



**REPUBLIC OF KENYA**

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

**COMMERCIAL & ADMIRALTY DIVISION**

**HCC NO. 276 OF 2016**

**TULLA RESERVE SUPPLIES LIMITED.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**VS.**

**NATIONAL BANK OF**

**KENYA LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MUSA A. ADAN.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**CENTRAL BANK OF KENYA.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. On 29<sup>th</sup> September 2017, this Court dismissed the Plaintiff's Notice of Motion dated 12<sup>th</sup> July 2016 which had sought to injunct National Bank of Kenya Limited (The Bank) from selling LR. No. 7918/731(IR No. 6442) (The charged property) in exercise of its power of statutory power of sale.
2. The Plaintiff returned to Court on 19<sup>th</sup> December 2017 with an application seeking, inter alia, a similar restraint order against the Bank and that it (the Plaintiff) be allowed to sell the property by way of private treaty. That application is yet to be heard and in various court appearances that followed, parties informed Court that they were negotiating the matter.
3. The Bank, perhaps because of a breakdown of negotiations, sought to sell the property on 13<sup>th</sup> September 2018 by way of public auction. This triggered an application dated 25<sup>th</sup> July, 2018 by the Plaintiff seeking to stop the sale on the ground that this matter was due for directions of Court on 2<sup>nd</sup> October 2018 in respect to the yet to be prosecuted application of 19<sup>th</sup> December 2017.
4. In a Court session before Hon Ngetich J on 4<sup>th</sup> September 2018 ,parties addressed Court upon which the learned Judge stayed the auction due for 13<sup>th</sup> September 2018 on condition that Kshs.10 million plus auctioneers fees be deposited with the Bank by 12<sup>th</sup> September 2018. The entire order is reproduced below:-

**IN COURT ON 4<sup>TH</sup> SEPTEMBER 2018**

**BEFORE THE HONOURABLE LADY JUSTICE R. NGETICH**

**ORDER**

THIS MATTER coming up for hearing on 4<sup>th</sup> September 2018 before the Honourable Lady Justice R. Ngetich AND UPON READING the Notice of Motion dated 25<sup>th</sup> July 2018 and presented to the Honourable Court by the Counsel for the Plaintiff under Section 159 of the Constitution of Kenya, Section 1A, 1B, 3A orders 51 of the Civil procedure Act Cap. 21, Order 40 Rules 1, 2, 3, 8, 10, 11, Section 99 of the Land Act 2012 and any other enabling provisions of law. AND UPON READING the supporting affidavit of DIDA HUSSEIN DADO sworn on 25<sup>th</sup> July, 2018 and annexures thereto. AND UPON READING the Counsel for the Plaintiff and the Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the Counsel for the 3<sup>rd</sup> Defendant.

**IT IS HEREBY ORDERED:**

1. THAT stay of sale of the property scheduled for next week be and is hereby granted awaiting further directions/orders by Justice Tuiyott.

2. THAT sale be and is hereby stayed on condition that Kshs.10 million plus Auctioneers fee is deposited with the bank by 12<sup>th</sup> September 2018.

3. THAT failure which sale to go on as scheduled.

4. THAT if auctioneers fees is disputed, the same to be deposited in court by 12<sup>th</sup> September 2018.

5. THAT mention on 26<sup>th</sup> September 2018 for directions/orders before Justice Tuiyott.

GIVEN under my hand and the seal of this Honourable Court this 4<sup>th</sup> day of September 2018.

ISSUED at NAIROBI this 10<sup>th</sup> September 2018.

DEPUTY REGISTRAR

HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

5. Unable to meet the condition for deposit, the Plaintiff, through a Notice of Motion dated 12<sup>th</sup> September 2018, sought extension of time to 23<sup>rd</sup> September 2018. This extension was conceded to by the counsel for the Bank in court proceedings of 18<sup>th</sup> September 2018. In that application, the Plaintiff does not state where it intends to source the money for the deposit.

6. Again, unable to meet the extended deadline, the Plaintiff filed the application dated 21<sup>st</sup> September 2018 in which it sought the following orders:-

1. THAT the interim orders of stay granted by this honourable Court on 4<sup>th</sup> September 2018 and extended on 18<sup>th</sup> September 2018 be further extended pending the inter partes hearing and determination of this application.

2. THAT the interim orders of stay granted by this honourable Court on 4<sup>th</sup> September 2018 and extended on 18<sup>th</sup> September 2018 be further extended pending inter partes hearing and determination of this application.

3. THAT the orders made by this honourable Court on 4<sup>th</sup> September 2018 and extended on 18<sup>th</sup> September 2018 be amended or varied to the extent that the time period required to deposit the sum of Kshs.10 million and the auctioneers fee be extended by a further 5 days to 28<sup>th</sup> September 2018.

4. THAT the details of the account(s) to which the money should be deposited be provided.

7. The above application does not seem to have been argued. Fast forward to 27<sup>th</sup> September 2019. The Plaintiff returns back with a Notice of Motion for the following orders:-

1. spent.

2. spent

3. spent.

4. THAT an order for injunction do issue restraining the 1<sup>st</sup> Defendant/Respondent by itself, its servants, agents or any one of them from interfering with the property known as L.R No. 7918/731 (IR NO. 6442) either by sale, offering for sale, auction, sale by private treaty, transfer or disposal by any means whatsoever and howsoever pending the hearing and determination of this suit.

5. THAT the costs of this application be in the cause.

8. This Application, which is prompted by the Bank's intention to sale the property on 17<sup>th</sup> October 2019, is the application now before Court. The main premise upon which the application rests is that the Applicant has fulfilled the condition for stay that was granted by Hon. Ngetich J on 4<sup>th</sup> September 2018.

9. I have read the application and the response made by the Bank. I have considered the short oral arguments made by counsel and have agonized over the matter. I return this view.

10. This Court has already made a decision as to whether it should injunct the Bank from exercising its statutory power of sale of the

charged property. The Court has through the ruling of 29<sup>th</sup> September 2017 declined to grant that plea. The Ruling has not been reviewed, set aside or varied. When the Plaintiff returned to Court on 19<sup>th</sup> December 2017 it sought to be allowed to sell the property by way of private treaty. I do not understand that request to be a challenge to the ruling of 29<sup>th</sup> September 2017 but a request by the Plaintiff to be involved in the sale.

11. It is in respect to that application that this Court was to give directions and has yet to do so because of the deviation that followed.

12. When Hon. Ngetich J. granted stay orders on 4<sup>th</sup> September 2018, the Honourable Judge merely preserved the status quo pending further directions of this Court. The Honourable Judge neither reviewed nor set aside the ruling earlier made by this Court on 29<sup>th</sup> September 2017 nor did the Judge make substantive orders injuncting the Bank from exercising its right to sale the charged property.

13. Looking at the record, the Plaintiff was unable to keep the timeline set by the Court on 4<sup>th</sup> September 2018 and subsequently extended to 28<sup>th</sup> September 2018. That the extension was only to 28<sup>th</sup> September 2018 is conceded to by the Plaintiff (see paragraph 7 of the affidavit of Diba Hussein Dado sworn on 27<sup>th</sup> September 2019).

14. Of significance is that there was no further extension beyond 28<sup>th</sup> September 2018 and even without getting into the debate as to where the money to be deposited was to come from, any deposit after 28<sup>th</sup> September 2018 would be in contravention of the Court order of 4<sup>th</sup> September 2018 and the timeline extended to 28<sup>th</sup> September 2018.

15. The issue this Court needs to grapple with is whether to grant the Plaintiff further relief by way of injunction when it has breached the timelines for deposit. This is a question I resolve in favour of the Bank for three reasons. First, if the Applicant had difficulty in fulfilling its promise to make the deposit by 28<sup>th</sup> September 2018, then it should have come back to Court seek further extension.

16. Second, the order made by Hon. Justice Ngetich on 4<sup>th</sup> September 2018 was not an end in itself. As I understand it, the Applicant sought the respite to enable it get directions from the Court in respect to its plea to sale the charged property by private treaty. The Applicant has not moved the Court for those directions since then, over 12 months now, and this prejudices the Bank which asserts that a huge debt is still unattended.

17. Further, this Court has already made a substantive ruling that the Plaintiff does not deserve an order stopping the Bank from exercising its power of sale. That order, to date, has not been set aside or varied. In addition, the spirit of the application of 19<sup>th</sup> December 2019 (and this is reflected in paragraph 2 thereof) is that whilst the charged property can be sold, it should be sold by the Plaintiff by way of private treaty. If the apprehension of the Applicant is that the Bank will sell the property at an undervalue then the law grants a remedy in damages (See Section 99(4) of the Land Act).

18. The upshot in to dismiss the Notice of Motion of 27<sup>th</sup> September 2019 with costs as I hereby do.

**Dated, Signed and Delivered in Court at Nairobi this 16<sup>th</sup> Day of October 2019**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Ms Misera for Plaintiff

Makambo for Defendant

Court Assistant: Nixon