



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. E416 OF 2018

ABDULLAHI MOHAMMED SHEIKH.....PLAINTIFF

VERSUS

GULF AFRICA BANK LIMITED.....1ST DEFENDANT

LEAKEY'S AUCTIONEERS.....2ND DEFENDANT

GREENBELT WAREHOUSE LIMITED.....INTERESTED PARTY

RULING

The Notice of Motion Application dated 30th January 2019, pursuant to **section 1A & 1B of the Civil procedure Act, Section 108 of the penal Code, order 2 Rule 15 (a), (b) and (d), order 13 Rule 2, Order 19 Rule 2, and Order 51 Rule 1 of the Civil Procedure Rules 2010** and all other enabling provisions of the law, the Applicant sought orders that;

- a) The Plaintiff's suit against the 1st and 2nd Defendants be struck out with costs to the 1st and 2nd Defendants;
- b) Judgment be entered on admission in favour of the 1st Defendant against the Plaintiffs as prayed in the counterclaim;
- c) Pending the hearing of this application inter-partes, the Plaintiff herein Mr. Abdullahi Mohamed Sheikh be summoned and cross-examined under oath on his sworn verifying Affidavit dated 4th December 2018;
- d) Upon cross-examination aforesaid, the court should rule on whether an order should be issued directing the police to charge the Plaintiff with the offence of perjury contrary to **Section 108 of the Penal Code**.

The application was based on following grounds;

- a) Prior to filing this suit, the Plaintiff filed **HCCC NO. 501 of 2016 (formerly ELC No. 1590 of 2016) Abdullahi Mohammed Sheikh- vs- Gulf African Bank Limited** seeking an order of injunction to restrain the bank from exercising its statutory power of sale.

Perjury

b) The Plaintiff is guilty of perjury because:

- i) He deliberately refused to disclose the above High Court case in this suit.
- ii) He deliberately refused to disclose Court of Appeal **Civil Application No. 121 of 2018: Abdullahi Mohamed Sheikh –vs- Gulf Bank Limited** whereby he filed an application for stay of auction of the said properties and lost.
- iii) He averred at **Paragraph 27 of the Plaint** that there is no other suit between the parties touching the subject matter.
- iv) He swore in his Verifying Affidavit at paragraph 3 that all the averments in the Plaint were true and correct.

Admissions

- c) The Plaintiff has admitted the debt in the past and made promises to pay but has reneged on the said promises.
- d) Indeed, it has been held in the said High Court and Court of Appeal cases that the Plaintiff had admitted the debt.

The suit is scandalous, frivolous, vexatious and an abuse of the court process

- e) The Plaintiff has filed numerous applications in the above High Court case to stop the sale of the properties but all the applications have been dismissed.
- f) In fact, there is an application by the Plaintiff in the said High Court case seeking inter alia an injunction to stop the transfer and registration of the said properties to the Interested Party coming for Ruling on 12th April 2019.
- g) The grounds cited in support of the injunction application above are the same grounds cited in support of the prayers in the Plaintiff in this suit.

The Suit does not disclose any reasonable cause of action in law

- h) The said properties were lawfully sold on 22nd November 2019 pursuant to a court order in the said High Court case.
- i) The proceeds of sale of Ksh 105,000,000.00 were applied to settle the debt. However, the said proceeds were not sufficient to offset the entire loan which has a balance of Ksh 35,815,499.81 as at 22nd January 2019.
- j) In the circumstances, this suit does not disclose any reasonable cause of action against the Defendants because the Plaintiff still owes the 1st Defendant Ksh 35,815,499.81 as at 22nd January 2019.
- k) From the foregoing, judgment should be entered in favour of the 1st Defendant in the sum of Ksh 35,815,499.81 as the Plaintiff has admitted the debt.

REPLYING AFFIDAVIT

The application was opposed vide a Replying Affidavit dated 19th March 2019 sworn by Abdullahi Mohamed Sheikh, the Plaintiff herein. He states that the Application is scandalous, frivolous and vexatious aimed at prejudicing, embarrassing and/or delaying the fair trial of the Plaintiff's suit dated 4th December 2018 and filed on 5th December 2018 and therefore an abuse of the process of the court.

That in any event, the issues raised in the Application are issues that could and have been raised by the Respondents in their Defence and/or Counter claim to the Plaintiff's suit instead of filing an application.

That, it is misleading for the 1st Defendant/Applicant to state that the Plaintiff is guilty of perjury for the non-disclosure of the said cases because of the following reasons;

- i) Paragraph 27 of the Plaintiff states; 'There is no other suit pending between the parties touching the subject matter hereof.
- ii) It is indeed true that both the suit in the High Court and the Civil Application at the Court of Appeal have been heard and the respective Courts done a determination on them and the Land has been sold to another party;
- iii) Without prejudice to the foregoing, even if there was a pending suit/applications in whatever forum, then the parties are very different and the subject matter very different too.
- iv) The Plaintiff shall crave leave of Court to cross examine the Deponent to verify the correctness of the averment of perjury against the Plaintiff.
- v) For the avoidance of doubt and without prejudice to the foregoing, the subject matter in the instant suit is the question of how (the process) the auction was undertaken and the legality thereof; issues that were not raised in the High Court and the Civil Application at the Court of Appeal.

That he admitted the debt in the past and the same was captured in the High Court and the Civil Application at the Court of Appeal.

Therefore no further judgment can be entered in favour of the 1st Defendant against the Plaintiff to the extent that the Plaintiff owed the 1st Defendant Ksh 35,815,499.81.

That in this suit he does not question whether there is a debt in the first place or not but rather whether the Defendants, more so the 2nd Defendant complied with the set down laws in execution of the 1st Defendant's exercise of its statutory power of sale by selling the suit properties known as **LR. No. 209/7260/19388** and **LR. No. 209/7260/19389** by public auction rules and regulations.

That the Plaintiff's suit discloses reasonable cause of action in the sense that:-

i) It questions the manner/process in which the Defendants especially the 2nd Defendant under the instructions of the 1st Defendant exercised its statutory power of sale by selling the suit properties known as LR. No. 209/7260/19388 and LR. No. 209/7260/19389 by public auction, if any at all was conducted;

ii) It questions the Defendants compliance with **Section 97(2) the Land Act** as to whether the 1st Defendant before exercising the right of sale, ensured that a forced sale valuation was undertaken by a valuer for Auction;

iii) The **valuation report produced by the Deponent is dated 17th May, 2018** an indication that the valuation was not undertaken by the 2nd Defendant for purposes of the auction as the High Court's Ruling was delivered on 30th October 2018 and the orders thereto issued on 13th November 2018.

DEFENDANTS' WRITTEN SUBMISSIONS

I. Whether the Plaintiff's Suit against the Defendants should be struck out

The Defendant submitted that the application before this Court seeks that the Plaintiff's claim against the Defendants be struck out for the following reasons;

a) The suit does not disclose a reasonable cause of action in law against the Defendants.

The properties charged to the Plaintiff were lawfully sold on 22nd November 2018 pursuant to an order by the High Court in **HCCC NO. 501 of 2016**.

The Plaintiff in his Replying Affidavit dated 19th March 2019 at paragraph 12 acknowledged that the charged properties have been sold to the Interested Party.

The Plaintiff therefore has no reasonable cause of action in law against the Bank, as the Bank has already realised its statutory power of sale over the charged properties.

In fact, the Bank still maintains a cause of action against the Plaintiff as the proceeds of the sale from the auction did not fully satisfy the outstanding debt owed to the bank.

The bank claims against the Plaintiff by way of counterclaim the sum of Ksh 35,815,499.81 as particularised at paragraph 12 of the Supporting Affidavit of Lawi.

The Bank is entitled to claim for the balance of the outstanding debt after selling the property by way of auction. The Court in ***Francis Joseph Kamau Ichatha –vs- Housing Finance Company of Kenya Limited [2014]eKLR*** made reference to the Chargee's right to pursue the Chargor for the balance of the loan where the proceeds from sale by auction did not suffice, as follows:

“The Defendant appended to the Mortgage Agreement in the presence of counsel and as provided under the Mortgage, the Defendant covenanted “to pay to the lender...and discharge all moneys and liabilities...due and owing to the Mortgagee”. It is clear as day that the Defendant's liability to the Plaintiff was not capable of being discharged after the sale of Mortgaged (suit) property in the exercise of the Mortgagee's statutory power of sale. The Defendant's argument that she had not entered into a “personal guarantee” over the Mortgage loan, and that the Plaintiff should have recovered all the debt due from the sale proceeds, was foreign to their clearly worded contract. The Plaintiff was entitled to recover the entire Mortgage debt together with all charges, interests, costs and incidentals arising therefrom, from the defendant. As the Mortgage debt was not fully recovered from the proceeds of the suit property, the plaintiff was entitled to recover the short fall of the debt from the defendant's and it was therefore the plaintiff's right to sue the Defendant to recover the debt.”

The Plaintiff has unsuccessfully sought injunctive orders in numerous applications in **HCCC NO. 501 of 2016**. He has another pending application dated 27th November 2018 in **HCCC 501 of 2016**, seeking an injunction to stop the transfer and registration of the sold properties to the Interested parties.

II. Judgment on admission to be entered as prayed in the counterclaim

Order 13 Rule 2 of the Civil Procedure Rules 2010 provides that a party may apply for judgment on admission when an admission of facts has been made by a party to the suit.

The Plaintiff has not denied his indebtedness to the Bank. In his Replying Affidavit dated 19th March 2019 at paragraph 9, he states:

“I know from my own personal knowledge that I admitted the debt in the past and the same was captured in the High Court and the Civil Application at the Court of Appeal.”

The 1st and 2nd Defendants have also produced by way of affidavit evidence admissions by the Plaintiff of his indebtedness to the Bank. The letters demonstrating the admission of debt are exhibited at pages 20 to 25 of the documents in support of the application herein.

The Court in Peeraj General Trading & Contracting Company Limited, Kenya & Another –vs- Mumias Sugar Company Limited [2016]eKLR set out the test for entering judgment on admission in favour of a party to a suit. The court held:

“Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning...”

Admissions of fact under order XII Rule 6 need not be on the pleadings. They may be in correspondence or documents which are admitted or they may even be oral. The rules used words “otherwise” which are words of general application and are wide enough to include admission made through letter, affidavits and other admitted documents and proved oral admissions... .. it is settled that a judgment on admission is in the discretion of the court and not a matter of right that discretion must be exercised judicially.”

III. The Honourable Court should find the Plaintiff guilty of perjury

The plaintiff is guilty of perjury for deliberately failing to disclose that there have been previous proceedings between the parties over the same subject matter in **HCCC No. 501 of 2016** and in the Court of **Appeal in Civil Application No. 121 of 2018**.

The term perjury is defined in the Black’s Law Dictionary, 9th Edition at page 1254 as -

“The act or an instance of a person’s deliberate making material false or misleading statements while under oath.”

The Court in Lucy Wanjiru Njunge & 2 others –vs- Job Mwangi Macharia & 9 others [2005] eKLR held as follows:

“The first two plaintiffs openly lied under oath and actually committed perjury by stating that they were not parties to the suit HCCC NO. 142 of 2005 while indeed they were. An affidavit cannot be amended by Counsel’s verbal word that a technical omission was made by here and seek to exonerate the deponents from any fault yet they are the ones who swore to the truth of their depositions. I hold that the verifying affidavits are improper and bad in law and must be struck out which I hereby do.”

PLAINTIFF/RESPONDENT SUBMISSIONS

1. DELAYING EXPEDITIOUS DISPOSAL OF THE MATTER

The Plaintiff submits that with respect to cross-examination on the affidavit is a flexible power conferred upon the Courts by the provision of **Order 19 Rule 2 of the Civil Procedure Rules**. However, it is not a matter of right and any party who wishes to cross-examine a deponent must satisfy the court that there is a good reason for the examination. It is the obligation of the party seeking for cross examination to lay down a proper legal foundation to justify his application for leave to cross examine the deponent. As it was held by Justice Ochieng in the case of Ahmednasir Abdikadir & Co. Advocates –vs- National Bank of Kenya Limited (2) [2006] 2 EA 6;

“As the requisite rules recognize the use of affidavits in evidence especially in the course of interlocutory applications, the courts ought not to readily permit cross examination of the deponent’s affidavits otherwise if the courts become too willing to allow cross examination, the already limited time available for applications would be further curtailed to the detriment of the wider interests of justice. Therefore, in order to ensure that not more time than is really necessary is further taken up by cross examination, it is only instances where the court is satisfied that the cross-examination is essential in enhancing the course of justice, that the court would allow deponents to be cross-examined.”

THE APPLICATION IS FRIVOLOUS & ABUSE OF COURT PROCESS

The Defendant’s Application is vexatious and an abuse to court process and is only aimed at prejudicing, embarrassing and delaying the hearing of the main suit. The Defendant/Applicant sought orders that do not warrant cross-examination on facts unequivocally set out in the Affidavit. Issues raised in the Defendants’ Application are the same issues raised in their statement of defence/counterclaim.

The Defendant has not raised any legal basis that warrants for cross examination of the Deponent and how crucial it is in the hearing of the main suit. That it is true that prior to filing the current suit (**E416 of 2018**) there were two other cases being **HCCC NO. 501 of 2016** and Court of Appeal – **Civil Application No. 121 of 2018**. However, the court should note that both suits have been heard and the respective courts have determined them and that the Land has been sold to the interested party.

We refer the judgment in SMT. Sudha and another –vs- Manmohan and Others (1996 Rajasthan 59) the Court held as follows;

“The order for attendance of deponent of the affidavit for cross-examination is absolute discretion of the courts. It is true that absolute discretion means not arbitrary but judicious discretion having justice-oriented approach in summoning the deponent of an affidavit for cross examination. Order for attendance of the deponent for cross examination would not be ordinarily be made unless the court is satisfied and convinced that application for summoning the deponent for cross examination is necessary in the interest of justice. Unless both the conditions co-exist the courts have no jurisdiction to summon a deponent for cross examination.”

DETERMINATION

After considering the pleadings and submissions by Counsel for the parties, the Court identified the following issues for determination.

- a) Whether the Plaintiff's statement of claim should be struck out
- b) Whether judgment on admission should be entered against the Plaintiff
- c) Does the Plaintiff's claim raises triable issues for hearing and determination at Trial
- d) Whether the Plaintiff exercised full and frank disclosure of previous cases over the same subject matter and/or if the Plaintiff is liable for perjury?

a. Whether the Plaintiff's statement of claim should be struck out?

The Plaintiff's claim against the Defendants is that the Defendants are liable for conducting an illegal sale of suit properties to the interested party because these properties were sold below market value and transfer of the said suit properties was based on an improper auction.

The Plaintiff's further claim is that whereas the 2nd Defendant advertised the sale of suit properties in Daily Nation of 5th November 2018 that the Public Auction was scheduled on 22nd November, 2018 at 11a.m. and the said day and time he was there and no such auction took place. The next day he was reliably informed that the suit properties were sold to the interested party at Ksh 105,000,000/-. This amount was way below the market value. He had consulted Interconsult Valuers to value these properties and the market value as at June 2018 was Ksh 228,000,000/- and forced market value was Ksh 171,000,000/-The said Report is annexed to his application.

Therefore the Plaintiff contends that the Respondent failed to have the properties valued before sale and the sale was in contravention of **Section 97(3) (b) & 98(2) of Land Act 2012** and **Rule 11(1) (b) (x) of Auctioneers Rules** as it did not comply with the legal procedures of a public auction.

The defendants in their joint defence filed on 29th January 2019 addressed the matter as follows;

- a) The Defendant outlined the letters of offers and securities by executed and registered charges by the 1st Defendant to the Plaintiff as hereunder;
 - i) 23/7/2010 amount of Ksh 30 million was advanced and the security was charge over LR 209/7260/72
 - ii) 13/6/2011 amount of Ksh 60 million was advanced and the security was further charge over LR 209/7260/72
 - iii) 18/4/2012 amount of Ksh 60 million was advanced and the security was to execute a memorandum to undertake legal charge on LR CS2/CS1. Customer undertook to channel all business and rental incomes through accounts with the bank.
 - iv) 3/12/2015 amount of Ksh 76,885, 814.99 was advanced and security was/is as per Clause 7 of the Agreement.

The plaintiff/Applicant failed to disclose that previously he filed 2 cases over the same subject matter;

- a) **HCCC 501 of 2016**
- b) **Court of Appeal Civil Application 121 of 2018**

In both suits the Plaintiff /Applicant admitted the debt and in **HCCC 501 of 2016**,the Court on 2nd November 2018 granted the Respondent Bank liberty to exercise statutory power of sale.

The 1st Defendant advertised the sale on 5th November 2018 scheduled to take place on 22nd November 2018.

The 1st Defendant relied on valuation report by Centenary Valuers of 17th May 2018.

The Defendants attached pleadings and Rulings of the Courts that sanctioned the impugned auction.

a) The Ruling by LJ O.Sewe of 22nd December 2017 in HCCC 501 of 2016

The Plaintiff's application for injunction of 19th December 2016 was dismissed and at Pages 12 & 13 are excerpts of minutes of meetings that the plaintiff and Respondent where Plaintiffs admitted indebtedness and made proposals to regularize the facility accounts with the Respondent.

b) The Ruling by LJ O.Sewe of 13th April 2018 in HCCC 501 of 2016

The Plaintiff filed Notice of Motion of 29th January 2018 for stay of execution of the orders from the Ruling of 22nd December 2017.

The Plaintiff filed Application of 5th February 2018 to be allowed to pay the decretal amount in instalments of Ksh 500,000/- a month.

The Plaintiff filed the Application of 13th March 2018 to restrain the auction disposal and/or interference with suit properties.

To all 3 applications the Court dismissed all 3 applications and noted there was abuse of Court process.

c) The Ruling of Court Appeal Civil Application 121 of 2018 on the High Court decision Ruling of 13th April 2018.

The Applicant/Appellant filed application for stay of execution of the High Court Ruling of 13th April 2018. The Court of Appeal dismissed the same on grounds that there was no arguable appeal. Since the ruling of 13th April 2018 was upheld on Appeal the Applicants applications were dismissed by the trial Court and the said court granted the auction.

From the outline above this Court finds that the matter at hand has been canvassed in the High Courts and the Court of Appeal. These Rulings are valid, regular and legal orders of the Court. Further this Court is bound by the decision of the Court of Appeal upholding of the High Court Rulings. This Court lacks jurisdiction to reopen matters already heard and determined by similar Court of equal and competent jurisdiction. The proceedings and Rulings disclose that the Plaintiff/Applicant although admitted indebtedness and default and did not challenge validity of the charge documents. Therefore, the issue of the auction having been sanctioned by the Court is confirmed and therefore moot.

Whether the Plaintiff exercised full and frank disclosure of previous cases over the same subject matter and/or if the Plaintiff is liable for perjury?

Secondly, this Court notes with concern, that the Plaintiff/Applicant failed to disclose material facts of previous litigation on the same subject-matter. Whereas the Defendant is at liberty to pursue perjury proceedings, from the disclosure and annexed Rulings of the Courts by the Respondent, and in the absence of any plausible explanation, by the Plaintiff/Applicant of why the previous litigation was not disclosed the Plaintiff/Applicant is deemed to have come to Court with unclean hands by virtue of non disclosure of pertinent and material facts.

The Applicant claims that the previous litigation issues were determined and the present matter was/is different. With respect, the court notes that the Applicant by application of 13th March 2018 he sought to stop the auction which application was dismissed and in the same breath in the present application challenges he the auction of being irregular and that it was not sanctioned.

The position in law with regard to non disclosure is as follows;

Republic Vs Kenya National Federation Of Cooperatives LTS EX CCK [2005] I KLR 242

“It is of fundamental importance that applications for judicial review should be made with full disclosure of all material available to the claimant. This is a case which I can properly use in order to send a message to those who are making applications to this Court reminding them of their duty to make full disclosure; failure to do so will result I appropriate cases, in the discretion of the Court being exercised against (a Claimant) in relation to the grant of (a remedy).”

The plaintiff/applicant failed to disclose material facts that having been brought to the attention of this Court by the Defendant confirm, the auction was Court sanctioned contrary to Plaintiff/applicant's claim that it was an illegal auction. Furthermore, in the said Rulings of the Court are detailed excerpts confirming the Plaintiff/Applicant's admission of indebtedness to the Defendant.

The plaintiff stated and took issue with the Defendant's process and outcome of auction of suit properties.

The Plaintiff relied on **Section 97 (3) Lands Act 2012;**

“(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).

Section 98 (2) Lands Act 2012

“(2) If a sale is to proceed by public auction, it shall be the duty of the chargee to ensure that the sale is publicly advertised in such a manner and form as to bring it to the attention of persons likely to be interested in bidding for the charged land and that the provisions relating to auctions and tenders for land are, as near as may be, followed in respect of that sale.”

The 1st Defendant relied on Valuation Report as indicated above and sold the suit property at the value of the suit property indicated as follows by Centenary Valuers Report of 17th May 2018 who recommended;

a) Market Value- Ksh 140,000,000

b) Mortgage Value- Ksh 126,000,000

c) Forced Sale value – Ksh 105,000,000

d) Insurance Value – Ksh 120,000,000

The Report was valid for 12 months as statutorily required. The Report was/is of May 2018 and the sale of November 2018.

The Plaintiff/Applicant did not request/demand to be availed the valuation Report by the Defendant or request the 1st Defendant and/or apply in Court to conduct an independent Valuation as prescribed by **Rule 11 (b) (x) of the Auctioneers Rules** that stipulates;

“The reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale.”

Therefore, the evidence available before the Court commends itself to the fact that the Court sanctioned the auction was in compliance with **Section 97(3) Land Act and Rule 11 (b) (x) of the Auctioneers Rules** Auctioneers Rules. The Defendant issued the requisite Notice of 45 days in the required format and on the day of the auction the interested party bought the suit property. The advertisement for sale was in compliance with Rule 16 of Auctioneers Rules 1997 in the Daily Nation of 5th November 2018 inviting members of the public to attend the auction. The aforementioned advertisement indicated the date and time of the auction, the conditions of the sale, notified the interested purchasers to view the properties, and gave details of its location. The charged properties were sold at the best reasonable price given the circumstances forced sale value Ksh 105,000,000/-. Apart from the claim that there were buyers at the designated auction place, no irregularity/illegality, non compliance of the law was proved.

b. Whether judgment on admission should be entered against the Plaintiff

Order 13 Rule 2 CPR 2010 on admissions which provides;

“Judgment on admissions

Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.”

Choitram vs Nazari [1984]KLR 237 that spelt the guiding principles of judgment on admission,

“For the purpose of order XII rule 6, admissions can be express or implied either on the pleadings or otherwise, e.g in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations onto a definite contract. It matters not if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis. Indeed, there is no other way, and analysis is unavoidable to determine whether admission of fact has been made either on the pleadings or otherwise to give such judgment as upon such admissions any party may be entitled to without waiting for the determination of any other question between the parties...”

From the above authorities, the Court finds that the evidence on record and earlier proceedings confirm admission by the Plaintiff/Applicant of indebtedness and default, various correspondence, minutes of meetings and pleadings confirm admission of the debt to the Defendant

The Plaintiff confirms admission in the Plaintiff dated 4th December 2018 and filed in court on 5th December 2018 in paragraphs 6 and 7 as hereunder;

“6. That on or about September 2016 the Plaintiff took a loan with the First Defendant for Ksh 80,000,000/- whereby a Legal Charge was created in favour of the 1st Defendant to secure the loan amount as security for the repayment of the advanced loan amount.

7. That unfortunately due to bad business and reasons beyond the Plaintiff's control the Plaintiff defaulted on the payments and the 1st Defendant exercised its statutory power of sale and sold the suit properties through their agents, the 2nd Defendant.

Admission is also confirmed in the Replying Affidavit of Abdullahi Sheikh, dated 19th March 2019 in paragraph 9;

“9. That I know from my own personal knowledge that I admitted the debt in the past and the same was captured in the High Court and the Civil Application at the Court of Appeal.”

The impugned auction was sanctioned by this Court and in compliance with the statutory provisions.

From the above, the application to strike out the Plaint is granted as there lacks reasonable cause of action. The Plaintiff/Applicant's admission of debt and the same was not redeemed thus resulting to the auction draws the Court's conclusion that there is no triable issue(s) for determination or for hearing.

DISPOSITION

1.The application of 30th January 2019 to strike out the Plaint and enter judgment on admission is granted with costs.

2. The impugned auction was sanction by the Court and was in compliance with Section 97 (3) & 98 (2) Lands Act 2012 and Rule 11 (b) (x) of the Auctioneers Rules

DELIVERED SIGNED & DATED IN OPEN COURT ON 6TH DECEMBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

Mr. WAMAE FOR THE 1ST RESPONDENT

MR, KAHARA H/B MS. NKATHA FOR PLAINTIFF/APPLICANT

COURT ASSISTANT: JASMINE