



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & TAX DIVISION**

**MISCELLANEOUS CAUSE NO. E014 OF 2018**

**ECOBANK KENYA LIMITED ..... APPLICANT**

**VERSUS**

**ORION EAST AFRICA LIMITED .....RESPONDENT**

**RULING**

1. This suit was instituted by way of Notice of Motion dated 4<sup>th</sup> May 2018. That Notice of Motion was filed by **ECOBANK KENYA LIMITED**, herein after called ECOBANK. The following is the prayer sought by ECOBANK under that Notice of Motion:

***“That this Honourable Court be pleased to grant the applicant (Ecobank) leave to exercise its right of purchase of the following charged properties under Section 100 of the Land Act No.3 of 2012:***

***a) L.R. No. 82/3029; and***

***b) L.R. No. 82/2042.***

2. The facts which are not denied by **ORION EAST AFRICA LIMITED**, the Respondent, are that on or about 4<sup>th</sup> November, 2010 the Respondent applied for a loan facility which was secured by a legal charge created over the properties 82/2039 and 82/2082 (herein after the charged properties). The Respondent defaulted in the repayment of the facility. This led to ECOBANK exercising its statutory power of sale of the charged properties. ECOBANK after issuing the requisite notices on the Respondent it instructed Onesmus Macharia T/A Watts Auctioneers to advertise for sale by public auction. The Respondent challenged that exercise of statutory power of sale by a suit in the High Court, being HCCC No. 98 of 2014. The High Court ordered ECOBANK to reissue and serve statutory Notices on the Respondent. The Respondent filed an appeal against that decision of the High Court to the Court of Appeal. The Court of Appeal by its judgment of 29<sup>th</sup> May 2015 dismissed the Respondent’s appeal.

3. It is the case of ECOBANK that on re-issuing statutory Notices on the Respondent, for sale of the charged properties, it instructed an auctioneer, Valley Auctioneers, to advertise for sale of the charged properties. The sale was advertised for 30<sup>th</sup> July 2015. The sale, however, did not proceed because no one attended the auction. Valley Auctioneers informed ECOBANK that the prospective purchasers of the charged properties had been denied access into the charge properties, for the purpose of viewing the developments thereof, and had therefore declined to place their bids for the auction.

4. ECOBANK stated, further in support of the application, that it instructed another firm of auctioneers to auction the charged properties but the auction did not take place for the very same reasons given by the previous auctioneer. In this regard ECOBANK relied on an affidavit of Joseph Mungai Gikonyo, the proprietor of Garam Auctioneers, dated 16<sup>th</sup> August 2016. By that affidavit the deponent, in part, stated thus:

***4) That on 18<sup>th</sup> January, 2016 I proceeded to advertise the properties for sale***

***5) That according to the advertisement, the auction was to take place at our offices at Western Height 5<sup>th</sup> floor, Karuma Road, Westlands on 3<sup>rd</sup> February, 2016.***

***6) That on or before 3<sup>rd</sup> February, 2016, prospective purchasers were required to submit bids for the purchase of the properties. In order to submit the bids, the purchasers needed to inspect the suit properties to ascertain the open and forced sale values and also the nature of developments being (sic) thereon. However, the interested purchasers informed us that they could not access the suit premises as the plaintiff (The Respondent) had denied entry by sealing off the main entrance and also given firm instruction to the security guards manning the entrance to the properties not to allow any person who wanted to view the property to gain access.***

5. The deponent also stated in that affidavit that he visited the charged properties in order to confirm what he had been informed by the prospective buyers. He was denied entry into the charged properties and he noticed a sign erected on the wall of the building, on the charged properties, that is “beware of robber Banks.”

6. ECOBANK, following failed attempts to auction the charged properties, filed an application in case HCCC No. 98 of 2014 seeking orders to restrain the Respondent from interfering with the sale of the charged properties. The Court in that case granted orders restraining the Respondent from denying and/or preventing ECOBANK’s servants or agents and prospective purchasers from entering, inspecting or viewing that charged; and an order restraining the Respondent from interfering with ECOBANK’s statutory power of sale over the charged properties.

7. The Respondent opposed the present application through the affidavit of Peter Ruo Maina sworn on 6<sup>th</sup> June 2018. That deponent is the Managing Director of the Respondent. He deponed that ECOBANK had failed to show that its purchase of the charged properties was most advantageous for the Respondent. That ECOBANK in failing to disclose the price it was offering for the charged properties it was in breach of duty of care it owed the Respondent. Further that if ECOBANK was to purchase the charged properties it should purchase the same at market price of Kshs. 140 million.

### **DISCUSS AND DETERMINATION**

8. I have considered the parties affidavit evidence and their written submissions. ECOBANK contends that it has been unable to exercise its statutory power of sale over the charged properties because the Respondent had persistently denied prospective purchasers entry of the properties for purpose of determining the bid they should offer at the public auction.

9. It is important to note that Justice Olga Sewe in case number HCCC No. 98 of 2014, while determining the application for orders to restrain the respondent from interfering with ECOBANK’s statutory power of sale stated thus:

***“whereas there is no evidence before this Court to demonstrate that access was thereafter denied, the Court is of the view that the fact that the said properties have not been sold after more than one attempt, is prima facie corroborative, of the 1<sup>st</sup> defendant’s (Respondent’s) stance that access had been denied; and that the prospective purchasers have not been able to access the land for inspection. There is no doubt that the prospective purchasers need to inspect the property in order to submit their bids.”***

10. That was the finding of Justice Olga Sewe. As a result of making that finding, as stated before, the learned judge restrained the Respondent from interfering with the statutory power of sale of ECOBANK.

11. The Respondent having failed to appeal against the learned judges said finding this Court is bound by that finding.

12. Over and above that this Court does indeed find that ECOBANK has been frustrated by the Respondent in its attempts to sell the charged properties by public properties by public auction, by the Respondent’s acts of refusing to allow prospective buyers view the charged properties.

13. ECOBANK has moved this Court under Section 100 of the Land Act No.3 of 2012. That Section provides:

***“Section 100 purchase by charge.***

***1. Other than in the circumstances provided to in subsection (3), a charge exercising the power of sale may with leave of the Court, purchase the property.***

***2. A Court shall not grant leave unless the chargee satisfies the Court that a sale of the charged land to the chargee is the advantageous way of selling the land so as to comply with the duty imposed on the charge by Section 97 (1).***

***3. If the charged land is to be sold by public auction so long as the price bid for the charged land by the charge is the greater of...***

***a) The highest price bid for that land at the auction; and***

***b) An amount equal to or higher than the reserve price, if any, put upon the land before the auction, whichever amount is the greater.”***

14. ECOBANK first attempted to exercise its statutory power of sale, over the charged properties was in March 2014. That sale was stopped by an order of the Court whereby ECOBANK was required to issue the Respondent fresh statutory Notices of sale.

15. ECOBANK stated that it instructed Valley Auctioneers to sell by public auction the charged properties. The public auction was set for 30<sup>th</sup> July 2015. Valley Auctioneers did not succeed in selling the charged properties because prospective buyers were not permitted to view the charged properties.

16. ECOBANK stated that it again on 11<sup>th</sup> January 2016 instructed an auctioneer, Garam Auctioneers, to sell by public auction the charged properties. Garam Auctioneers failure to get bidders at the auction the said auctioneers deponed in his affidavit that, he visited the charge properties and he was denied access thereof.

17. ECOBANK, has in my view proved on a balance of probability that its purchase of the charged properties is the most advantageous way of selling the charged properties.

18. I have also considered the valuations presented by ECOBANK and the Respondent. ECOBANK has presented a valuation of Kshs. 51 Million for both charged properties. The Respondent provided a valuation for both charged properties at a value of Kshs. 140 million.

19. The Respondent's Valuer took into account, in arriving at the value of Kshs. 140 million, that the outer Ring Road was being widened into a dual carriage way. That Valuer stated that that road construction would positively impact the value of the properties.

20. That Valuer did not provide evidence of such construction and the relevance of that road construction to the charge properties. It is because of that, I find ECOBANK's valuation to be more reliable. I will therefore set the purchase price relying on that valuation. I take note that ECOBANK's valuation relied on material held by it since its Valuer was denied entry into the charged properties by the Respondent.

21. In conclusion therefore, I grant the following orders.

**a) This Court hereby grants ECOBANK KENYA LIMITED leave to exercise its rights of purchase of the following charged properties under Section 100 of the Land Act No. 3 of 2012, that is:**

**i. L. R. No.82/3029; and**

**ii. L. R. No. 82/2042**

**b) ECOBANK KENYA LIMITED will exercise its right of purchase of the charged properties at a public auction where the public will have the liberty to bid, and which public auction shall be within four (4) months from today.**

**c) The charged properties shall not be sold at that auction for less than Kshs. 51 million.**

**d) The costs of the Notice of Motion dated 4<sup>th</sup> May 2018 are awarded to ECOBANK KENYA LIMITED.**

**DATED, SIGNED and DELIVERED at NAIROBI this 13<sup>TH</sup> day of JUNE, 2019.**

**MARY KASANGO**

**JUDGE**

**Ruling Read and Delivered in Open Court in the presence of:**

Sophie..... COURT ASSISTANT

..... FOR THE APPLICANT

..... FOR THE RESPONDENT