



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL CASE NO. E002 OF 2021**

**LEVI HOUSE CONSTRUCTION & ENGINEERING LTD.....APPLICANT**

**VERSUS**

**ABC BANK LIMITED.....1<sup>ST</sup> RESPONDENT**

**MUGA AUCTIONEERS & GENERAL MERCHANTS.....2<sup>ND</sup> RESPONDENT**

**RULING ON COSTS**

[1] The Plaintiff filed suit by a Plaint dated 3<sup>rd</sup> March 2021 seeking principal reliefs as follows:

*(a) A Declaration that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have no right to sell or dispose off the plaintiff's suit property known as LR. Kabete Kibichiko/3045 in contravention of the law and below the fair market price.*

*(b) An order directing that the valuation of the suit property be conducted by a registered independent valuer jointly appointed by the plaintiff together with 1<sup>st</sup> defendant to enable the sale to be conducted in a fair manner.*

[2] The suit did not proceed to full hearing as it was marked settled by consent of the parties on 29<sup>th</sup> June 2021 following the finalization of a joint independent valuation of the suit property, pursuant to an order of the Court made herein on as follows:

**“Court:**

**1. By consent of the parties the suit No. E002 of 2021 is marked settled.**

**2. Ruling on Costs on 15/7/2021.”**

[3] The debt subject of the exercise of the power of sale was not disputed and at paragraph 5 of the plaint dated 3<sup>rd</sup> march 2021 conceded that “the plaintiff was unable to repay the said amount [loan facility set out in the plaint as 35,000,000/-] necessitating the bank to start the process of auctioning the parcel recover the amount lent.”

The basis of the suit herein was an averment at paragraph 8 of the Plaint dated 3/3/2021 and backed by submission at the hearing of interlocutory motion for injunction by a call for an independent valuation under Rules 10 of the Auctioneers’ Rules 1997, as follows:

*8. The plaintiff also avers that the defendant now intends to dispose off the suit property below the market price without any reasonable basis or explanation is wrongful. Further that the forced sale valuation has been drastically reduced below the fair market price by more than 50% hence he said sale would be **outright fraud** occasioning the plaintiff irreparable harm.” (sic)*

At paragraph 7 the Plaint, it was averred “that the plaintiff had engaged the services of a valuer that valued the property as follows:

*(a) Open market Value of Land Ksh.70,000,000/-*

*(b) Open market value Kshs.56,000,000/-*

*(c) Forced sale value Ksh.52,000,000/-“.*

[4] The defendants had filed their Joint Statement of Defence dated 28/3/2021 asserting the 1<sup>st</sup> defendant’s **mortgagee’s power of sale**, and

deponed at paragraph 18 of a Replying Affidavit sworn on 12/3/2021 in response to the Notice of Motion that –

“18. That at all instances the 1<sup>st</sup> Respondent observed attendant legal requirements and prior to the intended auction, commissioned a pre-auction valuation of the suit land and which report itemized the suitland as follows:

a. Open market value Kenya Shilling 40,700,000/-

b. Forced sale value Kenya Shilling 30,525,000/-

(Annexed and marked FN7 is a copy of the pre-auction valuation Report dated 11/08/2020 by Sedco Valuers (k) Ltd.)”

[5] By its ruling of 29<sup>th</sup> April 2021 on the Notice of Motion dated 3<sup>rd</sup> March 2021, the court ordered that a joint independent valuation be undertaken in specific terms as follows:

1. **“The Court hereby orders that an independent valuation over property L.R No. KABETE/KIBICHIKU/3045 be conducted before the Respondents proceed with the intended sale.**

2. The parties shall within seven days agree on a joint valuer to value the suit property, and in default of agreement **the court will appoint an independent valuer from the official list of Registered Valuers of Kenya** to value the property and prepare a joint valuation report.

**3. The cost of the valuation shall be paid in the first instance by the plaintiff who seeks the independent valuation, subject to further orders of the court upon hearing and final determination of the suit.**

4. The matter will, therefore, be mentioned for directions on 14 May 2021.

5. **The Respondents will have the costs of the application, in any event.”**

[6] The court has considered the matter of costs in this suit on the principle that *costs follow the event* under section 27 of the Civil Procedure Act.

The Joint Valuation Report dated 25<sup>th</sup> June 2021 has placed the value of the property at Ksh.52 Million in open market and Ksh.39 Million in forced sale. It would appear that the plaintiff’s cause of **‘outright fraud’** for which it sought an independent valuation of the suit property to ensure that the property is not sold at an under value has not been vindicated. The parties have now agreed that the sale may proceed on the basis of a reserve price determined by the joint valuation. In the ruling on the interlocutory application dated 3<sup>rd</sup> March 2021, the court while ordering an independent or joint valuation directed the plaintiff to meet the costs of the valuation in the first instance subject to a final order upon hearing and determination of the suit. That order will now be confirmed for the payment of the costs by the plaintiff applicant.

### **Orders**

[6] As the suit is now concluded by consent of the parties, and the joint valuation report dated 25<sup>th</sup> June 2021 has somewhat vindicated the position of the defendant on the value adopted for forced sale upon a pre-auction valuation value before the exercise of the power of sale, this court makes direction as to the costs in the matter, on the principle that *costs follow the event*, as follows:

(1) **The Plaintiff shall pay the charges of the valuation to the joint valuers.**

(2) **The plaintiff shall pay the 2<sup>nd</sup> respondent’s auctioneer’s costs, such costs being agreed between the parties or taxed by the taxing officer of the court in default of agreement.**

(3) **The Defendant shall have the costs already awarded of the application for injunction filed by the plaintiff by Notice of Motion dated 3<sup>rd</sup> March 2021; such costs being agreed between the parties or taxed by the taxing officer of the court in default of agreement.**

[4] **As the suit has been determined early upon consent of the parties without full hearing, no getting-up and preparation for trial was necessary, and there shall, therefore, be no order as to costs of the main suit.**

[8] Save for any necessary taxation of costs and/or ensuing execution proceedings, this matter is marked closed.

Order accordingly.

**DATED AND DELIVERED ON THIS 15<sup>TH</sup> DAY OF JULY, 2021.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

**M/S Ojwang' Sombe & Co. Advocates for the Applicant**

**M/S Wambugu & Muriuki Advocates for the Respondent.**