



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL SUIT NO. 6 OF 2019

STUDERTEK POWER SYSTEM (EA) AND ANOTHER.....PLAINTIFF

VERSUS

HOUSING FINANCE CO. LTD.....DEFENDANT

RULING

**Auctioneer's notice**

[1] The Plaintiff has applied in a Motion dated 2<sup>nd</sup> December 2019 for three significant orders, to wit

**a. A temporary injunction to restrain the Respondent from selling the charged property namely LR. NO. NYAKI/MULATHANKARI/1787 through a public auction scheduled for tomorrow the 4<sup>th</sup> day of December 2019;**

**b. A declaration that the advertisements carried in the Daily Nation of 18<sup>th</sup> November 2019 is illegal and a nullity ab initio for failure by the Auctioneer to give 45 days' notice to the Applicant;**

**c. The court to grant the Applicant 60 days to procure a purchaser for the land herein.**

[2] The Motion is expressed to be brought under 1A, 1B, 3, 3A and 63 of the Civil Procedure Act and Order 40 of the Civil Procedure Rules and all enabling provisions of the law. It is supported by the grounds set out in the application and the Supporting Affidavit.

[3] Learned legal counsel for the Applicant, Mr. Mutegi, succinctly submitted in court. And arising from those submissions, the application and the affidavit, are the following major arguments; (1) that the auctioneer did not issue to the Applicant the mandatory 45 days' notice; (2) that the respondent has denied the applicant an opportunity to introduce a buyer of the property; and (3) the sale of the charged property will occasion him irreparable damage. He made allegations that the auctioneer has advised prospective buyers that the property shall be sold at half price of Kshs. 15 million. He beseeched the court to stop the sale and allow him time to introduce a buyer.

[4] The application was opposed through a replying affidavit. The learned legal counsel for the Defendant, Mr. Kimaita, also ably submitted in opposition thereto. His significant arguments include: (1) that the Applicant is abusing court process, for; the Applicant filed an application dated 26<sup>th</sup> September 2019 under certificate of urgency seeking same orders as the current one which the court declined to certify the said application to be urgent on 30<sup>th</sup> November 2019. The applicant has filed a similar application and abandoned the earlier application; (2) that all relevant statutory notices were issued to the applicant as required and no other notices were required. Mr. Kimaita submitted judicial authorities to support his argument. He stated that the auctioneer issued the relevant notices during the earlier auction which aborted and also issued another notice before advertisement in question; (3) that the applicant merely made empty promises to avail a buyer of the property; and (4) that the Applicant is only bent at delaying this matter. Counsel argued that the Applicant failed to adhere to the orders of the court which were so clear. For, those reasons, the court declined to stop due process towards realization of the security herein. He urged the court to decline the invitation to stop the sale herein.

**ANALYSIS AND DETERMINATION**

[5] I find recapitulation of some pertinent events in the matter to be apt. The Applicant applied for an injunction through an application dated 3<sup>rd</sup> April 2019. The court determined the application and ordered a stay of sale of the charged property for thirty days. The orders required the Applicant to repay promptly instalments of restructured loan. The stay of sale was to terminate automatically upon default on the part of the Applicant. From the record, the Applicant defaulted and the property was scheduled for sale. It seems the sale did not materialize for no bidder raised the reserve price. The Applicant filed an application on 11<sup>th</sup> September 2019 seeking stay of the sale. The court declined to issue any orders of stay and let due process towards realization of the chargee's statutory power of sale to proceed. The Applicant did not pay

as required. The property has again been advertised for sale on 3<sup>rd</sup> December, 2019. The Applicant has again come back to court for temporary injunction and declaration that the scheduled sale is a nullity *ab initio* for lack of mandatory notice under rule 15(d) of the Auctioneers Rules, 1997.

[6] Arising out of the facts of the case are three issues, namely:

- a. **Whether a notice under rule 15 of the Auctioneers Rules, 1997 is mandatory after statutory notices have been issued;**
- b. **Whether the Applicant is abusing court process; and**
- c. **Whether, in the circumstances, an injunction is deserved.**

[7] Upon receipt of a court warrant or letter of instruction to sell immovable property, the auctioneer shall among other things give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction. This requirement is provided in Rule 15(d) of the Auctioneers Rules, 1997 as follows: -

#### 15. Immovable property

**Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property—**

- d. **give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction**

[8] Several notable matters: (1) The rule comes into play upon receipt by the auctioneer of court warrants or letter of instruction to sell immovable property. (2) Therefore, the notice under the rule comes after all statutory notices required in law have been given by the chargee. (3) The rule creates statutory obligation on the auctioneer in executing the court warrants or letter of instruction.

[9] Be that as it may, what does facts of this case portend? Needless to state that the established judicial method in resolution of disputes is *fact-based*; entertain the *account from the other side*; and thereafter, to weigh, check and balance the two streams of evidence, thereby arriving at a valid and just result. And true it is what was stated by Andrew Goodman in his learned work, *How Judges Decide Cases: Reading, Writing and Analysing Judgments*, 2nd Indian Reprint (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2009), (p.44) that:

**“However rarefied and abstruse the legal argument before the [Court], it must be anchored on the facts of the case: while the judges will feel free to expound upon the most general principles in order to provide guidance for the future, the actual decision...will turn on the facts, even if the detail of the argument is quite remote from them”**

[10] Such is a fundamental principle and approach that produces a fair, dependable and plausible basis of judgment, as well as set a just and tenable reference-point for the future. In this case, the chargee issued relevant statutory notices in exercise of chargor’s statutory power of sale; that fact has not been challenged or disputed. Again, the Applicant denies neither indebtedness nor default on court orders. The auctioneer gave redemption notice for aborted public auction of the charged property. I note they also gave a 14 days’ notice before the advertisement in issue which scheduled sale of the charged property by public auction for 3<sup>rd</sup> December 2019. This is not the first public auction scheduled for the charged property by the auctioneer. The auction was scheduled after the earlier one aborted. The Applicant has come to court before and he failed to abide by the court orders. The Applicant did not disclose that he had applied in September 2019 and the court declined to stop exercise of chargor’s statutory power of sale or sale of the charged property after it became clear that the Applicant has defaulted to pay the debt despite reprieve by the court. He who comes to equity must come with clean hands. From the circumstances and facts of this case, it is clear that the Applicant is also abusing the process of the court. Therefore, the applicant has not come to equity with clean hands. To such suitor equity and law shall deny relief. Accordingly, I decline to stop the sale scheduled for tomorrow.

[11] I am aware that the Applicant has made allegations that the auctioneer acted in bad faith in dissuading prospective buyers from buying the charged property at fair and reasonable price. His allegations that the auctioneer intends to sell the property at half price are unfounded and do not stand on evidentiary support. It was stated by Kimaita that the auction was subject to reserve price based on the valuation done this year. It was also stated that the last sale aborted because no bidder raised the reserve price. Such show diligence on the part of the auctioneer. I do not, therefore, find any substance in these allegations. I also note that the Applicant has made a request to be allowed 60 days to get a buyer of the charged property. This is not the first time this request is floated around by the Applicant. Even last time when the court declined to stop the sale, the request was tabled and the court stated that he may introduce a buyer who shall buy the property and pay up the debt. The Respondent do not seem to be averse to such person introduced by the Applicant buying the property. So far, he has not introduced any such buyer. He is using this to sway the court into believing that he is serious about repayment of the debt herein. But, his conduct from the proceedings does not depict such keen debtor he is trying to portray.

[12] In the upshot, I find that the Applicant has not established any prima facie case for which an injunction may be granted. His claim that he will suffer irreparable damage is not proved for the property he gave as security is being sold in exercise of chargee’s statutory power of sale. This kind of loss of property is legal and does not produce the type of irredeemable loss in the sense of the law on injunction. In sum, the balance tilts at refusing an injunction. I dismiss the application dated 2<sup>nd</sup> December 2019 with costs to the Respondent.

**Dated, signed and delivered at Meru in open court this 4<sup>th</sup> day of December, 2019**

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**F. GIKONYO**

**JUDGE**

**IN PRESENCE OF**

**Mutegi for applicant**

**Mutunga for Kimaita for respondent**

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**F. GIKONYO**

**JUDGE**