



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL CASE NO. 125 OF 2016**

**MANJIT KAUR PUEE.....PLAINTIFF**

**VERSUS**

**SBM BANK (KENYA) LIMITED (FORMERLY FIDELITY**

**COMMERCIAL BANK LIMITED).....DEFENDANT**

**RULING**

**The Facts**

1. This ruling is in respect of the plaintiff's notice of motion application dated 19<sup>th</sup> April, 2018. The application is brought under Sections 1A, 1B, 3A, Section 63(c) of the Civil Procedure Act 2010 and Order 40 of the Civil Procedure Rules, Sections 85 and 97 of the Land Act, 2012 and Rule 11 of the Auctioneers Rules, 1997. The application seeks for the following orders:

**a) Spent**

**b) Spent**

**c) The Defendant by itself, auctioneers, directors, agents and servants be restrained from auctioning or offering for auction or sale in any manner the suit premises pending the hearing and determination of this suit.**

**d) In the event that any auction sale is held before the hearing and determination of this application, the Defendant by itself, auctioneers, directors, agents and servants be restrained from transferring the suit premises or any of the five houses comprised in the suit premises to any purchaser pending the hearing and determination of this application.**

**e) In the event that any auction sale is held before hearing and determination of this application the Defendant by itself, auctioneers, directors, agents and servants be restrained from transferring the suit premises or any of the five houses comprised in the suit premises to any purchaser pending the hearing and determination of this suit.**

**f) The costs of the application be paid by the Defendant in any event.**

2. The application is premised on 25 grounds on its face and further supported by an affidavit sworn by Manjit Kaur Puee, the Plaintiff on 20/4/2018. The Plaintiff's case is that he was served with a 14 days notification of sale by the Defendant's agent, Keysian Auctioneers. The Defendant had advertised the suit premises for auction on 20/4/2018. Consequently, the Plaintiff engaged a valuer wherein the suit premises which are comprised of five houses were valued at Kshs.13,600,000/= each and therefore having a total market value of Kshs.68Million and a reserve price of Kshs.51,000,000/=. According to the Plaintiff, the Defendant ought not to sell the five houses when a sale of only two houses can fully cover the amount of Kshs.19Million claimed by the Defendant.

3. It is averred that the Defendant threatens to sell the suit premises without a current professional valuation report contrary to **Section 97(2) of the Land Act 2012 and Rule 11 of the Auctioneers Rules 1997** hence the risk of perpetuating fraud by selling the suit premises at a gross under value even below 75% of the current market value. The Plaintiff further averred that Defendant has falsified the statement of accounts by NOT reflecting a sum of Kshs.500,000/= deposited by the Plaintiff's husband in 2017 and Kshs.400,000/= deposited by the Plaintiff's erstwhile advocate on 2/12/2016 in the same. The Deposit slip was annexed to application as "MK6".

4. It is the Plaintiff's case that, she had borrowed a loan of Kshs.18,500,000/= and secured the same with the subject suit premises. She stated that she has paid a total of Kshs.24,696,000.80, a fact confirmed by a report dated 31.7.2017 from Interest Rates Advisory Centre . The

said report was annexed to the application and marked as “MK7”. Having paid a sum more than the principal amount, what remains under dispute is the interest and the funds deposited in the subject account but not reflected. The Plaintiff further denies being served with the requisite notices.

5. The application was opposed vide the Defendant/Respondent’s Replying affidavit sworn on 18<sup>th</sup> June, 2018. The affidavit was sworn by the Defendant’s Regional Accountant, Octavian Mwandoto on 18<sup>th</sup> June, 2018. He depones that the Plaintiff had on 1<sup>st</sup> December, 2016 filed in the court a notice of motion application seeking to among other prayers, stop the Respondent from exercising its statutory power of sale over the suit properties. She had alleged therein that the Defendant/Respondent had not only failed to issue it with the proper statutory notices but also failed to value the properties prior to the intended auction. The court granted temporary injunctive orders in favour of the Plaintiff/Applicant halting the intended auction. However, on 30<sup>th</sup> March, 2017, parties compromised and entered into a consent so that the suit would be fast tracked for hearing. By the terms of the consent, it was agreed between the Plaintiff and the Defendant that all issues would be abandoned save for the issue of the interest charged by the Defendant/Respondent on the Plaintiff’s loan accounts. This would be the only core issue for determination in the suit as per the consent dated 30/3/2017. It was further agreed that the injunctive orders would be extended so far as the Plaintiff continues to pay her monthly installment as per the charge instrument.

6. The consent has never been set aside and the defendant asserts that it stands as a valid court order to date so that the only issue which the court should endeavour to determine is on the calculation of interest in the Applicant’s loan account and that the issue of injunction lapsed. It is averred that the Plaintiff/Applicant failed to comply with the terms of the consent by paying the monthly instalments. The Plaintiff failed to make instalments as agreed and since the orders of injunction had lapsed, the Defendant was at liberty to exercise its power of sale. Consequently the Defendant served upon the plaintiff a 14 days notice as the notification for sale.

### **The parties’ submissions on the application**

7. Both parties filed written submissions in support of their respective arguments. On 12<sup>th</sup> March 2020, the advocates for the parties attended court and made their oral submissions on the application. Mr. Kinyua submitted for the plaintiff/applicant while Mr. Kinuthia submitted for the defendant/respondent.

8. Mr. Kinyua’s submissions primarily centered around the valuation report and the notification of sale. He began by faulting the defendant for intending to auction the suit properties without a valuation report. Further, he submitted that the plaintiff did not receive the notification of sale in good time. He stated that in any event, any notification of sale given prior to valuation is invalid. To support this argument, he relied on the case of ***Ben Gitonga Muiruri Mungai v Equity Bank (Kenya) Limited [2019] eKLR***. Mr. Kinyua also submitted that the present dispute goes beyond pre-auction procedures and includes allegations of overstatement of debt and possible falsification of bank documents. He requested this Court to allow the application and let the plaintiff prepare her case for hearing on the merits.

9. Mr. Kinuthia, on the other hand, submitted on the valuation report and the statutory notices. He submitted that the suit properties were all valued on 5<sup>th</sup> May, 2018 and valuation reports produced. The defendant therefore complied with Section 97 (2) of the Land Act, 2012. He went on to submit that the plaintiff was actually served with the notice for sale on time and that an affidavit of service was prepared to the same effect. Mr. Kinuthia then submitted that the plaintiff had not made out a satisfactory case for an injunction. He requested the court to dismiss the application with costs to the defendant.

### **Analysis and determination**

10. I have carefully considered the application and the affidavits tendered by both parties in support of their respective issues raised herein as well as the judicial precedents and the law applicable. I take the following view of the matter. The issue for determination is whether or not the Plaintiff has met the threshold for granting an interlocutory injunction.

11. At this juncture, this court endeavors to briefly examine the legal principles governing the application of this nature. In applications for an interlocutory injunction, the burden resides with the Applicant to prove to the satisfaction of the court that the same should be granted. It is also noteworthy that an injunction is a discretionary remedy and is granted on the basis of evidence and sound legal principles.

12. It is now well settled law that the granting of injunctive reliefs is a discretionary exercise predicated upon 3 interdependent and sequential limbs to wit: that the claimant has established a prima facie case with a probability of success; once established, the claimant ought to prove that an award of damages would be insufficient to alleviate any damage caused and finally, when in doubt, the court would decide the application on a balance of convenience. (See the cases of ***Giella vs. Cassman Brown & Co. Ltd [1973] EA 358*** and ***Nguruman Ltd v. Jan Bonde Nielsen & 2 Others, [2014] eKLR***.)

13. However, in this case, it has not been denied that the applicant had once filed a similar application dated 1/12/2016 seeking to restrain the defendant from selling the suit property by way of public auction. The application was however compromised by a consent adopted by the parties in the terms that the Plaintiff would enjoy interim injunctive orders as long as she continues to pay the monthly instalments in a bid to settle the amount due. It was further agreed the only issue for determination in regard to this suit would be the interest chargeable.

14. The Defendant submits that the Plaintiff deviated from the terms of the consent order by defaulting in payment of the agreed monthly instalments. On her part the Plaintiff/Applicant avers that the consent is not material in the mean time. She expresses her grievances that she cannot keep on paying interests indefinitely. She goes on to state that she had borrowed a loan facility of Kshs.18,500,000/= wherein the suit premises were charged as securities for the loan and by a report dated 31.7.2017 from Interest Rates Advisory Centre, it is confirmed that she has paid a total of Kshs.24,696,000.80.

15. The Applicant further submits that she would suffer substantial loss and lose her lifetime investments if the suit premises were to be sold only to recover interests. She contends that the Defendant is further attempting to conduct the public auction without a proper valuation and service of requisite notices. The Respondent on the other hand, holds that the interest charged is contractual and the Plaintiff is obliged to

pay the amount due. Further, that the Defendant has produced a valuation report where all the suit premises were valued on 5<sup>th</sup> May, 2018 and in any event, were the premises to be auctioned; then the Plaintiff would be adequately compensated in the event she succeeds in her claim.

16. I have considered the materials placed before the court. It is not disputed that the Plaintiff/Applicant has fully paid the principal amount and the amount disputed is the unpaid interest only. Be that as it were, a dispute as to the amount of interest owing between a borrower and a financier cannot be of a ground for issuance of an injunction order.

17. Further, issuance of an injunction in the circumstances of this case does not benefit the parties as the Plaintiff's account continues to accrue interest and eventually she will suffer detriment due to increasingly accommodated interest under the comfort of enjoying restraining orders. On the other hand, the Defendant will be kept from recovering the amount due to it. It is the court's view that justice will only be achieved if the case is set for hearing and the issue of interest due determined as soon as possible.

18. In that regard, and in the interest of justice, I make the following orders;

**a) *The Plaintiff's advocate to fix the matter for hearing within 30 days of the date of this ruling and both parties to file and serve the documents, they will be relying on to prosecute their respective cases before then;***

**b) *In the meantime, there will be no disposal of any of the suit premises that are subject of these proceedings by either party, pending hearing and determination of the matter.***

**c) *The plaintiff/Applicant shall pay the costs of the application for the reason that it is the second time she has dragged the defendant for an application of this nature.***

It is so ordered.

**DATED, SIGNED AND DELIVERED at Nairobi this 4<sup>th</sup> day of JUNE,2020.**

**D.O CHEPKWONY**

**JUDGE**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemics, and in light of the directions issued by His Lordship, the Chief Justice, on 15<sup>th</sup> March 2020. This ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil disputes.