REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E137 OF 2018

ECO BANK LIMITED.....PLAINTIFF

VERSUS

MORU RIDGE LIMITED.....DEFENDANT

LEXIS INTERNATIONAL LIMITED.....INTERESTED PARTY

RULING

1. The applicant seeks the following orders through the application dated 20th May 2020: -

    a. SPENT

    b. THAT this honourable court be pleased to review the ruling delivered on 22nd January 2020 ordering the plaintiff to purchase the suit property as a private treaty and at market value

    c. This honourable court be pleased to allow the applicant to participate and purchase the suit property charged to it by public auction and at forced value in accordance with prayer 2 of the Originating summons dated 13th November 2018 in the event it emerges the highest bidder

    d. The applicant be awarded costs of this application.

2. The application is supported by the grounds on face of it and by the affidavit of the applicant's Head of Early Warning Remedial and Recovery **Ms Elizabeth Hinga.** She avers that even the Bank neither sought to be allowed to purchase the suit property by way of private treaty nor made a Counterclaim for the same, the impugned ruling delivered on 22nd January 2020 directed the Bank to purchase the suit property by private treaty and at a market price yet. She states that there is an error apparent on the face of the record as Section 100 of the Land Act allows the chargee to sell the charged property through public auction and not by private treaty.

3. Ms Hinga further states that the borrower has never made any payment towards settling the loan since the commencement of the suit and adds that the bank is greatly prejudiced in trying to dispose of the suit property.

4. The respondent opposed the application through the Grounds of Opposition dated 25th June 2020 wherein it states that the applicant is attempting to re litigate a matter upon which the court has become *functus officio*. The 1st respondent contends that a court cannot sit on appeal on its own decision and that the applicant is bound by its pleadings.

5. In addition to the Grounds of Opposition the 1st respondent filed a replying affidavit of **Mr. DICKSON WANJOHI** who states that the application for review is a regurgitation of the original application dated 13th November 2018 and amounts to an invitation to this court to re hear and re adjudicate over the same. He further avers that the matters raised in the application are *res judicata* and that the only recourse available to the applicant is to file an appeal to the Court of appeal.

6. The interested party opposed the application through the replying affidavit of **MAHESH VEKARIA** who states that when the applicant approached the court for leave to purchase the suit property by a public auction, the interested party recommended that the plaintiff be allowed to purchase the property at a market price instead of a public auction. He further states that Section 100(3) of the Land Act provides for the conditions to be met if the charged property is to be sold by a public auction but does not make it mandatory for the purchase to be at a public auction. He contends that the plaintiff has not provided any sufficient reason for the granting of the orders sought in the application.

7. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the application meets the *threshold set for the granting of orders of review.*

8. The courts power to review its judgment or ruling must be exercised within the framework of Section 80 of the Civil Procedure Act which gives the substantive right of review in certain circumstances and Order 45 rule 1 of the Civil Procedure Rules that provides the procedure to be adopted.

9. Section 80 of the Civil Procedure Act provides as follows;

> ***Any person who considers himself aggrieved—***
>
> ***(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***
>
> ***(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."***

10. Order 45(1) of the Civil Procedure Rules sets out the requirements for an application for review as follows:

> ***"Any person considering himself aggrieved***
>
> ***a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
>
> ***b) by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed, or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay".***

11. The applicant invoked the first condition for review by pleading and submitting that there was an error apparent on record with respect to the ruling dated 22nd January 2020. The applicant contended that the court erred in directing that the suit property be sold by way of private treaty at a market price. According to the applicant, there is no requirement under Section 100 of the Land Act that allows the chargee to purchase the property at the market price as the sale under the said section is by public auction. The applicant referred to the case of ***Gold Lida Limited v NIC Bank Limited & 2 others*** [2019] eKLR where the court observed that;

> ***"32. The Provision, as I see it, is intended to protect the chargor from underhand dealings by a chargee who wishes to purchase property over which it has taken a charge. So that where the chargee seeks to buy the property other than by public auction, then it must seek leave of court. This is a safeguard against possible abuse of the power of the chargee. The law however does not require such court permission or sanction where the sale is by public auction. Subsection 3 requires the bid by the chargee to be the highest bid at the auction and in addition that the bid must be equal or higher than the reserve price. This is the protection given to the chargor when the chargee seeks to bid at a public auction. If the law allows the chargee to bid for and purchase the charged property in a public auction, albeit with certain caveats, then it cannot bar a sister chargee from doing so."***

12. The interested party submitted that the court's interpretation of Section 100(3) of the Land Act cannot be classified as an error apparent on the face of the record. With regard to the court failing to consider the ruling of ***Eco Bank Kenya Limited v First Choice Mega Stores Limited*** [2018] eKLR counsel for the Interested Party submitted that the ruling was made by a court of equal status and is therefore not binding on this court. The defendant, on the other hand, submitted that the plaintiff's assertion that the court did not reach the same conclusions as the other courts cannot be a basis for review of its ruling.

13. The court in its decision dated 22nd January 2020 this court observed that

> ***"33. My understanding of the above provisions is the sale by the charge, in exercising its statutory power of sale, may either be conducted by a public auction or by private treaty. Indeed, in the wording of Section 100(3) of the Act is clear that the chargee may bid if the charged land is to be sold by public auction. I am in agreement with the submissions of counsel that the use of the word if in section 100(3) of the Act envisages that the sale may be by other means other than the public auction***
>
> ***34. Having regard to the above provisions, I find that there is no hard fast rule on the mode of sale/purchase by the chargee and that the sale by public auction is only one of such modes of sale.***
>
> ***35. The applicant's case was that all its attempts to sell the suit property at a public auction did not bear any fruits. The failure to sell the property at the public auction notwithstanding, the applicant still seeks leave of court to use the same public auction mode of sale through the instant application. My finding is that in the circumstances of this case, it will be foolhardy and indeed illogical to allow the chargee to purchase the suit property at a public auction, and expect it to obtain the best price reasonably obtainable when it has been categorical that such an option has already failed. I therefore find that the provisions of Section 98(1)(d) of the Act will be most appropriate in the circumstances of this case, which is to allow the applicant to purchase the suit property by private treaty at market price as a way of achieving the best price obtainable in line with the dictates of section 97(1) of the Act."***

14. In the case of ***Nyamogo & Nyamogo v Kogo*** **(2001) EA 170** the court held as follows regarding what constitutes an error apparent on

the face of the record:

> ***"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal"***

15. In the instant case the applicant faults this court's construction and application of section 100(3) of the land Act. According to the applicant the said section allows a chargee to purchase charged property at a public auction and not a private contract at market price as ordered by court. In ***Meera Bhanja v Nirmala Kumari Choudhury***, (1995) 1 SCC 170 the court observed that;

> ***"…. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate power which may enable an appellate court to correct all manner of errors committed by the subordinate court…"***

16. Further in ***Pancras T. Swai v Kenya Breweries Limited*** **[2014] e KLR** the Court Appeal cited its earlier decision in ***Francis Origo & Another v Jacob Kumali Mugala*** **C.A Civil Appeal No. 149 of 2001** and held that: -

> ***"Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal."***

17. Guided by the above cited decisions I find that the applicant's challenge in this application is on the merits of the decision dated 22nd January 2020 as it is founded on the interpretation of the law. I further find that grounds set out in the instant application qualify as a ground for an appeal and not review. My take is that the re-evaluating the manner in which the court interpreted the law would be tantamount to this court sitting on appeal on its own ruling.

18. Having regard to the findings and observations that I have made in this ruling I find that the instant application does not meet the conditions set for an order for review and I therefore do not have to belabor the other conditions for review that were not raised by the parties. Consequently, I find that the application dated 20th may 2020 lacks merit and I therefore dismiss it with costs to the respondent and interested party.

Dated, signed and delivered via Microsoft Teams at Nairobi this 1st day of July 2021 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Murithi for Marete for Respondent.

Ms Mathenge for Gichuhi for Plaintiff.

Court Assistant: Sylvia.