REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. E210 OF 2020

SAMMY GHANNAM .....PLAINTIFF

V E R S U S

SBM BANK KENYA LIMITED .....1ST DEFENDANT

PETER GACHOKI KATHANGA .....2ND DEFENDANT

RULING

(1) Before this Court is the Notice of Motion application dated **9th June 2020** by which the Applicant **SAMY GHANNAM** seeks the following orders:-

"(a) SPENT

(b) SPENT

(c) SPENT

(d) THAT this Honourable Court do issue a temporary injunction restraining the 1st Defendant, its agents, auctioneer, servants, employees, 2nd Defendant and or any person claiming under the Defendants whether as auction purchaser or assign from, claiming any right, taking possession, transferring and or continuing to generally deal in any manner whatsoever with L.R. No. 195/228 unit No. 44 Karen Hills, Three Dee Lane, Karen Nairobi City County on the basis of the Public Auction sale to be conducted on the 19th May 2020 pending hearing and determination of this suit.

(e) THAT this Honourable Court do and hereby issue an inhibition order pursuant to Section 68 of the Registration Act inhibiting the registration of inhibitions/transfers arising from the purported sale by auction conducted by the 1st Defendant on the 19th May 2020 in respect of L.R. No. 195/228 Unit No. 44 Karen Hills, Three Dee Lane, Karen Nairobi City County in favour of the 2nd Defendant or any other persons pending the hearing and determination of this suit.

(f) THAT the costs of this application be provided for."

(2) The application as premised upon **Order 40 Rules 1, 2, 3** and 4**, Order 51 Rule 1 & 3** of the **Civil Procedure Rules**. **Section 1A, 1B, 3A** and **Section 63(a)** of the **Civil Procedure Act, Section 68** of the **Registration of Land Act** and all other enabling provisions of law and was supported by the Affidavit of even date sworn by the Applicant.

(3) The 1st Defendant / Respondent **SBM BANK KENYA LIMITED** opposed the application vide the Replying Affidavit dated 3rd August, 2020 sworn by **EDNA OMANGI** the **Debt Recovery Officer** of the 1st Defendant Bank. The 2nd Defendant / Respondent **PETER GACHOKI KATHANGA** also filed a Replying Affidavit dated **24th August 2020** opposing the application.

(4) The application was canvassed by way of written submissions. The Plaintiff/Applicant filed his written submissions dated **15th September 2020**, the 1st Respondent filed written submissions dated **21st September 2020** whilst the 2nd Respondent filed submissions dated **29th September 2020.**

BACKGROUND

(5) The 1st Defendant Bank at the behest of the Plaintiff/Applicant granted to the latter a loan facility to enable the Applicant purchase the property known as **Unit 44, Karen Hill, Three Dee Lane on L.R. No. 195/228** in the **Karen** area of **Nairobi County** (hereinafter referred to as the **"suit property"**). The said loan facility later fell into arrears at which point the Bank commenced realization of its security by moving to exercise its statutory power of sale under the charge.

(6) The Plaintiff/Applicant then moved to Court and filed a suit being **HCCOMM No. E355 of 2019: SAMY GHANNAN –VS- SBM BANK KENYA LIMITED** in which suit the Plaintiff/Applicant sought the following orders:-

> **"(a) The public auction sale scheduled on the 15th**
>
> **October, 2019 or any other day by the 1st Defendant/Respondent with respect to the suit property be and is hereby declared illegal, null and void and be forthwith set aside.**
>
> **(b) A permanent injunction restraining the Defendant/Respondent and/or its agents from auctioning and transferring the suit property on the basis of the public auction sale to be conducted on the 15th October, 2019."**

(7) The parties eventually settled the **Suit No. E352 of 2019** vide the consent dated **15th October 2019** duly signed by both counsel in the following terms.

"BY CONSENT

This suit be and is hereby marked as settled in the following terms and conditions:-

> **(1) That the auction scheduled for 15th October 2019 be and is hereby suspended.**
>
> **(2) The Plaintiff shall within 30 days from today complete the private treaty sale of the property to Christian Thomas or his nominee as per the letter of offer dated 9th October 2019.**
>
> **(3) The Plaintiff shall settle the full outstanding loan balance from the proceeds of the sale within 30 days from today.**
>
> **(4) In default the Defendant shall proceed with the public auction of the property without any recourse to the Court.**
>
> **(5) The Plaintiff shall bear the costs of this suit and the auctioneers fees."**

(8) The anticipated sale of the suit property by way of private treaty did not materialize and the Bank proceeded to instruct **M/s GARAM INVESTMENTS AUCTIONEERS** who conducted an auction of the suit property on **19th May 2020**. At that Auction the 2nd Respondent emerged as the successful bidder with a bid of **Kshs. 83,000,000/-**. The 2nd Respondent was declared the purchaser at the fall of the hammer and thereafter entered into a Memorandum of Sale dated **19th May 2020** with the 1st Respondent Bank and **Garam Auctioneers**. The 2nd Respondent avers that he did deposit the **10%** of the purchase price vide an **RTGS** transfer made on **19th May 2020** (the very day of the Auction). The Plaintiff/Applicant then filed the present application seeking to prevent the transfer of the suit property by the Bank to the 2nd Defendant. On **24th September 2020** the Court issued orders of "**status quo**" in the matter pending the hearing and determination of the application dated **9th June 2020.**

ANALYSIS AND DETERMINATION

(9) I have carefully considered the application before this Court the replies filed by the Respondents as well as the written submissions filed by all the parties. The fact that the 1st Respondent Bank advanced to the Plaintiff/Applicant a loan facility has not been denied. Neither is it in dispute that the said loan facility fell into arrears. Having so fallen into arrears the 1st Respondent was at liberty to proceed to exercise its statutory power of sale. In so doing the Bank did issue the requisite orders to the Plaintiff/Applicant. The Applicant does not deny having received the said notices nor does he impugn the same.

(10) The Plaintiff / Applicant is seeking for injunctive orders to prevent the legal transfer of the suit property to the 2nd Respondent who purchased the said property at the auction conducted on **19th May 2020**. The Applicant contends that the said sale by auction was both illegal and unprocedural as the same was not based on a **recent** valuation of the suit property.

(11) The principles for grant of temporary injunctions are well set out in the case of **GIELLA –VS- CASSMAN BROWN AND COMPANY LIMITED [1973]E.A 385, at page 360** where Spry J. held that:-

> **"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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."**

(12) A prima facie case was well defined in the case of **MRAO LIMITED –VS- FIRST AMERICAN BANK OF KENYA AND 2 OTHERS (2003)KLR 125**, where the Court of Appeal in determining what amount to a prima facie case stated;

"A prima facie case in a Civil Case includes but is not confined to a "genuine or arguable" case. It is a case which on the material presented to the Court; a tribunal property 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. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case." [own emphasis]

PRIMA FACIE CASE

(13) The Plaintiff/Applicant submits that the Bank erred in conducting an auction to sell the suit property without a fresh valuation and thereby disposed of the property at an undervalue. The 2nd Respondent in opposing the application for injunctive orders asserts that having emerged as the highest bidder for the suit property he is a bona fide purchaser for value without notice by virtue of **Section 99(3)** and **(4)** of the **Land Act**.

(14) **Section 97** of the **Land Act, 2012** deals with the duty of a chargee in exercising its statutory power of sale. **Section 97** provides as follows:-

"Duty of a charge exercising power of sale

97(1) 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 charger, any guarantor of the whole or any part of the sums advanced to the chargor, any charge under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.

(2) A chargee shall before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.

(3) …"

(15) The only question this Court has to determine is whether the 1st Respondent breached its statutory duty of care in the sale of the suit property thereby contravening the provisions of **Section 97** and **Rule 11(b) (c)** of the **Auctioneers Rules** which require that a valuation be conducted not more than **twelve (12) months** prior to the proposed auction.

(16) The Applicant submits that the suit property was sold on the basis of a Valuation Report which had been prepared on **8th February 2019**, which valuation had been undertaken more than twelve (12) months **before** the auction of **19th May 2020**. However the Applicants allegations are false because aside from the Valuation Report dated **8th February 2019** the 1st Respondent has also annexed a second Report of a second Valuation conducted on **31st March 2020** barely two (2) months prior to the auction (see Annexture **SBM-4** at pages **22** and **24** of the Replying Affidavit dated **3rd August, 2020**).

(17) Accordingly I find and hold that the 1st Respondent did exercise the duty of care required of them and ensured that a **recent** valuation was conducted on the suit property. The Plaintiff/Applicant has alleged that the suit property was sold to the 2nd Respondent at an undervalue being **Kshs. 83,000,000/-.** The Valuation Report prepared by **Lloyd Masika Limited** dated **31st March 2019** commissioned by the 1st Respondent gave a market value of **Kshs. 100,000,000/-** and a forced sale value of **Kshs. 75,000,000/-** for the suit property. It is therefore manifest that the suit property was sold for an amount far above the reserve price set by the valuer.

(18) The Plaintiff avers that a valuation which he himself commissioned conducted by **Redfem Valuers** on **8th October 2019** returned a valuation of **Kshs. 200,000,000/-** for sale by private treaty. It is on this basis that the Plaintiff claims that the property was sold at an undervalue. However the Applicant cannot demand that the property be sold for an amount which meets his approval. Through the consent entered into between the parties on **15th October 2019** the Bank granted to the Applicant an opportunity to dispose off the suit property by way of private treaty. The Applicant therefore had the opportunity to realize a purchase price of **Kshs. 200 million** or even more if achievable. However, the Applicant failed to sell the property by private treaty. The words of the consent were clear that in event of default the Bank would proceed to sell the suit property by way of public auction. The Applicant having agreed to the consent cannot now turn round and begin to cast aspersions on the sale by public auction.

(19) In the case of **PALMY COMPANY LIMITED –VS- CONSOLIDATED BANK OF KENYA LIMITED [2014]eKLR** the Court held as follows:-

"The onus of establishing on *prima facie* basis, that the Applicant's right has been infringed by the Respondent by failing to discharge the duty of care under section 97(1) of the Land Act lies on the Applicant. .... The court needs cogent evidence and material in order to say that prima facie, there has been an undervaluation of the suit property which is an infringement of section 97(2) of the Land Act by the Respondent as to entitle the court to call for an explanation or rebuttal from the Respondent."

(20) In **ZUM ZUM INVESTMENT LTD –VS- HABIB BANK LTD (2014)e**KLR the Court stated as follows:-

"… 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.” [own emphasis]

The fact that the sale of auction did not fetch a price which was pleasing to the Applicant does not make that sale illegal and/or unprocedural. I find no evidence that the 1st Respondent Bank in any way breached its duty of care as chargee in exercising their statutory rights of sale.

(21) The Plaintiff/Applicant further contends that the purchase of the suit property by the 2nd Respondent was irregular because as the Plaintiff alleges that the 2nd Respondent failed to pay the deposit of **10%** of the purchase price at the fall of the hammer thereby breaching the terms and conditions of the Auction. This again is a false allegation.

(22) The 2nd Respondent avers that he personally attended the auction on **19th May 2020** where he emerged as the highest bidder for the suit property. The 2nd Respondent states that he deposited the sum of **Kshs. 8,300,000/-** representing **10%** of the purchase price of **Kshs. 83 million**. This is proved by the **RTGS** slips and Bankers cheques totaling **Kshs. 8,300,000/-** (Annexture **‘PGK-3’** to the Replying Affidavit dated **24th August 2020**). I therefore find that the **10%** deposit was paid and the documents show that the transfer was infact made on the same day the auction took place ie on **19th May 2020**.

(23) The Applicant further claims that the 2nd Respondent failed to clear the balance of the purchase price within **90** days as required. This allegation by the Plaintiff is disingenuous given that at the instance of the Plaintiffs Advocate this Court on **30th July 2020** issued status quo orders, whose effect was to stall any further progression of the sale transaction. While the status quo orders subsist the sale transaction could not be completed.

(24) The Courts have held severally that in case of an auction a sale is deemed complete at the fall of the hammer and that the chargors right of redemption is deemed to be extinguished at that point. In **SAMUEL NJOROGE MBURU –VS- CONSOLIDATED BANK OF KENYA LIMTIED [2014]eKLR** the Judge held:-

“I have detailed above, the plaintiff lost his right of redemption in relation to the suit property at the fall of the hammer at the public auction held on 6th November 2012. Section 99 of the Land Act 2012 details the protection to which the purchaser of the suit property at auction is entitled. The suit property has already been auctioned. The applicants right to redemption was extinguished at the fall of the hammer on 15th February 2018. The applicants remedy now lies in damages if they will prove that the auction was not carried out in accordance with the law.” [own emphasis]

(25) In **BOMET BEER DISTRIBUTORS LTD & ANOR. –VS- KENYA COMMERCIAL BANK LTD & 4 OTHERS (2005)eKLR**. The Court held that:-

“What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished. The only remedy for chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages.” [own emphasis]

(26) In the circumstances, I find the 2nd Respondent is a bona fide purchaser for value and the Plaintiffs remedy if any lies in damages. Lastly it is quite evident that this present suit **HCCC E210 of 2020** is infact **‘Res Judicata’**. The Plaintiff/Applicant does not deny that he filed a previous suit **No. E353/2019** in which he sought to challenge the exercise by the Bank of its statutory power of sale. That suit was determined by the consent entered into by the parties on **15th October 2020**. The Applicant does not deny that he failed to comply with the terms of the consent and instead proceeded to file a fresh suit being **HCCC No. 6210/2020** again challenging the exercise by the Bank of its statutory power of sale. The actions of the Applicant amount to an abuse of the Court process and cannot be condoned.

(27) Based on the foregoing I find that the Plaintiff/Applicant has failed to show a prima facie case to warrant the grant of the interim injunctive orders being sought.

IRREPARABLE HARM

(28) The suit property which was voluntarily charged by the Plaintiff to the Bank is a property whose value is quantifiable. In the event that the Plaintiff eventually succeeds at trial then damages would be adequate compensation. In **NGURUMAN LIMITED –VS- JAN BONDE NIELSEN & 2 OTHERS [2014]eKLR** the Court held:-

“On the second factor, that the applicant must establish that he *“might otherwise”* suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, *prima face*, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot *“adequately”* be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

(29) The Plaintiff/Applicant’s land and any construction thereon can be quantified in monetary terms. The bank being a financial institution is quite capable of paying any damages that may be ordered by the Court. In the case of **ANDREW MURIUKI WANJOHI –VS- EQUITY BUILDING SOCIETY & ANOTHER [2006]eKLR** the Court held thus:-

"Whenever the applicant offered the suit property as security, he was fully conscious of the fact that if the borrower did not meet his obligations, the suit property could be sold off. Therefore, in the event that it later became necessary for the suit property to be sold off, by the chargee, the chargor could not be heard to complain that his loss was incapable of being compensated in damages. He had had the said property evaluated in monetary terms. He had then told the chargee that he knew the property to be capable of providing the chargee with the peace of mind, of knowing that the money given as a loan would become recoverable, even if the borrower did not pay it.

By offering the suit property as security the chargor was equating it to a commodity which the chargee may dispose of, so as to recover his loan together with interest thereon. Therefore, if the chargee were to sell off the suit property, the chargor's loss could be calculable, on the basis of the real market value of the said property." [emphasis added]

(30) I find that the Plaintiff has failed to prove this limb of irreparable harm.

BALANCE OF CONVENIENCE

(31) In the case of **AMIR SULEIMAN –VS- AMBOSELI RESORT LIMITED [2004]eKLR Hon. Justice Ojwang** (as he then was) held that in responding to prayers for interlocutory relief, the Courts should always opt for the lower risk of injustice. The Applicant obtained a loan facility from the 1st Respondent and gave up the suit property as security fully aware of the risk involved if he defaulted in repaying the loan. Banks are not charitable institutions. They rely on repayments for monies advanced to clients to remain in business.

(32) In the case of **HYUNDAI MOTORS LIMITED –VS- EAST AFRICAN DEVELOPMENT BANK LTD [2007]eKLR Hon. Justice Warsame** (as he then was) stated as follows:-

"The application in my view epitomizes the resolute nature of the plaintiff and its utter contravention of the requirement of good conscience and commercial ethics. It has borrowed huge sums of money on the strength of the charge document. It admits or acknowledges a debt of Kshs 100 million. There is persistent default but wants to use every trick on earth to postpone the day of reckoning. They must have in mind that the money of the lenders is not for free. The loan advanced was not meant to be candy sweets to be enjoyed freely by the plaintiff. The monies of the lenders are a carrot accompanied by a stick and the stick can only be used when there is a default. Where there is an absolute default, the party in default cannot avoid the stick simply because it has taken the carrot."

(33) This is a loan which was granted to the Applicant way back in **2014**. The Applicant himself concedes that said loan was outstanding. Having benefitted from the loan the Applicant now wants to drag the Bank through the Courts in an effort to evade repaying the said facility. The 1st Respondent was at liberty to exercise its statutory right of sale and the 2nd Respondent should not be made to suffer for buying the suit property at an auction. I find that the balance of convenience tilts in favour of the Respondents.

(34) Finally I find no merit in the present application. The Notice of Motion dated **9th June 2020** is dismissed in its entirety. Costs are awarded to the Respondents. For the avoidance of doubt the status quo orders made by this Court on **30th July 2020** are hereby lifted.

Dated in **Nairobi** this **5TH** day of **FEBRUARY, 2021**.

……..

MAUREEN A. ODERO

JUDGE