REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO. 6 OF 2019

STUDERTEK POWERS SYSTEMS (E.A) LTD ..... 1ST PLAINTIFF

RICHARD GAKIME MBURU .....2ND PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY LTD .....DEFENDANT

RULING

[1] Before me is the plaintiff's Motion dated 22/06/2020 expressed to be brought pursuant to **Section 3, 3A of the Civil Procedure Act, Section 96 of the Land Act, Article 159 (2) (d) of the Constitution of Kenya, 2010, Order 51 of the Civil Procedure Rules 2010** and all other enabling provisions of the law. The plaintiff seeks for three significant orders:

> **1) THAT the defendant be ordered to supply a statement of account for the loan due and owing from the 1st plaintiff.**
>
> **2) THAT the Honorable Court does set the monthly installments payable by the 1st plaintiff to the defendant at the sum of Kshs. 260,000/-.**
>
> **3) THAT the Honorable Court does order a government valuer to carry out a valuation of the land title No. NYAKI/MULATHANKARI/1787 (hereinafter 'the charged Land').**

PLAINTIFF'S CLAIM

[2] The grounds upon which the application is premised are set out in the application, the supporting and further affidavit of Richard Gakime Mburu sworn on 15/06/2020 and 7/07/2020 respectively. It is argued that due to the hard economic times of the Covid -19 pandemic, he has been unable to service the loan which the defendant unilaterally increased the interest rate. Besides, the defendant has failed to restructure the loan and intends to sell the Suit Land which they have underestimated. The fact that the defendant slated auctions which did not attract bids that matched the forced sale value cannot be an excuse not to carry out a revaluation. The Suit Land has been set for sale in the Daily Nation 22/06/2020 and the defendant is willing to sell it at whatever price no matter how much it is worth contrary to **Section 97(1) of the Land Act.**

[3] Mutuma, counsel for the plaintiff, submitted that the value of the Suit Land was Kshs. 30,000,000/- how then can it depreciate. He argued further that valuation is a new matter therefore it cannot be *res judicata* as the issue never arose before. He could not agree with Mr. Kimaita that the court is *functus officio*. His view was that the court had jurisdiction over the matter which is yet to conclude. Of Meru HC Civil Suit No. 5 of 2020; he submitted that the said suit was dismissed for it was *sub judice* the matter before this court.

[4] The applicant relied on the case of **Charles Alex Njoroge v National Bank of Kenya Ltd & another [2015] eKLR**, **Othaya Villas Limited v Victoria Commercial Bank Limited & 2 others [2020] eKLR** and **Olkasasi Ltd v Equity Bank Limited [2015] eKLR** to support their submissions.

RESPONDENT'S CLAIM

[5] The application was opposed by the defendant vide the replying affidavit of Samuel Muthomi Kibiti, Operations Manager at the respondent's Meru Branch, sworn on 3/06/2020. It is contended that in the first instance the court is *functus officio* for there is no review of any of the court orders. Moreover, the matter is *res judicata* for similar orders were sought in Meru HCCC No. 5 of 2020 where pleadings were struck out.

[6] Alternatively, it is not correct that the plaintiff's default is due to the pandemic for this is a recent challenge. The default to pay the facility started long time ago as a result of which the 3 months' statutory notice was issued on 15/06/2017. The respondent refuted claims

that it varied the interest rate. The disparity of valuation cannot be a basis to encumber the power of sale as the same has recourse in law by way of damages. Furthermore, the court cannot make orders as to applicable monthly installments as such would amount to redrawing of contractual obligations. Stopping the exercise of statutory power of sale would prejudice the respondent for the outstanding loan amount is Kshs. 23,957,954/- as at 30/06/2020. In view of the chronology of events and steps taken the application has been brought by bad faith and should fail.

[7] Kimaita, counsel for the defendant, submitted by reiterating the averments made in the affidavit. But, he emphasized that this matter has been dealt with before and orders given which the applicant failed to comply with. He affirmed that they have done a proper valuation which is not a ground to stop a sale. They relied on several cases including **Premier Flour Mills Ltd & 2 others v Standard Chartered Bank Kenya Ltd [2019] eKLR**, **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure and 3 others [2013] eKLR**, **Olkasasi Ltd v Equity Bank Limited [2015] eKLR** which supported their submissions.

Analysis and Determination

[8] Before delving into the major issues, let me first deal with some preliminary points. The respondent argued that the plaintiff's advocate who have drawn and filed the instant application are not on record as they do not have a consent and/or leave to be on record after court formally closed the matter on 14/011/2019. The applicant's counsel on the other hand submitted that order 9 rule 9 of the CPR envisages conclusion by way of judgment. According to him, there is no judgment that was delivered in this case.

[9] It is apparent from the record that the matter was declared to be concluded on 14/11/2019. Counsel who filed this application was not the counsel on record as at 14/11/2019. Does **Order 9 Rule 9 of the Civil Procedure Rules** apply? The order provides that:

> **"When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court—**
>
> **(a) upon an application with notice to all the parties; or**
>
> **(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."**

I take the view that, even though the matter was declared concluded on 14/11/2019, a final judgment in the sense of order 9 rule 9 of the CPR has not been passed. Accordingly, it was not necessary for the incoming counsel to obtain consent from the previous counsel and or leave of the court before filing a notice of change of advocates. The notice of change of advocates dated and filed on 22/06/2020 is properly filed and sufficient.

[10] The other point was the objection by Kimaita that the plaintiff filed the further affidavit without leave of the court. He asked the court to strike out the affidavit. I have perused the record. Yes, the plaintiff did not have leave to file the further affidavit. However, perusal of the further affidavit reveals that it merely responds to the averments made in the defendant's replying affidavit and provided the advertisement notice. This may be seen within the limited scope of the applicants right of reply. That notwithstanding, whereas litigants should adhere to procedural legal requirements in the filing of pleadings, in this case, I hear repeated thuds of the command in **Article 159 of the Constitution** ringing quite loud that I should excuse the omission in the interest of justice. It bears repeating that, I do not see any prejudice being occasioned by the further affidavit on the respondents for it merely responds to issues in the replying affidavit. In light thereof, I spare and hereby validate the further affidavit.

[11] The other two issues; of the court being *functus officio* and the core of the application being *res judicata;* are better resolved together with the request before the court which are:

a) **That the defendant be ordered to supply a statement of account for the loan due and owing from the 1st plaintiff**

b) **An order that a government valuer to carry out a valuation of the Suit Land; and**

c) **The court to set the monthly installments payable by the 1st plaintiff to the defendant at the sum of Kshs. 260,000/-**

Indebtedness

[12] Concerning the first issue, the plaintiff's indebtedness to the defendant is not disputed and resulted in this matter being marked as concluded on 14/11/2019. From the record, it is apparent that the applicant defaulted to repay the loan long before the outbreak of COVID-19 Pandemic. It is not therefore correct for the applicant to tie the default to the pandemic. Good faith is everything and I do not think such excuses epitomizes that noble tenet. At one time, the court observed that the applicant may introduce a suitable buyer of the property to the bank so that the loan can be repaid. This was his request. The loan was not repaid. Notably, this is a matter that has seen many circumlocutions. Of significance however is that, the applicant has not shown that the statement of account has not been supplied to the applicant. That being the case, a request for supply of a statement of account for the loan due has no basis. It may also be mere adornment of the application. I reject the request.

Government valuer

[13] Is there merit on the request that the court should order a government valuer to carry out a valuation of the Suit Land? The applicant is seeking for this order on the basis that the respondent has underestimated the value of the Suit Land in order to facilitate quick disposal of the

charged property at whatever price. But, according to the respondent, the matter is *res judicata* as it had been tabled and dealt with in Meru HCCC No. 5 of 2020.

[14] **Section 7 of the Civil Procedure Act** states:

> **"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."**

[15] See the case of **Kamunye & others v Pioneer General Assurance Society Ltd [1971] E. A. 263** that:

> ***"The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably."***

[16] Looking at the record of Meru HCCC No. 5 of 2020 which was between the same parties, the plaintiff in his application dated 16/03/2020 had sought several orders including an order directing the government valuer to conduct a valuation on the Suit Land. The suit was not heard since the application was dismissed for reason that there were other suits in respect of the same cause of action. See the ruling delivered on 28/05/2020 in the said case. Based on this, this issue cannot be regarded as *res judicata* as it was not heard and finally determined on its merits. I so hold.

[17] Back to the main. The applicant stated that, according to the defendant's report dated 3/02/2020 the market value of the Suit Land is Kshs. 28,600,000/- while the forced value is Kshs. 21,450,000/-. According to him, the respondent has undervalued the land since based on his valuation commissioned on 7/10/2019 the market value of the Suit Land was Kshs. 40,000,000/- while the forced sale value was Kshs. 30,000,000/-.

[18] I will revisit the record. The applicant filed a Motion dated 2/12/2019 which was supported by the affidavit of the 2nd plaintiff sworn on 2/12/2019. At paragraph 6 he stated as follows:

> **"That furthermore the sale advertisement is in bad faith as the auctioneers have been advising potential buyers that the land shall be available for half price of Kshs. 15 million during the auction."**

[19] In a ruling dated 4/12/2019 the court pronounced itself as follows:

> **"[11] I am aware that the Applicant has made allegations that the auctioneer acted in bad faith in dissuading prospective buyers from buying the charged property at fair and reasonable price. His allegations that the auctioneer intends to sell the property at half price are unfounded and do not stand on evidentiary support. It was stated by Kimaita that the auction was subject to reserve price based on the valuation done last year. It was also stated that the last sale was aborted because no bidder raised the reserve price. Such show diligence on the part of the auctioneer. I do not, therefore, find any substance in these allegations.…"**

[20] This is not the first time allegation of undervaluation of the charged property has been made by the applicant. Nonetheless, the respondent is under a duty to value the charged property for purposes of sale in exercise of the chargee's statutory power of sale. Under Section 97 (2) the duty on the chargee is to ensure that a forced sale valuation is undertaken by a valuer- a requirement which the respondent complied with as evidence by valuation report by Trans country Valuers Limited dated 3rd February 2020. Once, the valuation is done, the burden falls on the shoulders of the applicant to show that the valuation by the chargee's valuer did not result in the best price reasonably obtainable for the charged property.

[21] On this matter, I am content to cite the decision by Kasango J in the case of **Zum Zum Investment Limited v Habib Bank Limited [2014] eKLR** that:

> "26. **Section 97 (2) only bestows a duty on the chargee to ensure that a forced sale valuation is undertaken by a valuer, a requirement which the Defendant complied with as per the third valuation report by Tysons Limited dated 24th April 2013. It was then incumbent upon the Plaintiff to show that the valuation by the Defendant's valuer did not result in the best price reasonably obtainable for the suit property. Since the Plaintiff only discredited the Defendant's valuation on the basis that the valuer was inconsistent, the allegation of which I have established to be unfounded, the Plaintiff has not discharged that burden.**
>
> 27**. In my view, the Plaintiff has not demonstrated satisfactorily why this court should disregard the Defendant's valuation report and only rely on the Plaintiff's valuation reports. 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. The Plaintiff needs to show, for instance, that the Defendant's**

valuer is not qualified or competent to carry out the valuation, or that the valuation was carried out in consideration of irrelevant factors or that the valuation was done way before the time of the intended sale. The Plaintiff has not raised any of such grounds."

[22] The onus of proof is on the applicant to show on the balance of probabilities that the valuation did not obtain the best price envisaged under section 97 of the Land Act. It is not sufficient for him to merely rely on a valuation he obtained before the valuation by the respondent was done or by merely stating that the property could not depreciate on the basis of an earlier valuation. It is not strange or uncommon for real property to depreciate due to varied factors, say, change of character of the property, market dip or economic or financial depression caused by many factors including natural calamities such as COVI-19 Pandemic and so on and so forth. The applicant may be dissatisfied by the valuation done by the bank's valuer and may desire that it be sold at a particular and higher price. Such feelings arise when a chargor is about to lose property. But, that alone is not enough. The applicant failed to show that the valuation by the bank's valuer did not obtain the best price reasonably obtainable for the charged property in accordance with section 97 of the Land Act. They failed to discharge their burden of proof. I find that they have not offered sufficient evidence to show that valuation was underestimation of the charged Land. There is no reason to stop the sale scheduled for today. See **Olkasasi Ltd v Equity Bank Limited [2015] eKLR.** In any case, the plaintiff may seek remedy under **Section 99 of the Land Act**.

Fixing amount of instalment

[23] The court has been invited to set the monthly installments payable by the 1st plaintiff to the defendant at the sum of Kshs. 260,000/-. A loan facility is a contract between the lender and borrower. Therefore, a court of law cannot rewrite the terms of the contract for the parties. The Court of Appeal in **Margaret Njeri Muiruri -V- Bank of Baroda (Kenya) Limited (2014) eKLR** stated:-

"It is not for the Court to rewrite a contract for the parties. As this Court held in National Bank of Kenya Ltd vs Pipe plastic Sankolit (K) Ltd. Civil Appeal No. 95 of 1999 "a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract."

Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the/a procedural abuse during formation of the meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, *commercially unreasonable, and grossly unfair given the existing circumstances of the case."*

[24] It has not been shown by way of evidence that the bargain was unconscionable. In any event, these matters arose earlier in these proceedings and were dealt with by the court. Accordingly, the court cannot rewrite the contract herein for the parties. I decline the invitation.

[25] From the foregoing, it is clear the plaintiff's Motion dated 22/06/2020 is unmeritorious and is hereby dismissed with costs to the respondent. It is so ordered.

Dated, signed and delivered at Meru this 14th day of July 2020.

F. GIKONYO

JUDGE

IN PRESENCE OF

Mutuma J. for Plaintiff

Kimaita for defendant

F. GIKONYO

JUDGE