REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

COMMERCIAL SUIT NO. 2 OF 2019

SOLOMON HODO RUGARIA

T/A SUNSHINE SPRING ACADEMY.....PLAINTIFF/APPLICANT

VERSUS

KENYA COMMERCIAL BANK LIMTIED.....DEFENDANT/RESPONDENT

RULING

The application dated 22nd February 2019 sought an Interlocutory Injunction to restrain the Defendant, **KENYA COMMERCIAL BANK LIMITED**, from selling the suit property **L.R. NO. BUKIRA/BUJIRIMONONO/1731** until the suit was heard and determined.

1. The Plaintiff, **SOLOMON HODO RUGARIA** Trading As **SUNSHINE SPRING ACADEMY** expressly stated that he was not opposed to the Defendant exercising its Statutory Powers of Sale.

2. Whereas the Plaintiff conceded that the Defendant had the right to exercise its Statutory Powers of Sale, he insists that the Defendant ought to be compelled to carry out a valuation of the suit property prior to the exercise of the said right.

3. According to the Plaintiff, the suit property was valued in the sum of Kshs 25,600,000/=, yet the Defendant wanted to sell it for a sum of Kshs 3,000,000/=.

4. In the Plaint dated 22nd February 2019, the Plaintiff stated as follows, at Paragraph 7;

> ***"That unless an injunction is issued compelling the defendants to value the property, the plaintiff is likely to lose his hard earned investment."***

5. At Paragraph 8 of the Plaint it was stated that;

> ***"The plaintiff's claim against the defendant is for an order of mandatory injunction to compel the defendant to do a current valuation of the property BUKIRA/BUJIRIMONONO/1731 before they can exercise their right of sale."***

6. Finally, the Plaintiff sought the following substantive relief in the Plaint;

> ***"1. A mandatory injunction to compel the defendant to jointly do a current valuation of the property with the plaintiff over land parcel No. Bukira/ Bujirimonono/1731 before the defendant can exercise their right of sale."***

7. When determining an application for an interlocutory injunction, the court first considers whether or not the applicant had made out a prima facie case with a probability of success.

8. Noting that the substantive relief sought in the Plaint was for a mandatory injunction to compel the Defendant to carry out a valuation jointly with the Plaintiff, I note that the Plaintiff's application did not urge for a joint valuation.

9. The application was asking that the bank should be compelled to carry out a current valuation prior to the exercise of its power of sale.

10. It therefore follows that the relief sought in the Plaint is at variance with that which was being sought in the application.

11. In any event, the Plaintiff has not demonstrated to the court that there was either a statutory or a contractual requirement for a joint valuation of the charged property prior to the chargee exercising its statutory powers of sale.

12. There is a statutory requirement that a chargee ought to carry out a valuation of the charged property prior to exercising its statutory powers of sale.

13. Pursuant to **Section 97(2)** of the **Land Act**;

> ***"A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer."***

14. As the law imposes an obligation on the chargee to have the charged property valued prior to the exercise of the chargee's powers of sale, I find that the Plaintiff failed to establish a prima facie case, that there should be a joint valuation process undertaken.

15. In this case, the Defendant has exhibited a Valuation Report dated 31st July 2018.

16. As the charged property had been scheduled for sale by public auction on 27th March 2019, I find that the valuation process meets the requirement for the ascertainment of the current Forced Sale Value.

17. However, in the event that the valuation was erroneous, giving rise to a sale at a gross undervalue, as alluded to by the Plaintiff, it would be possible for the Plaintiff to be compensated by an appropriate award in damages.

18. I so hold because the Plaintiff has already assigned a value for the suit property. Therefore, if the Plaintiff was able to prove that the property had been sold at an undervalue, it would be possible for the court to easily quantify such compensation as would be sufficient to make good such loss as the Plaintiff would have suffered.

19. Section 99 (4) of the **Land Act** appears to contemplate situations in which a person suffered prejudice due to the unauthorized, improper or irregular exercise of the power of sale indicating that he shall have a remedy in damages against the person exercising that power.

20. I also find that the Defendant, through **KEYSIAN AUCTIONEERS**, indicated an intention to sell;

> ***"All that property known as L.R. NO. BUKIRA/ BUJIRIMONONO/1731 PART OF SUNSHINE SPRING ACADEMY."***

21. The sale is not of the whole Academy; but of only a part thereof.

22. Annexture **"SHR 1"** is a valuation report dated 8th January 2016. The said report explicitly states that it is in relation to;

> ***"Title Number: Bukira/Buhirimonono 1675, 1676 and 1731."***

23. At pages 7 and 8 of the report, it is indicated that Plot No. **Bukira/Buhirimonono/1675** is **0.025 Hectares** or **0.06 Acres**; whilst Plot No. **Bukira/Buhirimonono/1676** is **0.025 Hectares** or **0.06 Acres**; and Plot No. **Bukira/Buhirimonono/1731** is **0.081 Hectares** or **0.200 Acres.**

24. In the Notification of Sale prepared by Keysian Auctioneers, it is clear that the Defendant wishes to sell Plot No. **1731 ONLY**, which is 0.081 Hectares or 0.200 Acres.

25. Therefore, the auction is not intended to be of the whole Academy.

26. But I also appreciate the sentiments which the Plaintiff expressed in his further affidavit, when he pointed out that about 90% of all the developments that make **SUNSHINE SPRING ACADEMY** are located on Plot No. **1731**.

27. Therefore, if the three parcels of land were valued at 25.6 Million Shillings, that implies that the other two plots, (being Number 1675 and 1676), have a value of about 10% of the said Kshs 25.6 Million.

28. Assuming that the Plaintiff was right, in the valuation sums he assigned to Plot No. **1731**, that would mean that if that plot was sold for Kshs 3 Million, the remaining plots would be far from sufficient to cover the balance of the loan.

29. However, a close scrutiny of the evidence placed before the court shows that on 8th January 2016, Messrs **CMT** Realtors Limited had, in their Valuation Report, indicated that the;

> ***"i. Open Market Value (Upon completion; Kshs 25,600,000.00 (Kenya Shillings Twenty Five Million Six Hundred Thousand)Only***
>
> ***ii. Open Market Value (Current Stage); Kshs 14,000,000.00 (Kenya Shillings Fourteen Million) Only***
>
> ***iii Mortgage Value: 11,200,000.00 (Kenya Shillings Eleven Million Two Hundred Thousand) Only***

iv Forced Sale Value/Estimated Reserve Price: Kshs 10,500,000.00 (Kenya Shillings Ten Million Five Hundred Thousand) Only

v. Insurance Value: Kshs 11,500,000.00 (Kenya Shillings; Eleven Million Five Hundred Thousand) Only

vi Land Value: Kshs 2,500,000.00 (Kenya Shillings: Two Million Five Hundred Thousand) Only."

30. It is evident that the value of the school was **NOT** Kshs 25,600,000/= as at the date when it was valued on 8th January 2016. That is the value which the Valuers estimated it would have, upon completion.

31. It is significant to note that the actual value, as at 8th January 2016, was Kshs 14,000,000/=.

32. If the Plaintiff intended to persuade the Court that the security was valued at Kshs 25,600,000/=, he ought to have provided a current valuation.

33. Depending on the level of completion, coupled with the quality of the work done subsequent to January 2016, it would then have been possible to ascertain the current value.

34. Meanwhile, the Valuation Report dated 8th January 2016 cited the Forced Sale Value as being Kshs 10,500,000/=. If that was the actual Forced Sale Value as at January 2016, it would appear that a valuation at Kshs 3,000,000/= in July 2018 would have to be explained in detail, to enable all parties appreciate the reason for the marked reduction in value.

35. When the apparent reduction in value was not properly explained, it may be justifiable for the Plaintiff to feel that the intended sale was being undertaken without the chargee discharging the obligation of ensuring that the auction would obtain the best price reasonably obtainable at the time of sale. Pursuant to **Section 97 (1)** of the **Land Act**, one of the duties of care which the chargee owes to the chargor is that of taking steps to make it possible for the sale to attract the best price reasonably obtainable at the time of the sale.

36. Therefore, if a Valuation Report cited a value which was too low, a Reserve Price based upon that Valuation Report would not be capable of attracting the best price reasonably obtainable.

37. But in this case, the Plaintiff did not provide the court with a Current Valuation Report of the particular security, from which the court could have made an informed determination as to whether or not the proposed Reserve Price was too low.

38. In the final analysis, the application is without merit, and is therefore dismissed, with costs to the Defendant.

39. Nonetheless, the Defendant is reminded of its statutory obligation to undertake a valuation. The need for the said valuation has arisen primarily because of this case, which has resulted in a delay between the latest valuation and any sale which the Defendant may wish to undertake.

40. In effect, the application has only served to increase the Plaintiff's indebtedness.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 16TH DAY OF SEPTEMBER 2019

FRED A. OCHIENG

JUDGE