



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

COMMERCIAL SUIT NO. 7 OF 2018

NELLIE BENIGNUS WAMALWA.....PLAINTIFF/APPLICANT

VERSUS

RAFIKI DEPOSIT TAKING

MICROFINANCE (K) LTD.....DEFENDANT/RESPONDENT

RULING

The application dated 28th February 2018 is for a temporary injunction to restrain the Defendant, **RAFIKI DEPOSIT TAKING MICROFINANCE (K) LIMITED**, from effecting any transfer, or altering the records at the Lands Office by removing the name of the Plaintiff, **NELLIE BENIGNUS WAMALWA**, or alienating or otherwise interfering with the Plaintiff's parcel of land **L.R. NO. KISUMU/KONYA/4949**.

1. According to the Plaintiff, there had been an advertisement by Messrs **KEYSIAN AUCTIONEERS**, indicating that the suit property was scheduled for auction on 14th December 2017.
2. However, no public auction was conducted on 14th December 2017.
3. It is the Plaintiff's case that on 14th December 2017, a Valuer visited his property with the intention of conducting a fresh valuation.
4. On the other hand, the Defendant's case was that the public auction was conducted as scheduled, on 14th December 2017.
5. The Defendant said that the suit property was sold to **ALLAN FREDRICK ODERO OPIYO**, who was the highest bidder, in the sum of Kshs 7,400,000/=.
6. According to the Defendant, the suit property had been valued by **ZENITH (MANAGEMENT) VALUERS LIMITED**, whose report was dated 20th January 2017.
7. The said valuation gave the values of the suit property as follows;
 - (a) *Open Market Value*
 - Kshs 9,500,000/=;
 - (b) *Forced Sale Value*
 - Kshs 7,200,000/=.
8. Therefore, when the highest bid was for Kshs 7,400,000/=, the auctioneers accepted it and issued a Certificate of Sale.
9. In her submissions, the Plaintiff said that the court ought to grant the interlocutory injunction so as to stop the Defendant from benefiting from an illegality which was also an act in contempt of court.
10. The Plaintiff described the sale as an illegality because the valuation that the Defendant relied upon when purporting to auction the suit property was much less than the value which the Defendant's valuer had first provided.

11. By the Replying Affidavit sworn by **JANE WARAU**, the Respondent provided copies of all the requisite Notices which were served by both the Chargee and the Auctioneer prior to the auction scheduled for 14th December 2017.
12. On a prima facie basis, I find that the Defendant served the Chargor with the requisite Notices.
13. I also find that the Defendant carried out a valuation of the suit property in January 2017.
14. By issuing the Notices and also having a fresh valuation carried out, the Defendant met the conditions which the court had laid down in Ruling dated 13th July 2016.
15. Furthermore, if the valuation carried out by the Defendant is finally proved to have been at an under-value, the Plaintiff can always be compensated by an appropriate award in damages.
16. There are serious allegations made against the auctioneer, suggesting that he did not conduct any public auction.
17. Secondly, it was suggested that the said auctioneer colluded with the alleged highest bidder, to have him declared the purchaser even though there had been no public auction.
18. Of course, the allegation implies that the person said to have purchased the property has been portrayed as an accomplice in the auctioneer's nefarious activities.
19. In so far as the auctioneer was the Defendant's contracted agent, in the realization of the security, it might be possible that the Defendant could be held liable for the auctioneer's shortcoming, if any.
20. However, the Plaintiff has not shown that the Defendant was directly either involved with the auctioneer and the highest bidder in the actions in issue, or that the Defendant was aware of the said actions.
21. Furthermore, if the court were to make a finding regarding the alleged activities involving the auctioneer and the highest bidder, justice demands that the said highest bidder be accorded an opportunity to be heard.
22. As of now, the person who had been declared the highest bidder is not a party to this suit, and has not, therefore, been given an opportunity to be heard.
23. Meanwhile, although the Plaintiff asserted that if the temporary injunction was not granted, the Defendant would have been allowed to benefit from an illegality, the Plaintiff did not demonstrate to the court how the Defendant would derive any benefit from the situation.
24. Pursuant to the 45 days' Redemption Notice dated 3rd October 2017, the amount of money that was then due and payable by the borrower was Kshs 23,885,056/=.
25. If the security was sold for Kshs 7,400,000/=, I am unable to comprehend how such a sale is beneficial to the Defendant.
26. I say so because a sale at Kshs 7,400,000/= would leave the Defendant still exposed to an outstanding debt of over Kshs 14,000,000/=; but without a security.
27. On top of that, if the Plaintiff was to eventually prove that the security was sold-off at an under-value, the Defendant may be compelled to compensate the Plaintiff.
28. From the evidence tendered by the Plaintiff, it appears that the Defendant was not at all enthusiastic about engaging the Plaintiff in a negotiated settlement, for the sums which the Defendant was claiming.
29. Although a court of law cannot compel parties to amicably resolve a contentious dispute, the conduct of the Defendant, if eventually proved, may well be a factor to be taken into account in calculating such compensation as the Plaintiff may become entitled to, if the Plaintiff proved her case.
30. For now, the Defendant has not commented on the correspondence between it and **PARAGON PROPERTY VALUERS LIMITED**, which suggests that the Defendant had put the valuers on Notice about the apparently high value that was assigned to the suit property in 2013.
31. It appears that the Defendant has greater confidence in the more recent valuations, which it relied upon when realizing the security.
32. The correspondence was produced in evidence by the Plaintiff.
33. In the light of that correspondence, it is possible that instead of the most recent valuation being an under-value, it is the earlier valuation which might have been an over-valuation.
34. In conclusion, I find that the Plaintiff has not proved a prima facie case with a probability of success.

35. Secondly, I find that even if an interlocutory injunction was not granted, the Plaintiff has not proved that she would suffer irreparable loss which cannot be adequately compensated by an award of damages.

36. If the sale was at an under-value, the court can award appropriate compensation to the Plaintiff.

37. Accordingly, there is no merit in the application dated 28th February 2018. It is therefore dismissed with costs to the Defendant.

DATED, SIGNED and DELIVERED at KISUMU

This 8th day of October 2019

FRED A. OCHIENG

JUDGE