



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL CASE NO.4 OF 2018

(FORMERLY OF ELC.NYAH.21 OF 2018)

FRANCIS NGARAMA KIRATU.....PLAINTIFF/APPLICANT

- V E R S U S -

EQUITY BANK.....DEFENDANT/RESPONDENT

R U L I N G

The application by way of Notice of Motion dated 28/2/2019 is expressed to be brought pursuant to Article 159 of the Constitution, Section 1A, 1B and 3A of the Civil Procedure Act, Sections 103 and 114 of the Land Act No.6/2012, Order 1 Rules 10(2) and 25; Order 10 Rules 1 & 2 Rules and Order 51 Rules (3) of the Civil Procedure Rules 2010.

The applicant, Francis Ngarama Kiratu seeks the following orders:

1.spent;
2. That leave be granted to the plaintiff/applicant to have:
 - (a) The Purple Royal Auctioneers enjoined to these proceedings as the 2nd defendant/respondents;
 - (b) That the Land Registrar be enjoined in these proceedings as the 3rd defendant/respondent;
3.spent;
4. That the court do grant an injunction restraining the respondent (actual appellant) their agents, servants or officers from selling, advertising for sale, resale, transferring or dealing with Land Registration No.Laikipia/Ol'Arabel/235 measuring 35.0 Ha or 85.5 acres situated at Gitirima Village Laikipia West pending hearing and determination of the suit;
5. That there be a declaration that the suit property was sold below market value and hence the public auction of 19/12/2018 was illegal, null and void;
6. That the 2nd respondent be compelled to produce the proceedings of the auction conducted on 19/12/2018;
7. That in the alternative, there be a new independent valuation undertaken in respect of the Land Registration No.Laikipia/Ol'Arabel/235 and a new auction process be undertaken;
8. Costs of the application.

The application is supported by grounds found in the body of the application, affidavit of the applicant dated 28/2/2019 and further affidavit dated 1/7/2019. The applicant's counsel also filed submissions on 18/7/2019 which were highlighted by Mr. Muga.

The application was opposed and a replying affidavit was sworn by John Njenga, the 1st respondent's General Manager, Legal Services on 18/4/2019. Submissions were filed by Mburu Maina Advocate and highlighted by Mr. Ojoo Advocate.

A brief background of this matter is that in 2011, the applicant identified the suit land and managed to procure it by way of a facility from the 1st respondent. The 1st respondent agreed to finance its purchase by providing Kshs.13,000,000/= to the applicant and the parties then executed a charge over the said property. Sometimes between 2014 – 2015 the applicant was unable to service the loan when the 1st

respondent moved to exercise its power of sale.

It is the applicant's contention that the said exercise of power of sale is unlawful as it is a collusion between the intended 2nd and 3rd respondents in that they failed to comply with the law that is Section 97(1) of the Land Act No.6 of 2012 which provides the chargee who exercises power of sale the charged land, owes a duty of care to the chargor to obtain the best price reasonably obtainable at the time of sale; that Under Section 97(3) the price at which the land is sold should not be less than 25% or below the market value; that Under Section 90(1) of the Land Act, if the chargor defaulted in repayment, the chargee needs to issue a demand notice; that Under Section 96(2) the chargee needs to serve on the chargor a notice to sell in the prescribed form; that the sale also breached Rule 11(b)/(x) of the Auctioneers Rules which requires that any instruction by a chargee to an Auctioneer, to sell, by auction, should contain a reserve price of the property to be sold. Reliance was made on *Elizabeth Wambui Njuguna v Housing Finance Co-Operation (2006) eKLR*.

It is also the applicants contention that the statutory power of sale had not accrued and the purposed sale is unlawful, fraudulent because in 2011, the property was valued at Kshs.25,950,000/= and yet it has been sold for only Kshs.23,000,000/= 8 years later and yet it is common knowledge that in Kenya, land appreciates; that the applicant had obtained a purchaser for the suit property at Kshs.85,000,000/= but the original title which was in the 1st respondent's custody and the Green Book at the Lands Office mysteriously got lost and the sale aborted; that the respondent reported the loss of the title to the police station and the loss was advertised in the Daily Nation Newspaper and later another title was issued but by then, the applicant had lost the buyer; that the 1st respondent's actions in respect of the suit land are suspicious because on 29/8/2018, the 1st respondent instructed a private valuer to carry out a confidential valuation without the applicant's knowledge under report (FNKE) which indicates the current open market value of the suit land to be Kshs.30,000,000/= and a forced sale valuation at Kshs.22,500,000/= Report is FNK10; that in their letter dated 29/8/2018 to the Auctioneer, the 1st respondent did not disclose the reserve price or reasons for selling without a reserve price; that they later indicated the value of the property to be Kshs.35,000,000/= but the value was not supported by any evidence. The other complaint is that although the sale was supposed to take place on 13/12/2018, it actually took place on 19/12/2018. The applicant sought Chrisca Real Estates, an independent valuer, to carry out a valuation and the land was valued at Kshs.60,000,000/=; that the applicant's account was credited with amounts not paid by him which is irregular; that he did a search at Lands Registry in February, 2019 and found that the property is still registered in his name and hence the need to stop any consequential acts arising from the illegal exercise of statutory power of sale by the 1st respondent.

It was further submitted that the applicant has satisfied the test for grant of an injunction in terms of the case of *Giella v Cassman Brown 1973 EA 358*; in that on the land, stands his matrimonial home on which he does commercial farming and if it were to be sold, he would suffer irreparable harm. The applicant relied on the decision in *J.M. Gichanga v Co-Operative Bank Ltd (2005)* cited in *Panari Enterprises Ltd v Lijoodi and two others (2014) eKLR* where the court held that damages are not always a suitable remedy where the plaintiff has established a clear legal right or breach.

It was further argued that Order 1 Rule 10(2) Civil Procedure Rule allows the joinder of parties at any stage of the proceedings (*See Lillian Wairimu Ngetho & another v Moke Sengi Co-Operative Security Ltd (2014) KLR*).

Mr. Muga also urged that the sale never took place as there is no evidence of it; that the sum allegedly paid at the Auction is not before the court and the statement of account does not reflect the said sums.

The respondent opposed the application and John Njenga the 1st respondent's General Manager deponed that the application lacks merit and baseless because a legal charge was duly executed over the suit property upon the applicant being advanced Kshs.13,000,000/=; that the applicant having defaulted to pay despite the restructuring of the loan and accommodation, he failed to repay the loan, interest and further charges and the 1st respondent was therefore entitled to realize the amount owed to the chargee; that as of 2/2/2014, the arrears stood at Kshs.10,219,940/60; that despite demands and statutory notices, the applicant has failed to repay the loan and the 1st respondent moved in exercise its power of sale. That the applicant went to court to *Nyeri ELC.40/2014 Francis Ngarama Kiratu v Equity Bank Ltd* where an injunction was issued and the orders were only discharged by the court on 18/12/2017 for indolence on the part of the applicant to prosecute. The 1st respondent instructed the 2nd intended defendant to proceed with the sale and recover Kshs.23,016,344/65; Accurate Valuers were instructed to conduct a valuation; that the applicant then moved to court in *Nyahururu No.23/2018 Francis Ngarama Kiratu v Equity Bank Ltd* by the application dated 3/12/2018 seeking an injunction against the defendant but the court declined to grant the order on 19/12/2018 to reserved its ruling for 22/3/2019; that the property was sold to the highest bidder at Kshs.23,000,000/= (JW7) which was the best price in the market at the time and that 1st respondent complied with all statutory requirements and had issued notices as was required by law; that the reserve price was unnecessary; that there is no evidence that the suit land was worth Kshs.60,000,000/=. As respects the alleged sale that the applicant had tried to enter into in 2014, counsel argued that no consent was exhibited as proof that a consent of Land Control Board was ever issued; that when the applicant entered into the alleged sale the consent of the 1st respondent had not been sought; that when the title went missing, the appellants tried its best to get its replacement but the applicant was uncooperative. The 1st respondent made all steps possible to replace the title which was done; that it is unlikely that anybody wished to buy the land for Kshs.85,000,000/= without doing due diligence.

As regards the sale of 19th December, the notice of 11/10/2018 corrected the earlier notice of 1/10/2018 which indicated that the sale would be on 19/12/2018 instead of 13th December; that the land was regularly sold to Esther Njoki; that Kshs.5,750,000/= in the applicant's account a deposit of proceeds of sale which is to be used to settle the loan; that the applicant has employed all manner of schemes to try and prevent the 1st respondent from exercising his rights under the charge; that the orders sought are prejudicial to the 1st respondent and will be subjecting the 1st respondent to financial loss and damage as it may not be possible to recover the sums advanced from the applicant; it is also urged that applicant will not suffer any irreparable loss because he can recover the commercial value of the suit land; that the applicant has not demonstrated that any of his rights have been infringed during the exercise of the statutory power of sale by the 1st respondent and that the balance of convenience lies with the 1st defendant.

Mr. Ojoo, counsel for the 1st respondent relied on the affidavit and written submissions. He added that there is no doubt that the applicant defaulted in repayment of the loan advanced to him; that the 1st respondent exercised his statutory right of sale and the auction having been done, an order of injunction cannot issue against a person who is not a party to the proceedings.

Having considered the affidavits and submissions of counsel, the issues that arise are whether:

(1) Whether there was an auction and if so, was it procedural;

(2) Whether the applicant is entitled to an order of injunction.

It is not in dispute that the 1st respondent advanced to the applicant a loan of Kshs.13 million for the purchase of the suit property by letter dated 31/10/2011. It is also not in dispute that a charge was executed over the suit property and by 2/2/2014, the applicant's account was in arrears standing at Kshs.16,219,940/= (JM3). Despite several demands and notices (JM4), the applicant did not repay the loan which continued to accrue interest and other charges.

In 2014, when issued with notice of sale, the applicant obtained an injunction in Nyeri ELC.40/2014 which remained in place till 2017 when the court discharged. Thereafter, the 1st respondent instructed the intended 2nd respondent to recover the loan, which stood at Kshs.23,016,344/65 as of 29/8/2018. There is therefore no doubt that the applicant had defaulted in the loan repayment.

In essence, the applicant's complaint is that though he owes the 1st respondent, the sale by public auction conducted on 19/12/2018 un-procedural, was illegal or fraudulent and it should be set aside.

Section 90(2) of the Land Act allows a chargee to issue notice in writing to a chargor who is in default under a charge, notifying him of the default and demand payment. If the chargor does not rectify the default, then the chargee has a right to exercise his statutory power of sale by first issuing notice under Section 96(2) of the Land Act. In the case of Elizabeth Wambui Njuguna v Housing Finance Company of Kenya Ltd (2006) eKLR, the court in considering Section 90(2) stated:

"...the omission to serve a valid statutory notice is not an irregularity or impropriety to be remedied in damages. It is a fundamental breach of statute; which derogates from the chargor's equity of redemption."

The 1st respondent exhibited as 'JN4' notices issued to the applicant. By a letter dated 22/12/2017, the applicant was issued with redemption notice. The sale never took place. The last notice was issued on 11/10/2018 by Purple Royal Auctioneers giving the applicant 45 days redemption notice. This is in compliance with Section 97 of the Land Act.

Section 96(2) of the Land Act. It provides that:

"...before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sale."

Although the applicant contends that he was never served with the said notice, the 1st respondent contends otherwise. After the injunction order was discharged in Nyeri ELC.40/2014, in 2017, the 1st respondent moved to exercise its statutory power of sale and by the letter of 29/8/2018, the 1st respondent appointed Purple Royal Auctioneers to sell the suit land, who issued notice of intended sale dated 11/10/2018. Maina Mwangi a licensed process server duly swore an affidavit to having served the notice on the applicant on 11/10/2018. Upon service of that notice, the applicant quickly moved to this court for an order of injunction 3/12/2018 but the court declined to issue the order. It is my view that, in order to move this court for orders on the day of the auction, the applicant must have been aware of the intended sale and therefore, he must have been duly served with the mandatory statutory notice of sale.

The other complaint by the applicant is that the sale offended Section 97(1) which requires the chargee to act in good faith in obtaining the true market value of the land and Section 97(3) that requires that the charged land should not be sold below 25% of the market value.

The applicant complains that the land was undervalued; that he obtained another valuation that valued the land at Kshs.60,000,000/= whereas it was sold at Kshs.23,000,000/=. He alleges fraud.

Section 97(1) of the Land Act provides that:

"(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 charge under a subsequent charge or under a lien to obtain the best price reasonably obtained at the time of sale.

(2).....

(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)."

According to the 1st respondent, Accurate Valuers valued the property at Kshs.30,000,000/= as the current open market value and Forced Sale Value at Kshs.22,500,000/=. The suit property was then sold at Kshs.23,000,000/= which the 1st respondent argues is reasonable at the

time of sale. I note that the purported valuation by the applicant done by Chrisco Valuers is nearly three (3) times that of Accurate Valuers and the question that lingers is which one of them is close to the actual value of the suit property. But even as I ponder this question, the legal position on the issue of alleged undervaluing of property at an auction is settled. J. Emukule considered this issue in John Kagura Githae v KCB Ltd & 2 others HCC.34/2013 (NKR) where the court adopted the decision in Downhill Ltd v Harith Ali EL-Busaidy (2000) eKLR where the court held:

“If, as the borrower contends, the property had been sold at an-undervalue, that was a proper ground for recovering damages from the bank. It is no ground for stopping the sale and transfer to the appellant. We note that the borrower instituted these proceedings after his equity of redemption had been extinguished. He could have paid the amount demanded even after the sale to the appellant but before he was registered as a proprietor.”

In Joyce Wairimu Karanja v James Mburu CA.118/2017 paragraph 31:

“Our case law has been consistent in holding this position. The appellant cited many cases whose holdings I need not rehash here. Some of the cases the appellant relied on include: Simon Njoroge Mburu v Consolidated bank of Kenya Ltd (2014) eKLR, Nancy Kahoya Amadiya v Expert Credit Ltd & another (2015) eKLR and Lawrence Mukiri v Attorney General & 4 others (2013) eKLR; Twin Buffalo Safaris Ltd. v Business Partners International Ltd (2015) eKLR. Suffice it to cite two cases. Justice J.B. Havelock had this to say about Section 99 and the position of purchaser in Simon Njoroge Mburu v Consolidated Bank of Kenya Ltd (2014) eKLR:

That Section [99] now statutorily encompasses the right of the chargor prejudiced by unauthorized, improper or irregular exercise of the power of sale to have a remedy in damages. In my view, such is where the plaintiff’s remedy lies in this case. In this regard, the plaintiff would do well to note the powers of the court in respect of remedies and reliefs set out in under Section 104 of the Land Act, 2012...

What is clear is once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished. The only remedy for the chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages....”

See also Andrew Mwaniki Wanjohi v Equity Building Society Ltd and 2 others 203/2005 and Bomet Beer Distributors Ltd & Wilson Martim Lasoi v KCB & another HCC.147/2004.

From an analysis of the above decisions, it is clear that the practice is that undervaluation of a property would not be a ground for interfering with a statutory power to sell as a chargor can be compensated in form of damages.

The other complaint was that the 1st respondent did not comply with Rule 11(1)(b)(x) of the Auctioneer’s Rules, which requires that any instruction to sell to an auctioneer by a chargor shall contain a reserve price of the property to be sold. On the other hand, the 1st respondent contended that the reserve price was not necessary.

The applicant relied on the decision in Nationwide Finance Co. Ltd v Meck Industries Ltd and Michael Gerald Kimani (2001) eKLR where the court said “it is not disputed that the notification of sale did not have a reserve price. At that time of its issue, no valuation had been done. The power of the court to set aside a sale on the ground or irregularity is under order XX Rule 79 of the Rules.”

In Harrishcha Bhovambhai Jobanputra & another v Paramount Universal Bank where the court stated as follows:

“Failure to indicate the reserve price is therefore, an express breach of Rule 11(1)(b)(x) which is couched in mandatory terms and which must, therefore, be obeyed in observance. Failure to comply can only denote that no valuation of the property was undertaken contrary to the express requirement of that Rule.... The total sum of these irregularities is that it would be procedurally illegal to allow the applicant’s property to be sold unless and until the laid down procedure has been adhered to. I therefore, find that it would be improper to allow the applicants to sell the said property without complying with the law and that the applicants have established a prima facie case with a probability of success....”

I have seen the instructions given to the auctioneers on 29/8/2018. They did not contain any reserve price nor did the notices of sale issued by the auctioneer. Unlike the above cited decisions, there was a valuation report in existence dated 3/10/2018 which guided the auctioneer. In this case, the valuation contains the market value of Kshs.30,000,000/= and the ‘forced sale price’ of Kshs.22,500,000/=. The 1st respondent claims to have sold the property above the forced price, that is, Kshs.23,000,000/=.

In my view, failure to comply with Rule 11(1)(b)x of the Auctioneers Rule seems to be regulatory and would not render a sale invalid.

Whether the order of injunction can issue:

The principles for grant of injunction were settled in the celebrated case of Giella v Cassman Brown and Co. Ltd (1973) EA 358. The applicant has to establish that he has:

(1) A prima facie case with a probability of success;

(2) That if an order of injunction was not granted, the applicant will suffer irreparable loss which cannot be adequately compensated by an award of damages;

(3) If the court is in doubt, it will decide on a balance of convenience.

What amounts to a 'prima facie case' was settled in the celebrated case of Mrao Ltd v First American Bank where the court stated this:

"A prima facie in a Civil Application includes but is not confined to a 'genuine and arguable case'. It is a case which on the material presented to the court, a tribunal properly 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 latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

As observed earlier, the applicant was advanced a loan facility of Kshs.13,000,000/= in 2011 and a charge registered against the suit land and due to default in repayment by the applicant, the 1st respondent claims about Kshs.23 million. The 1st respondent has tried in vain to exercise its statutory power of sale since 2014. It resulted in the applicant filing the first suit Nyeri 40/2014 where interim orders were issued till they were vacated by the court on 4/12/2017. The 1st respondent is a bank which is in business and its money has been tied up in the loan.

There is no evidence adduced to this court by the applicant to demonstrate that he has repaid the said loan or any part of it. It stands at about Kshs.23,016,344/64 at the time the 1st respondent instructed the Auctioneer on 29/8/2018. An injunction is an equitable remedy and he who comes to equity must come with clean hands. The applicant also seems to be disputing the said sums but that is no reason to deny the 1st respondent their right to exercise their right of sale. In Mrao Ltd Supra, the court cited Halsbury's Laws of England Vol.32 (4th Edition) Paragraph 725 which states:

"725 when mortgagee may be restrained from exercising power of sale. The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute because the mortgagee has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged."

The 1st respondent's right of sale accrued once the applicant defaulted and I find that the respondent has not shown that he has a prima facie case with a probability of success.

Will the applicant suffer irreparable loss?

The applicant contends that the suit land is his matrimonial home and he will suffer irreparably if it is sold. I am guided by the decision in Andrew Mwaniki Wanjohi Supra where J. Ochieng' stated:

"...by offering the suit property as security, the chargor was equating it to a commodity which the chargee may dispose of so as to recover his loan together with interest thereon. Therefore, if the chargee were to sell off the suit property, the chargor's loss could be calculable on the basis of the real market value of the said property."

If it is found that the property was undervalued as alleged or that the sale is irregular, auction can be challenged as to the said loss for which the 1st respondent can compensate the applicant. He cannot suffer irreparable harm or loss.

Where does the balance of convenience lie?

Even though the applicant denies that the property has been sold, the 1st respondent exhibited the certificate of sale "JN7" and memorandum of sale which disclosed the sale price and the purchaser.

The applicant also argues that he did a search and found that the land is still registered in his name and hence there is no sale.

However, the law of the sale is concluded at the fall of the hammer and the chargor's equity is that redemption immediately lapses upon the fall of the hammer – see Kiran Renji Kotech v Trust Bank Ltd HCC.1319/1999 and Capt Patrick Kanyagia v Damaris Wangechi and another CA.150/1993. Justice Ngugi confirmed the position in Joyce Wairimu's case when he said "what is clear is that once a property has been knocked down and sold in a public auction, by a chargee in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished or the only remedy the chargor who is dissatisfied with the conduct of the sale is to file suit for general and special damages."

Whereas there are some contested facts in the suit as to the manner in which the public auction of the suit property was conducted and its subsequent transfer, that will require legal arguments and evidence, which will be tested through cross examination of witnesses.

As to joinder of Purple Royal Auctioneer and the Land Registrar as 2nd and 3rd respondents to this suit, Order 1 Rules 10(2) Civil Procedure Rules allows the joinder of parties at any stage of the proceedings. They must be parties relevant to the proceedings and against whom orders may be sought. For that reason, I do hereby allow the joinder of Purple Royal Auctioneers who may need to respond to some of the allegations made against them on the conduct of the auction. The Land Registrar only be enjoined as regards the land title.

Having said all the above, I find that the applicant has not satisfied the requirements for grant of a temporarily injunction. The application is dismissed. Let the parties comply with order 11 Civil Procedure Rules and the matter be set down for hearing.

Dated, Signed and Delivered at NYAHURURU this 19th day of November, 2019.

.....

R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Muga for applicant

Ms. Ndegwa for respondent

Soi – Court Assistant