



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO. 501 OF 2016

ABDULLAHI MOHAMED SHEIKH.....PLAINTIFF

VERSUS

GULF AFRICAN BANK.....DEFENDANT

RULING

(1) Before this Court is the Notice of Motion dated 27th November 2018, by which **ABDULLAHI MOHAMED SHEIKH** (the Plaintiff/Applicant) herein seeks the following Orders:-

“1. SPENT

2. THAT a temporary injunction be issued restraining the Defendant whether by itself through its agents and particularly Leakey’s Auctioneers or any person acting under its instructions, directions, permission and/or authority from selling, completion of sale, transferring or seeking for registration of that property known as land Reference No.209/7260/19388 and land Reference No.209/7260/19389, to Greenbelt Warehouse Limited or to any purported buyer, purporting to emanate from the Auction purportedly conducted on the 22nd November 2018, pending the hearing and determination of the suit.

3. An order be issued declaring void, any purported sale or subsequent transfer of the property known as Land Reference No.209/7260/19388 and Land Reference No.209/7260/19389 for failing to comply with section 97(1)(3) & Section 98(1) of the Land Act and Rule 11(b) (x) of the Auctioneers Rules.

4. That the costs of this application be provided for.”

(2) The application which was premised upon **Sections 1A & 1B** and **3 & 3A** of the **Civil Procedure Act, Order 40 Rules 1 & 2** and **Order 51 Rule (1)** of the **Civil Procedure Rules, Section 97(1) (2)(3) & Section 98** of the **2010 Land Act 2012**, and all other enabling provisions of the law, was supported by the Affidavit sworn on **27th November 2018** by the Plaintiff/Applicant.

(3) On their part the Defendant/Respondent **GULF AFRICAN BANK LIMITED** raised a Preliminary Objection vide the Notice of Motion dated **27th November 2018** seeking to have the suit against themselves dismissed on the grounds that:-

“(a) The Plaintiff has never extracted and served summons since the suit was filed on 19th December 2016.

(b) The summons on record have neither been extracted, signed nor served upon the Defendant.

(c) There being no valid summons, the suit has abated and should be dismissed with costs.”

The two applications were heard together and directions were given that parties file written submissions. Both parties filed their written submissions on **21st January 2019**.

BACKGROUND

(4) Briefly this suit involves a loan facility which was advanced to the Plaintiff/Applicant by the Defendant/Respondent. In order to secure that facility a charge was created upon **LR.NO.209/ 260/19388** and **LR 209/7260/19389** (hereinafter jointly referred to as **“the suit properties”**). The Plaintiff/Applicant fell into arrears of the loan facility and the Bank moved to realize its security through the sale by public

auction of the suit properties. The Plaintiff/Applicant moved to court to prevent the sale by auction of the suit properties. In the ruling delivered on **30th October 2018**, this court dismissed an interim stay of sale and held that the Defendant/Respondent was at liberty to exercise its statutory power of sale by way of the sale of the suit properties by way of public auction.

(5) Consequently on **5th November 2018**, the Defendants Auctioneers advertised the suit properties in the Daily Nation inviting members of public to attend the sale by Public Auction. The Court has been informed that an auction was in fact conducted by **Leakey's Auctioneers** on **22nd November 2018** at which auction the suit properties were sold to **Greenbelt Warehouse Limited** for a sum of **Kshs.105,000,000/=**. Subsequent to that auction the Plaintiff/Applicant filed the present application.

ANALYSIS AND DETERMINATION

(6) There are two issues which arise for determination in this matter:-

(1) Whether the suit is for dismissal due to failure to extract and serve summons on the Defendant.

(2) Whether the Plaintiff/Applicant is entitled to the interim orders sought in this application

I will proceed to deal with each issue individually.

(1) SERVICE OF SUMMONS

(7) In the Preliminary Objection dated **27th November 2018** the Defendant/Respondent seeks to have this suit struck out on the following grounds:-

“(a) The Plaintiff has never extracted and served summons since the suit was filed on 19th December 2016.

(b) The Summons on record have neither been extracted, signed nor served upon the Defendant.

(c) There being no valid Summons, the suit has abated and should be dismissed with costs.”

(8) Counsel for the Plaintiff/Applicant countered that the purpose of summons was to notify the Defendant of the existence of a suit against it. In a case such as the instant one where the Defendant have participated actively in the proceedings thus far, they cannot be heard to decry the failure by the Plaintiff to serve summons.

(9) I have perused this file and confirm that the Summons to Enter Appearance were extracted but were not signed by the Deputy Registrar were they nor collected by the Plaintiff for service. As a consequence no summons has ever been served upon the Defendant/Respondent.

Order 5 Rules (1) and (5) Civil Procedure Rules 2010 provide as follows:-

“5(1) When a suit has been filed a summons shall issue to the Defendant.

(2)

(3)

(4)

(5) Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue or notification whichever is later failing which the suit shall abate.

(10) The purpose of service of summons is to notify the Defendant of the existence of the suit against it and to prompt the Defendant to enter appearance and to file a Defence to the suit. This is a suit which was filed on **19th December 2016**.

(11) I take notice of the fact that the Defendant has fully participated in the prosecution of all the applications filed in this suit and that the Defendant has also filed applications in the case. As such it is manifest that the Defendant was fully cognizant of the existence of this suit against and even instructed Counsel who have vigorously represented the Defendant 36in all stages of the proceedings.

In **TEJ PRAKASH SHEM –VS- PETROAFRIC COMPANY LIMITED & 2 OTHERS 2014 eKLR**, the Court held as follows:-

“In addition, Order 5 Rule (1) provides the function of summons as being to order the Defendant to appear within a specified time. In my view, where a Defendant gets notice of a suit against him through other means other than summons and participates in subsequent proceedings, there is no prejudice occasioned by the delay in the issue and service of summons that would warrant the dismissal of a suit” [emphasis supplied].

(12) Similarly in **TROPICAL FOODS INTERNATIONAL & ANOTHER –VS- EASTERN AND SOUTHERN AFRICAN TRADE & DEVELOPMENT BANK & ANOTHER [2017] eKLR** my learned brother **Justice Tuiyott** held thus:-

“The purpose of Summons is for the Defendant to appear within the time specified therein. It also serves to give Notice of the existence of a suit against a Defendant. If therefore the Defendant gets notice of the suit by other means other than the Summons and participates in subsequent proceedings, then the Defendant should not complain of the non-service of Summons unless it can be demonstrated that the non - service has caused some prejudice on the Defendant.”

(13) The Defendant herein has not demonstrated what if any prejudice it has suffered as a result of the Plaintiff’s omission to serve it with a Summons to Enter Appearance. Clearly the Defendant got wind of the existence of the suit, proceeded to enter appearance and actively participated in all subsequent proceedings.

(14) Finally on this point I am guided by the decision in **INDUSTRIAL & COMMERCIAL DEVELOPMENTCORPORATION – VS- SAM MODEZ INDUSTRIES LTD Civil Appeal No.229 of 2001**, where it was held that:-

“Service of Summons to Enter Appearance though important, a failure to do so within the stipulated time does not necessarily render proceedings null and void. It will depend largely on the circumstances of each case.”[emphasis supplied]

Based on the circumstances of this particular case the fact that vigorous litigation has proceeded in this file since the suit was filed, with the active participation of the Defendant I find that failure by the Plaintiff to serve the Summons to Enter Appearance upon the Defendant was not fatal. The Defendant entered appearance and has participated fully in all matters relating to this suit. No prejudice has been occasioned to the Defendant at all. Accordingly I find no merit in the Preliminary Objection dated **28th November 2018**. The same is dismissed in its entirety.

INTERIM ORDERS

(15) The Plaintiff/Applicant in their written submissions challenged several aspects of the sale of the suit properties to **Greenbelt Warehouse Limited**, and took issue with the manner in which the auctioneer conducted the auction on **22nd November 2018**. The Plaintiff/Applicant contends that the sale was conducted in an irregular and illegal manner. That the Defendant failed its statutory duty of care and that the suit properties were disposed of at a price well below the forced sale value thereby prejudicing the Plaintiff. The Plaintiff/Applicant states that he did on **22nd November 2018** go to the auctioneer’s office intending to witness the auction only to be informed upon arrival that the sale had already taken place.

(16) The Plaintiff/Applicants contention is that in fact no auction took place but that the suit properties were sold to a pre-selected buyer at a throwaway price without giving any consideration to the reserve price. The Plaintiff/Applicant is aggrieved that the price fetched at this **“auction”** was not sufficient to offset the outstanding debt owed to the Bank. The Plaintiff/Applicant contends that due to the fraudulent sale and having lost his properties, he still remains indebted to the Bank. Finally the Plaintiff/Applicant urges the court to find that the Defendant/Respondent did not conduct the sale in a procedural manner and failed to obtain the best reasonable price for the suit properties. He urges the court to order for a joint valuation in order to ascertain value of the suit properties.

(17) The Defendant opposed the Plaintiff’s application through the Replying Affidavit sworn on **14th December 2018** by **PRESTONE WAWIRE** an Advocate of the High Court of Kenya. The Defendant insists that the auction was conducted in a lawfully and procedural manner. The Defendant denies the Plaintiff’s assertion that no auction took place. He avers that he personally attended the auction and was present when **Greenbelt Warehouse Limited** emerged the highest bidder with a bid of **Kshs.105,000,000/=**. The allegation that the suit properties were sold at a throwaway price was strenuously denied. The Defendant/Respondent contends that the suit properties were legally sold to Greenbelt Warehouse Ltd who have already paid a deposit of **Kshs.26,859,995.47**.

(18) The first challenge the Plaintiff/Applicant has made to the auction conducted on **22nd November 2018** relates to the price at which the suit properties were disposed. His contention is that they were sold way below the reserve (forced sale) value.

Section 97(1) of the Land Act, 2012 provides as follows:-

“(1) A charge who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of a court order owes a duty of care to the charger, any guarantor of the whole or any part of the sums advanced to the charger, any charge under a subsequent charge or under a lieu 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.”

Section 98(2) of the same Act provides:-

“If a sale is to proceed by public auction, it shall be the duty of the Chargee to ensure that the sale is publicly advertised in such a manner and form as to bring it to the attention of persons likely to be interested in bidding for the charged land and that the provisions relating to auctions and tenders for land are as near as may be followed in respect of that sale.”

The **Auctioneers Rules, 2017** also set out the procedural rules which must be adhered to by an auctioneer in the conduct of a public auction.

(19) Section 97 obliges the charge to **“obtain the best price reasonably obtainable at the time of sale.”** The Plaintiff/Applicant avers that

the Bank failed to honour this obligation while the Defendant/Respondent claims that it was guided in pricing by the Valuation Report dated **17th May 2018** prepared by **Centenary Valuers Ltd** which gave a reserve price of **Kshs.105 Million**. The Court is faced with a **“He said, she said”** scenario. The value of a property is a matter that cannot be determined on the basis of affidavit evidence.

(20) In **PALMY COMPANY LTD –VS- CONSOLIDATED BANK OF KENYA LTD [2014] eKLR**, the Court stated thus:-

“The onus of establishing on a prima facie basis that the applicant’s right has been infringed by the Respondent by failing to discharge the duty of care under Section 97(1) of the Land Act lies with the Applicant. The Court needs cogent evidence and material in order to say that prima facie there has been an under valuation of the suit property which is an infringement of Section 97(2) of the Land act by the Respondent so as to entitle the court to call for an explanation or rebuttal from the Respondent.”
[emphasis supplied]

In order to make a determination regarding the propriety or otherwise of the sale price the court would have to receive evidence on the issue.

(21) Secondly the Plaintiff/Applicant raises questions regarding the manner in which the auction of **22nd November 2018** was conducted. Indeed the Plaintiff/Applicant goes so far as to state that no action took place. He faults the auctioneer for not having adhered to the auctioneers rules and regulations in conducting the sale. The Plaintiff/Applicant further submits that the auction was not public and alleges that the suit properties were sold to a pre-selected buyer, who had to be approved by the Bank.

(22) The Defendant/Respondent disputes all the above allegations and maintains that the auction was conducted procedurally and in accordance with the laid down law and regulations. Once again the court is faced with discordant allegations which as stated above cannot be resolved at this interlocutory stage. Evidence would have to be called and testimony received in order to determine these disputed issues.

(23) The principles for the grant of an injunction were set out in the case of **GIELLA –VS- CASMAN BROWN & COMPANY LIMITED [1973] E.A 358** where it was held that:-

(i) The Applicant 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 irreparable injury.

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

(24) A **“prima facie”** case was defined in **MRAO LTD –VS – FIRST AMERICAN BANK OF KENYA LTD [2003] eKLR** as:-

“A case on which the material presented to the court a tribunal property directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

(25) Whilst the Defendant/Respondent had the right to exercise its statutory power of sale it was obliged to do so within the law and regulations. The violations of law and regulations alleged by the Plaintiff/Applicant are critical matters which in my view warrant further interrogation by the court. These disputed facts can only be settled upon a trial of the suit.

(26) In **SULEIMAN –VS- AMBOSELI RESORT LTD [2004] eKLR**, **Hon Justice J.B Ojwang** (as he then was) stated that:-

“A fundamental principle is that the court should take which ever course that appears to carry the lower risk of injustice if it should turn out to have been wrong.”

(27) The balance of convenience dictates that the injunction ought be granted pending the hearing and determination of this suit. Accordingly I do grant a temporary injunction in the following terms.

“A temporary injunction is hereby issued to restrain the Defendant whether by itself, through its agents and particularly Leakey’s Auctioneers or any person acting under its instructions directions, permission and/or authority from transferring or seeking for registration of that property known as Land Reference No.209/ 7260/19388 and Land Reference No.209/7260/19389 to Greenbelt Ware-house Limited or to any purported buyer, purporting to emanate from the auction conducted on 22nd November 2018 pending the hearing and determination of the suit.”

Costs of this application will be in the cause.

It is so ordered.

Dated in **Nairobi** this **1st** day of **July 2019**.

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Justice Maureen A. Odero