



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.E249 OF 2019

MAIZE MILLING COMPANY LIMITED.....1ST PLAINTIFF

CAPITOL SECOND LIMITED.....2ND PLAINTIFF

VERSUS

SPIRE BANK KENYA LIMITED.....1ST DEFENDANT

GARAM INVESTMENTS AUCTIONEERS.....2ND DEFENDANT

RULING

1. Before this Court is the Application dated **23rd October 2019**, brought under Certificate of Urgency seeking to stop the intended sale by auction of the charged property known as **Floor Number 2 of Tower 1 on Land Reference Number 209/9769, Capitol Hill Towers** (hereinafter referred to as the “**suit property**”) which sale was scheduled to take place on **5th November 2019**.

2. The 1st Respondent **SPIRE BANK LIMITED** and **GARAM INVESTMENTS AUCTIONEERS**, the 2nd Respondent opposed the application for any stay of the intended auction through the Replying Affidavit dated **29th October 2019** sworn by **JOHN WAGECHE**, a Senior legal officer with the 1st Defendant. Parties appeared before the Court to argue the application orally on **30th October 2019**.

3. I will not re-hash the facts of the case suffice to say the Applicants do not deny having been advanced a loan facility by the Defendant Bank in the amount of 150 Million (the amount due now stands at some Kshs.200 Million) nor do the Applicants deny being in arrears of said facility. The suit property was charged to secure that loan facility. There has been much back and forth between the parties as the Defendant Bank sought to exercise their statutory right of redemption.

4. The conditions precedent to the grant of injunctive orders were well established in the case of **GIELLA –VS- CASMAN BROWN [1973] EALR**. The Applicant must show a prima facie case. The Applicant must be liable to suffer irreparable harm if the orders sought are not granted and thirdly if in any doubt the court will decide the case on balance of convenience.

5. It must be remembered that what the Bank advanced to the Applicant was a loan facility. This was a facility that was repayable subject to the terms and conditions set out in the Agreement between the parties.

6. Warsame J in **Hyundai Motors Kenya Limited Vs- East African Development Bank Ltd [2007] eKLR** stated that:-

“The application in my view epitomizes the resolute nature of the Applicant and its utter contravention of the requirement of good conscience and commercial ethics. It has borrowed huge sums of money on the strength of the charge document. It admits and acknowledges a debt of kshs.100 million. There is persistent default but it wants to use every trick on earth to restrain the order to postpone the day of reckoning. They must have in mind that the money of the lenders is not for free. The loan advanced was not meant to be candy sweets to be enjoyed freely by the Applicant. The monies of the lenders are a carrot accompanied by a stick and the stick can only be used when there is a default. Where there is an absolute default, the party in default cannot avoid the stick simply because it has taken the carrot.”[own emphasis]

7. On **29th August 2019** this Court issued a Ruling in which it granted a stay of an auction which had been scheduled for **10th September 2019** but gave two conditions for that stay.

1. That the Applicant clear all the Auctioneers costs and fees.

2. That the Applicants deposit a bank guarantee in the amount of Kshs.30 million.

8. Both parties confirm that the first condition has been met. However the Applicant failed to deposit the bank guarantee within thirty (30) days of the date of that Ruling. The orders given by this court were very clear. In event of failure to comply with any one of the conditions given, the Respondents would be at liberty to proceed to sell the suit property by auction without any further reference to the Applicant. Accordingly the Respondents were well within their rights to proceed to advertise the property for sale once the Applicants failed to comply with the conditions set by the Court. Indeed the Applicant appeared to merely gloss over its failure to comply with the conditions set by the court.

9. In the event that the Applicant had a particular difficulty in complying with the conditions set by the Court, several options were available to it. The Applicants could have approached the court before expiry of the 30 day period to seek a review the ruling of this Court delivered on **29th August 2019** or they could have appealed that Ruling. Instead the Applicant apparently sat back and did nothing. They waited until the 30 day period had expired, and after the Respondents had advertised for a fresh auction to file another application seeking exactly the same prayers as those which were sought in the Notice of Motion dated **9th August 2019** which application this court had already ruled upon. This is tantamount to abuse of the court process.

10. It is pertinent to note that this is a facility which was granted to the Applicants way back in the year 2012 (that is seven (7) years ago). The same remains unpaid and unserviced to date. The bank is also entitled to equity from these courts. A borrower having received and utilized a facility cannot be allowed to use the courts to frustrate the banks attempts to recover its monies.

11. The Applicants have alleged that no valuation was done contrary to the provisions of **Section 97(2)** of the Land Act. This was the case in regard to the first auction slated for **10th September 2019**. However the Respondents have now annexed a valuation Report dated **18th October 2019** prepared by **LandMark Realtors Ltd**. Therefore **Section 97(2)** has now been complied with.

12. The Applicant submits that the valuation in that report is below par. In my view this is not a demonstration of irreparable harm which the Applicant is likely to suffer. The loss which the Applicants may suffer due to any undervalue is quantifiable and can be adequately compensated through an award of damages. I find that the Applicants have failed to satisfy the conditions set out in the **Giella –Vs- Casman Brown Case**.

Accordingly I find no merit in this application for stay of the auction scheduled for **5/11/2019**. The same is dismissed with costs to the Respondents.

Dated in Nairobi this 4th day of November, 2019.

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Justice Maureen A. Odera