHA FOR THE DEFENDANT

GEOFFREY – COURT ASSISTANT

