



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**COMMERCIAL & TAX DIVISION**

**HCCA NO. E 038 OF 2020**

**ADREC LIMITED.....APPELLANT**

**VERSUS**

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

**TOPLINK AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Adrec Limited (ADREC) is the Appellant herein and brings a Notice of Motion dated 12<sup>th</sup> September 2020 for the following prayers:-

*1. THAT this application be certified as extremely urgent to be heard instantly its service notwithstanding.*

*2. THAT pending the hearing and determination of this appeal ssuan order of injunction do ie (sic) restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondent/defendants, their agents, servants and or employees or anyone duly authorized by them or claiming under them against advertising for sale, trespassing onto, selling, auctioning, attaching and or threatening to do the same or deal in whatever manner the suit property known as L.R No. Kajiado/Kaputiei North/31500 Milimani Area Kajiado County and any erections thereon.*

*3. THAT pending the hearing and determination of the suit CMCC 2027 of 2020 ADREC LIMITED VERSUS FAMILY BANK LIMITED AND ANOTHER an order of injunction do issue restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents/defendants, their agents, servants and or employees or anyone duly authorized by them or claiming under them against advertising for sale, trespassing onto, selling, auctioning, attaching and or threatening to do the same or deal in whatever manner the suit property known as L.R No. Kajiado/Kaputiei North/31500 Milimani Area Kajiado County and any erections thereon.*

*4. THAT Pending the hearing and determination of the application herein dated 12<sup>th</sup> September 2020 an order of injunction do issue restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents/defendants, their agents, servants and or employees or anyone duly authorized by them or claiming under them against advertising for sale, trespassing onto, selling, auctioning, attaching and or threatening to do the same or deal in whatever manner the suit property known as L.R No. Kajiado/Kaputiei North/31500 Milimani Area Kajiado County and any erections thereon.*

*5. THAT costs of this application be provided for.*

2. A plea for similar orders before the lower Court failed in Ruling delivered by Hon. D.O Mbeja on 24<sup>th</sup> August 2020. That decision is the subject of the present Appeal.

3. A director to ADREC swears an affidavit in which he states that neither he nor his co-directors were served with the requisite Notices under Section 96 of the Land Act and 15 of the Auctioneers Rules. Further, that the Bank intends to proceed with the auction on the basis of an old valuation contrary to the provisions of Section 97.

4. On another front, the Appellant states that the Bank is partly to blame for the woes it (the Appellant) is facing as it said that the Bank allowed certain fraudulent transactions in the Appellant's account leading to a loss of Kshs.273,000/=.

5. The Bank, in an affidavit sworn on its behalf, avers that a 3 months statutory demand Notice dated 23<sup>rd</sup> June 2019 was served on ADREC

on 28<sup>th</sup> June 2019 via Certificate of Posting No.936 4KE. Also by the same mode, the Bank states that it served another statutory Notice on the Directors of the Plaintiff on the same day via Certificate of Posting Number 934 7KE.

6. The Bank also states that by way of Certificate of Posting it served both ADREC and the directors with a Notice of intention to sell on 27<sup>th</sup> September 2019. This is said to be a Notice issued under the Provisions of Section 96(2) of the Land Act.

7. As to valuation, the Bank states that, on instructions, valuation of the charged property was carried out by Transcountry Valuers Limited and a report generated on 22<sup>nd</sup> January 2019.

8. As to the claims that some fraudulent activity caused a loss to the borrower's account, the Bank points out that even after the alleged fraud, the parties carried out a restructure of the facility and a new letter of offer of 18<sup>th</sup> March 2019 executed between the parties.

9. This Court has read and considered the submissions filed by the parties herein.

10. As a preliminary it is noted that the application before Court is on all fours with the application that was before the Trial Court and which was dismissed by that Court in its impugned ruling of 24<sup>th</sup> August 2020. It is within the right of an Appellant to seek another bite of the cherry by dint of the provisions of Order 42 Rule 6(1) and (2) of the Civil Procedure Rules which reads:-

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

11. The test for grant of such an injunction would be that stated in the case of Giella vs Cassman Brown:-

i. An application must show a prima facie case with a probability of success;

ii. An injunction will not normally be granted unless the applicant might otherwise suffer irreparably injury which would not adequately be compensated by an award of damages;

iii. When the court is in doubt, it will decide the application on the balance of convenience.

12. It is not disputed that there is default on the part of the borrower. This is expressly acknowledged by the borrower. An attempt to blame that default on some fraud in the borrowers account may not yield much because the evidence is that the fraud may have happened in the year 2015 yet the breach for which realization of the security is sought is in regard to a facility that was restructured vide a letter of offer dated 18<sup>th</sup> March 2019. A date after the alleged fraud.

13. ADREC is the chargor, there is evidence that the Notices required by Section 90(2) and 96 (2) of the Land Act 2012 were served upon the chargor by way of certificate of posting through post address 21889-00100 Nairobi. It is not denied that it is the address of the chargor as given in the charge documents. What the Court sees as a complaint is that the Notice was not served on the Directors of the company as one was out of the Court and the other was recuperating from recent injuries or health problems.

14. That is to miss the point. The legal obligation is on the chargee or his agent to serve a Notice upon the chargor. ADREC is the chargor and the obligation of the Bank was to serve the chargor with the statutory Notices. A complaint by its Directors that they (being Directors) were not served does not help the prospects of the Applicant's case.

15. Turning to arguments around valuation of the charged property, the requirement for a recent valuation is under the provisions of Section 97 of the Land Act:-

“97. Duty of chargee exercising power of sale

(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 chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee 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) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market—

(a) there shall be a rebuttable presumption that the chargee is in breach of the duty imposed by subsection (1); and

(b) the chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the chargee has complied with the duty imposed by subsection (1).

(4) It shall not be a defence to proceedings against a chargee for breach of the duty imposed by subsection (1) that the chargee was acting as agent of or under a power of attorney from the chargor or any former chargor.

(5) A chargee shall not be entitled to any compensation or indemnity from the chargor, any former chargor or any guarantor in respect of any liability arising from a breach of the duty imposed by subsection (1).

(6) The sale by a prescribed chargee of any community land occupied by a person shall conform to the law relating to community land save that such a sale shall not require any approval from a Community Land Committee.

(7) Any attempt by a chargee to exclude all or any of the provisions of this section in any charge instrument or any agreement collateral to a charge or in any other way shall be void.”

16. Should the Bank not heed the law on a recent valuation then it will open itself up to a suit for damages. The solution for failure to cause a recent valuation prior to a sale is not to stop the sale. Damages is a sufficient remedy not unless it can be shown that the Bank will not be in a position to pay up the damages. There is no such assertion here.

17. As is that the Applicant can neither demonstrate a prima facie case with a probability of success or irreparable harm if the injunction is not granted, the Notice of Motion of 12<sup>th</sup> September 2020 is dismissed with costs.

**Dated, Signed and Delivered in Court at Nairobi this 14<sup>th</sup> Day of October 2020**

**F. TUIYOTT**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17<sup>th</sup> April 2020, this Ruling has been delivered to the parties through virtual platform.

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Gichohi for Applicant.

Orende for Respondent.