



REPUBLIC OF KENYA



**Sharma & 3 others v Kenya Commercial Bank Limited & another (Civil Suit 362 of 2014)
[2024] KEHC 12556 (KLR) (Commercial and Tax) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12556 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 362 OF 2014
PM MULWA, J
OCTOBER 17, 2024**

BETWEEN

**NAVEEN PRAKASH SHARMA 1ST PLAINTIFF
JITENDRA CHOTABHAI PATEL 2ND PLAINTIFF
REX DEVELOPERS LIMITED 3RD PLAINTIFF
AVIASPEN KENYA LIMITED 4TH PLAINTIFF**

AND

**KENYA COMMERCIAL BANK LIMITED 1ST DEFENDANT
SPENCON KENYA LIMITED 2ND DEFENDANT**

RULING

1. In a judgment dated 27th September 2022, the court dismissed the plaintiffs' suit against the defendants but the 1st defendant (the bank) was ordered to issue fresh statutory notices in accordance with the strict requirements of Section 90 of the *Land Act*. The plaintiffs have now filed the Notice of Motion dated 14th November 2023 under inter alia Sections 90 and 103 of the *Land Act*, Sections 3A and 63(c) and (e) of the *Civil Procedure Act*, Order 40 Rule 2(1) and Order 42 Rule 6 of the Civil Procedure Rules. They claim that the bank wrongly instructed Garam Investments to auction the properties; Title No. 7785/280 within Runda Estate, Title Nos. 9042/155 and 9042/156 along North Airport Road, and Title Nos. 17/198 and 17/201 within Thigiri Ridge (the properties) on 21st November 2023 at 11 a.m. in total disregard of the judgment and the obligations owed to the plaintiffs.
2. The plaintiffs contend that the impugned auction is founded on statutory notices dated 22nd June 2023 requiring the plaintiffs to pay the sum of Kshs. 1,348,368,947.27 being the overall debt owed by the 2nd defendant to the bank, which demand contravenes both the judgment of the court and the Laws



of Kenya. The plaintiffs state that the court held in paragraphs 24, 29, 30 and 32 of the judgment that they are not liable for the overall debts incurred by the 2nd defendant and that the impugned notice defies the peremptory orders made therein.

3. According to the plaintiffs the bank has failed to calculate and supply them with their respective accounts for the sums secured in the Charges as ordered by this Court and as agreed in the Charge Documents. That the said notices are illegal in the face of Section 90(2) of the Land Act, that they offend the in duplum rule under Section 44A of the Banking Act, that the auctioneer has not served them with any notice of the intended auction and that the purported auction is premature and offends the peremptory orders of the Court as set out in the judgment. The plaintiffs claim that the auction is being arranged in a clandestine and opaque manner calculated to deprive them of their prime properties, offend the right of redemption and render their intended appeal nugatory.
4. The plaintiffs contend that this Court has residual power after judgment, under Order 40 Rule 2 of the Rules, to grant an injunction and ensure their rights are not defeated through the injurious acts of the bank and that the balance of convenience tilts in their favour. As such, the plaintiffs seek to restrain the bank from advertising, offering to sell, selling, transferring, or otherwise alienating the properties pending full compliance with the judgment and that in the alternative, the court stays the sale, auction, transfer, or other alienation of the properties pending the outcome of this application and the final determination of their appeal, that is, Civil Appeal No. E230 of 2023.
5. The plaintiffs' application is supported by the affidavits of Ashu Sharma, a director of the 3rd and 4th plaintiff companies sworn on 14th November 2023 and 16th February 2024. The bank opposes the application through the replying affidavit sworn on 22nd January 2024 by Jimmy Ohanya, its Head, Recoveries Unit. The bank depones that the plaintiffs have never applied for stay pending appeal after the judgment was delivered and therefore the bank took steps to comply with the judgment and exercise its power of sale. That in compliance with the judgment, the bank issued fresh statutory notices to the plaintiffs under Section 90 of the Land Act by registered post demanding the amounts secured under each charge as set out below:
 - a. By a letter dated 21st February 2023 from the bank to the 3rd plaintiff, the bank demanded payment of Kshs. 22,500,000.00 plus interest, costs and other expenses.
 - b. By a letter dated 21st February 2023 from the bank to the 4th plaintiff, the bank demanded payment of Kshs. 18,750,000.00 plus interest, costs and other expenses.
 - c. By a letter dated 22nd June 2023 from the bank to the 1st and 2nd plaintiffs, the bank demanded payment of Kshs. 19,500,000.00 plus interest, costs and other expenses secured under the charge.
6. The bank states that it is not correct that the 1st and 2nd plaintiffs were required to pay the full amount owed by the 2nd defendant. That the plaintiffs failed to make any payment despite being served with the statutory notices under Section 90 of the Land Act. Once the notices lapsed, the bank issued the notice required under Section 96 of the said Act as follows:
 - a. By a letter dated 22nd June 2023, the bank informed the 3rd plaintiff that the sale would proceed unless the charge amount of Kshs. 22,500,000.00 together with interest of Kshs. 177,460,206.28 was paid.
 - b. By a letter dated 22nd June 2023, the bank informed the 4th plaintiff that the sale would proceed unless the charge amount of Kshs. 18,750,000.00 together with interest of Kshs. 147,888,505.24 was paid.



- c. By a letter dated 11th October 2023, the bank informed the 1st and 2nd plaintiffs that the sale would proceed unless the charge amount of Kshs. 19,500,000.00 together with interest of Kshs. 187,010,475.36 was paid.
7. That the plaintiffs did not make payment despite the notices and the bank instructed Garam Investments Auctioneers to proceed with the sale of the properties, upon which the auctioneers issued the 45 days' notice before advertising the properties for sale. That the properties were advertised for sale on 14th November 2023 and the public auction was scheduled to take place on 21st November 2023. The bank depones that the postal addresses that were used for service were the addresses provided by the plaintiffs under the charges and that they had not at any point prior to this informed the bank of any change of addresses. That the 2nd defendant did not cease operations after the appointment of the administrators and the postal address was not altered and in addition, the letters were also served on the directors' personal postal addresses.
8. The bank states that it placed the 2nd defendant under receivership in exercise of its rights under the debenture between itself and the 2nd defendant and therefore it is not precluded from realizing its rights under the charges; that both forms of realization can run concurrently. The bank asserts that it has disclosed the amounts due by the 2nd defendant in the notices that have been issued to the plaintiffs, the letters have also specified to the plaintiffs the amounts owed under each charge.
9. The bank denies having received payments from the Government of Kenya on account of an award of Kshs. 1,027,080,719 in favour of the 2nd defendant. And that the bank had dutifully shared information of the amounts outstanding under each charge, plus the statutory notices with Mr. Sharma vide on email on 9th August 2023.
10. It was the bank's contention that it had not offended the in duplum rule and that the plaintiffs are attempting to relitigate issues that have been determined by the Court as the issue of the 2nd defendant's indebtedness to the bank was determined in the judgment and that 2nd defendant is yet to pay the amounts the Court has determined as owing. The bank reiterates that it has complied with the judgment and all statutory provisions before exercising its statutory power of sale and that it should be allowed to exercise its power of sale in respect of the properties.
11. The application was canvassed by way of written submissions which are on record and I have carefully considered.

Analysis and determination

12. Having gone through the application, the responses thereto together with the parties' submissions, I note that the court is being called to interpret the import of the judgment and whether there has been compliance thereto.
13. As stated, the bank at the last paragraph of the judgement was directed to "...issue fresh notices in accordance with the strict requirements of Section 90 of the *Land Act*". These notices have now been issued and it is what the plaintiffs are challenging. Whereas it is inviting for this court to determine the propriety of the said notices, it should not be lost that the judgment was final and not conditional or interlocutory.
14. A decision was made in respect of the previous notice issued by the bank. Once the bank issued new and fresh notices, a new set of facts emerged and once the plaintiffs challenged their propriety and subsequent intended auction, then a new cause of action arose. In my view, recourse should not be had to this suit, but the plaintiffs ought to initiate another suit addressing the new situation. The Plaintiffs



appear to be seeking substantive orders on new issues and a new cause of action in an interlocutory application rather than a substantive suit.

15. When faced with a similar application, Musyoka J., in *Wandera & another v National Bank of Kenya Limited (Civil Suit 89 of 2011)* [2023] KEHC 17642 (KLR) held as follows:

“The plaintiffs appear to misapprehend the judgment, in terms of treating the orders made in it as interlocutory. The stoppage of the sale was not interlocutory. It was final. What the court was saying was that the sale, contemplated in 2011, was premature, for lack of a proper statutory notice of sale, and it stopped it. It was pointed out that any future sale had to be preceded by a statutory notice. If the defendant is contemplating another sale, and the plaintiffs are of the view that no proper statutory notice has been served, that would be a fresh cause of action. The judgment on record was with respect to the sale contemplated in 2011, when the instant suit was filed. The decree obtained did not bar the defendant from mounting other sales, and, should the sales not comply with the law, for want of appropriate notices, then recourse should not be had to this suit, but the plaintiffs ought to initiate another suit addressing the new situation.”

16. I am also of the same view that the fresh notices issued by the bank constituted a new cause of action and their propriety and that of any subsequent auction or sale based on the same ought to be litigated in a fresh suit and not in the present suit. The plaintiffs’ application is therefore misguided and fails to appreciate that the court is now functus officio and that the issues it raises constitute a new cause of action which ought to be litigated elsewhere.

Disposition

17. For the above reasons, I find no merit in the plaintiffs’ application dated 14th November 2023. I dismiss the same with costs to the 1st defendant assessed at Kshs. 30,000.00. The interim orders in force are discharged.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI

THIS 17TH DAY OF OCTOBER 2024.

P. MULWA

JUDGE

In the presence of:

Mr. Ojiambo for plaintiffs

Mr. Lawson Ondieki for 1st defendant

Ms. Mutisya h/b for Mr. Wafula for 2nd Defendant

Court Assistant: Carlos

Page 3 of 3

