



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 387 OF 2018

GOLD LIDA LIMITED.....PLAINTIFF

VERSUS

NIC BANK LIMITED.....1ST DEFENDANT

JOSEPH GIKONYO T/A

GARAM INVESTMENTS AUCTIONEERS.....2ND DEFENDANT

MITCHELL COTTS FREIGHT KENYA LIMITED.....3RD DEFENDANT

RULING

1. Gold Lida Limited (Gold Lida or the Plaintiff) presents a Notice of Motion dated 11th October 2018 in which it seeks the following orders:-

1. *Spent*

2. The 3rd Defendant acting by itself, servants or agents be and is hereby restrained from further alienating or encumbering property Land Reference Number 15099 contained in Grant Number I.R 72132 dated 17th January, 1997, pending the hearing the inter-partes hearing of this Application.

3. The 3rd Defendant acting by itself, servants or agents be and is hereby restrained from further alienating or encumbering property Land Reference Number 15099 contained in Grant Number I.R 72132 dated 17th January, 1997, pending the hearing and inter-partes hearing of this suit.

4. A valuation by a new and independent valuer to assess the market value of the suit property and ascertain its correct market value.

5. The costs of this Application be provided for.

2. Prior to 24th October 2017, Gold Lida was the registered owner of LR No.15099, no doubt a prized property (the suit property). It is developed and on it stands warehouses and auxiliary developments.

3. So as to enable NIC Bank Limited (N.I.C or the 1st Defendant) advanced certain facilities to Folon East Africa Ltd (the borrower). Gold Lida pledged the suit property to the Bank as follows:-

a) Charge Kshs.60,000,000/- registered against the title on 17th August 2009.

b) A further charge for Ksh.84,000,000/= registered on 18th March 2011.

c) A second further charge for Kshs.241,000,000/- registered on 19th July 2013.

4. It is common ground that the Borrower defaulted its repayment of the facility and N.I.C took steps to enforce its statutory power of sale. Unhappy about this and challenging the value placed on the property as the basis for an auction slotted for 21st March 2017, Gold Lida filed

5. Emerging from the rival evidence placed before this Court by the parties and which would not be controversial are the Orders made by Eboso J on 21st March 2017 which read:-

1. THAT the intended auction of Land Reference Number 15099 Title No. IR 72132 by the Defendants is suspended for a period of 45 days from today.
2. THAT the Plaintiff shall within the said period of 45 days deposit into the loan Account United States Dollars 4,395,964.62, Kshs.6,469,183.72 and all subsequently accruing interest.
3. THAT in default of payment of the said sums, the first Defendant shall be at liberty to undertake a valuation of the suit property within the framework of section 97 of the Land Act and proceed to realize the security in tandem with the terms of charge instrument.
4. THAT the valuation shall be done by a registered valuer other than M/S. Mwaka Musau Consultants and Landmark Realtors Limited.
5. THAT costs shall be in the cause.
6. THAT this matter shall be mentioned on 24th May, 2017 with a view to giving further directions taking account that the only dispute before Court is about the value of the suit property and Section 97 of the Land Act gives charge the mandate to undertake a valuation of the charged property.

6. Gold Lida complains about what transpired thereafter and has its version of events. That following default in depositing of certain sums with N.I.C as required by order 1 of the Order of 21st March 2017, N.I.C purported to again exercise its Power of Sale. That without conducting a Public Auction, N.I.C fraudulently transferred the suit property to Mitchell Cotts Freight Kenya Limited (Mitchell Cotts or the 3rd Defendant) on 24th October 2017.

7. It is the contention of Gold Lida that the Bank understated the open market value of the property by placing it at Kshs.650,000,000.00 instead of Kshs. 1,300,000,000.00 with the implication that the forced sale value was reflected at Kshs.487,500,000.00 instead of Kshs.975,000,000.00. It further asserts that N.I.C made a misrepresentation by publishing that the property would be sold by Public Auction on 13th June, 2017 when no Auction was scheduled for that date. That instead, the Bank had misrepresented that the property was sold by Public Auction on that day to Seven Star Limited for Kshs.595,000,000.00/-.

8. Gold Lida alleges further misrepresentation on the part of Seven Star. That Seven Star supposedly paid a sum of Kshs.148,750,000/= towards the purchase price on 13th June 2017 when no such sum was paid, and transferred the property to Mitchell Cotts on a false position that it had paid Kshs.595,000,000/- to the Bank and Joseph Gikonyo t/a Garam Investments Auctioneers (Garam or the 2nd Defendant), the person alleged to have conducted the Auction.

9. Lastly that the Directors and Shareholders of Mitchell Cotts are Andrew Ndegwa and James Philip Maina who are also the Directors and controlling mind of N.I.C.

10. These allegations are made in the Complaint filed on 11th October 2018 and the current application. In the Complaint, Gold Lida seeks the following prayers:-

- a. A declaration be and is hereby issued that the sale and transfer of property Land Reference Number 15099 contained in Grant Number I.R 72132 dated 17th January, 1997 by the 1st and 2nd Defendants to the 3rd Defendant on 24th October, 2017 was unlawful, null and void ab initio.
- b. An order be and is hereby issued for the cancellation of the transfer of property Land Reference Number 15099 contained in Grant Number I.R 72132 dated 17th January, 1997 by the 1st Defendant to the 3rd Defendant made on 24th October 2017.
- c. The 3rd Defendant acting by itself, servants or agents be and is hereby restrained from further alienating or encumbering property Land Reference Number 15099 contained in Grant Number I.R 72132 dated 17th January, 1997.
- d. The 1st Defendant be and is hereby directed to discharge all securities registered against the title of property Land Reference Number 15099 contained in Grant Number I.R 72132 dated 17th January, 1997 upon the Plaintiff's payment of the outstanding sum ascertained as due and owing from Foton East Africa Limited to the 1st Defendant.
- e. The 3rd Defendant by itself, servants or its agents be and is hereby directed to vacate property Land Reference Number 15099 contained in Grant Number I.R 72132 dated 17th January, 1997 and handover vacant possession thereof to the Plaintiff in the state and condition in which the same was before the 3rd Defendant's entry thereupon.
- f. In the alternative to prayers a. to e. hereinabove, the 1st Defendant be 705,800,000.00 being the difference between the open

market value of the property and the price for which the property was transferred to the 3rd Defendant.

g. The 1st, 2nd and 3rd Defendants be and are hereby directed to pay the Plaintiff general damages for fraud and negligence, to be assessed by the Court.

h. The 1st, 2nd and 3rd Defendants be and are hereby directed to pay the Plaintiff the costs of this suit.

i. Any other relief as the Court may deem fit.

11. NIC and Mitchell Cotts make a similar defence to the claim by Gold Lida on the value of the property. NIC's position is that this issue was addressed in ELC 177 of 2017 and should not be revisited. Further that the market value of Kshs.1,300,000,000.00 returned by M/S Mwaka Musau Consultants cannot stand in light of the Court Ruling of 21st March 2017 in ELC 177 for 2017 which required the suit property to be revalued by a valuer other than Mwaka Musau Consultants and Land Mark Realtors Limited.

12. On the process of sale, the following sequence is given. That on 23rd May 2017, N.I.C obtained a fresh valuation report from Gimco Limited which placed the market value of the property at Khs.650,000,000.00. On 29th May 2017 and 12th June 2017, Garam published the advertisement of the suit property for sale by public auction on 13th June 2017. That the suit property was sold on that day for Kshs.595,000,000.00 being the highest bid. The allegation of sale by private treaty is refuted.

13. In respect to the payment of the purchase price, N.I.C says that the successful purchaser paid 25% deposit on the date of sale by way of cheques of Khs.10,000,000.00 presented to the auctioneer as bidding deposit and Kshs.138,250,000.00 paid directly to the loan account of the Borrower by way of RTGS.

14. On 17th July 2017, Mitchell Cotts remitted Khs.146,250,000.00 and the balance being Kshs.300,000,000.00 was settled by NIC as financiers to Mitchell Cotts. Mitchell Cotts is said to be the purchaser's nominee. Shown to Court is a copy of the title to the property showing that it was transferred to Mitchell Cotts on 24th October 2017.

15. The Court is asked to determine an application for grant of a temporary injunction and is once again required to restate the principles in **GIELLA VS. CASSMAN BROWN** [1973] EA 358 which sets out the test to be satisfied as being:-

- a) An Applicant must show a prima facie case with a probability of success.
- b) An Interlocutory Injunction will not normally be granted unless the Applicant might otherwise suffer irreparable loss which would not be adequately compensated by an award of damages.
- c) If the Court is in doubt, it will decide an application on the balance of convenience.

16. In addition that Court must be mindful that at this interlocutory stage, the evidence before it is untested and the Court should not make hard and fast conclusions which could possibly embarrass the trial Court.

17. It is common ground that the attempt by the Bank to sell the suit property has been litigated previously in ELC 177 of 2017. Just as here, one of the grievances of Gold Lida was the value placed on the charged property for purposes of sale. On 21st March 2017 Eboso J. made the following orders (which i reproduce again) on an application by Gold Lida Ltd:-

1. THAT the intended auction of Land Reference Number 15099 Title No. IR 72132 by the Defendants is suspended for a period of 45 days from today.
2. THAT the Plaintiff shall within the said period of 45 days deposit into the Loan Account United States Dollars 4,395,964.62, Kshs.6,469,183.72 and all subsequently accruing interest.
3. THAT in default of payment of the said sums, the 1st Defendant shall be at liberty to undertake a valuation of the suit property within the framework of Section 97 of the Land Act and proceed to realize the security in tandem with the terms of charge instrument.
4. THAT the valuation shall be done by a registered valuer other than M/S Mwaka Musau Consultants and Landmark Realtor Limited.
5. THAT costs shall be in the cause.
6. THAT this matter be mentioned on 24th May, 2017 with a view to giving further directions taking into account that the only dispute before Court is about the value of the suit property and section 97 of the Land Act gives charge the mandate to undertake a valuation of the charged property.

18. It is not in contention that neither the borrower nor Gold Lida made amends to the breach in repayment as required by order 2 thereof and so the Bank proceeded to enforce the default clause. In doing so the Bank instructed GIMCO Limited to value the property. In a report of 23rd May 2017, the valuer returned the following values:-

Market value Kshs.650,000,000.00
Mortgage value..... Kshs.520,000,000.00
Forced sale value..... Kshs.487,500,000.00

19. It is on the basis of the said valuation that the impugned sale proceeded. In challenging this valuation, Gold Lida relies on the valuation by Mwaka Musau of 19th September 2014 in which the valuers returned a market value of Ksh.1,300,000,000.00 and a forced sale value of Kshs.975,000,000/= . Gold Lida argues that the valuation of GIMCO is a gross undervaluation.

20. To be observed however is that this same valuation (that of Mwaka Musau) had been used as a basis to challenge an earlier valuation commissioned by the Bank and undertaken by Landmark valuers in ELC. No. 117 of 2017. In resolving that issue Eboso J ordered that another valuation be undertaken by a registered valuer other than Mwaka Musau Consultants and Landmark Realtors Limited and hence the third valuation by GIMCO.

21. In exercising its statutory power of sale, a chargee owes a duty of care to the chargor to obtain the best price reasonably obtainable at the time of sale. That duty is elaborated as follows in section 97 of The Land Act:-

“(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”.

22. The impugned sale is said to have taken place on 13th June 2017 which would be less than a month after the valuation by GIMCO. In that sense the valuation was recent and the Bank may have fulfilled the obligation placed on it under section 97(2) of the Land Act.

23. As to the values returned by GIMCO, the Court observes that it has 3 reports before it all returning different values, albeit on different dates. These are:-

(1) Landmark (valuation of 4th February 2013)

Open market value Kshs.550,000,000.00

Forced sale value Kshs.400,000,000.00

(2) Mwaka Musau (valuation of 19th December 2014)

Market valueKsh.1,300,000,000.00

Forced sale valueKshs.975,999,000.00

(3) GIMCO (valuation of 23rd May 2017)

Market valueKsh.650,000,000.00

Forced sale value.....Kshs.487,500,000.00

24. The valuations were done at different times and there is no knowing whether that explains the variations. However on a cursory observation, the valuation commissioned by Gold Lida appears to be completely out of step with the others. As to which of the valuations is correct is a matter that cannot be interrogated fully at this stage of the proceedings. That may require a full blown trial. However, the basis upon which the sale proceeded is not entirely disconnected with an earlier professional view. If, however, the valuation by GIMCO is found to be wrong and unjustified, then Gold Lida is not without a remedy.

25. Indeed the alternative prayer in Plaintiff is made pursuant to the avenue under section 99(4) of the Land Act which reads:-

“(4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power”.

26. As to whether the sale was by way of public auction or private treaty, there is an advertisement in the Daily Nation of 29th May 2017 advertising a public auction of 13th June 2017. That advertisement is annexed as DL 6 to the affidavit in support of the application. The Defendants assert that the auction actually took place on 13th June, 2007. I am afraid this Court is unable to follow the complaint by Gold Lida that no auction took place on 30th May 2017. The Court understands the auction date to have been on 13th June, 2017.

27. In respect to payment of the purchase price by or on behalf of the 3rd Defendant, the Replying affidavit of Ibrahim Ngatia sworn in November 2018 sets out the payment as follows:-

- a) Kshs.10,000,000.00 on 13th June 2017 by cheque
- b) Kshs.138,750,000.00 on 13th June 2017 by way of RGTS.
- c) Kshs.146,250,000.00 on 2nd November 2017 by way of RTGS.
- d) Kshs.300,000,000.00 through a loan by the Bank to the 3rd Defendant.

This evidence is not challenged. If however the complaint by Gold Lida is that it was not paid the surplus amounts as it should have been, then that cannot be reason to restrain Mitchell Cotts from enjoying its rights as a registered owner of the land. Gold Lida can sue the Bank.

28. The Court now turns to the final issue. At the auction, a company by the name Seven Stars Limited bought the charged property. Mitchell Cotts says that it is the purchaser's nominee. This is not controverted.

29. Also not controverted is that Mitchell Cotts and the Bank have at least 5 common Directors and shareholders. Gold Lida has characterized the two as sister companies. However there is no firm evidence that both companies are owned by the same parent company and the Court is unable to find that the characterization by Gold Lida is entirely accurate. However because of the commonality of some owners and directors, the two may have affiliations.

30. If, *arguendo*, the Court was to hold that for all intents and purposes the chargee and Mitchell Cotts are one and the same, then what should concern the Court is whether the Bank has breached the law by allowing Mitchell Cotts to purchase the charged property.

31. This takes the discussion to section 100 of the Land Act which reads:-

“(1) Other than in the circumstances provided to in subsection (3), a chargee 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 most advantageous way of selling the land so as to comply with the duty imposed on the chargee by section 97(1).

(3) If the charged land is to be sold by public auction, the chargee may bid for and purchase the charged land at that public auction so long as the price bid for the charged land by the chargee 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.

(4) If a chargee who has sold charged land to the chargee applies to the Registrar to be registered as the lawful owner of land under a land or lease, the Registrar may require that chargee to provide any evidence that the Registrar may specify showing that the provisions of this section have been complied with and the Registrar shall not be obliged to register any such land or lease until the chargee has so satisfied the Registrar”.

32. The provision, as I see it, is intended to protect the chargor from underhand dealings by a chargee who wishes to purchase a property over which it has taken a charge. So that where the chargee seeks to buy the property other than by public auction, then it must seek leave of the Court. This is a safeguard against possible abuse of the power of the chargee. The law, however, does not require such court permission or sanction where the sale is by public auction. Subsection 3 requires the bid by the chargee to be the highest bid at the auction and in addition that the bid must be equal or higher than the reserve price. This is the protection given to chargor when the chargee seeks to bid at a public auction. If the law allows the chargee to bid for and purchase the charged property in a public auction, albeit with certain caveats, then it cannot possibly bar a sister company of a chargee from doing so. Save for underhand dealings or impropriety by the chargee or its affiliate, such a purchase cannot be faulted. In the matter at hand no proof has been tendered to show that Mitchell Cotts or its principal (Seven Star Limited) did not deal at arms length at the auction.

33. On this Court's assessment, on the material before it, the Plaintiff's case does not demonstrate a prima facie case with a probability of success and the application of 11th October 2018 must fail. It is hereby dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 7th day of June, 2019.

F. TUIYOTT

JUDGE

PRESENT:

Ligame for Onyango for Plaintiff

Onyango (miss) for Gachui for 3rd Defendant

Onyango for Kabaiko for 1st and 2nd Defendant

Nixon – Court Assistant