



**REPUBLIC OF KENYA**

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

**COMMERCIAL SUIT NO. 69 OF 2018**

**OMEGA FOUNDATION.....PLAINTIFF**

**VERSUS**

**CHASE BANK OF KENYA LTD.....DEFENDANT**

**R U L I N G**

1. The plaintiff, OMEGA FOUNDATION, has asked the Court to grant a temporary injunction to restrain the defendant, CHASE BANK LIMITED, from advertising for sale, selling by public auction, transferring or in any other way interfering with the plaintiff's property **L.R. NO. KISUMU MUNICIPALITY/BLOCK 4/316**.

2. The primary reason advanced by the plaintiff, for seeking the interlocutory relief is that the defendant was proceeding to take steps with a view to realizing the security, yet there was a serious undervaluation of the suit property.

3. It is the plaintiff's case that on 30<sup>th</sup> September 2015 the suit property was valued as follows:

**“(a) Open Market Value Kshs 65,000,000/=**

**(b) Mortgage Value Kshs 52,000,000/-**

**(c) Forced Sale Value Kshs 48,750,000/=**

4. The said valuation had been carried out by DOMINION VALUERS, who had been instructed by the bank.

5. Based on that Valuation, the bank granted a loan to the plaintiff, in the sum of Kshs 60,000,000/=, and the suit property was charged to the bank, as a security for that loan facility.

6. It is common ground that the plaintiff has failed to meet its obligations under the Charge, and that it is in arrears.

7. It is also common ground that the bank has issued to the plaintiff all the statutory notices which precede the realization of the security.

8. Prior to the realization of the security, the bank has had the suit property valued by ARDHI WORTH REAL ESTATE LIMITED. In a Report dated 12<sup>th</sup> September 2017, the valuer cited the following values for the suit property;

**(i) Open Market Value Kshs 42,500,000.00**

**(ii) Open Market Value for**

**Mortgage purposes Kshs 36,000,000.00**

**(iii) Estimate Reserve**

**(Forced Sale) Kshs 32,000,000/=**

**(iv) Gross Replacement Cost for Insurance purposes Kshs 38,000,000/=**

9. It is that valuation which precipitated this suit, as the applicant believes that the new valuation is a serious understatement of the real value.
10. The court was invited to find that the bank had failed to conduct a proper forced sale valuation.
11. The plaintiff submitted that because the bank had greatly undervalued the suit property, if the bank was allowed to proceed with the proposed sale, the plaintiff would be highly prejudiced.
12. Pursuant to the provisions of **Section 97(2) of the Land Act**, as understood by the plaintiff;

***“The purpose of a valuation.....is two-fold. The first one is to obtain the best price reasonably obtainable at the time of the sale, thus protecting the right of the chargor.....***

***The second one is to prevent an unscrupulous Chargee from selling the charged property at a price which is peppercorn or not comparable to interests in land of the same character and quality.”***

Those words were cited from PALMY COMPANY LIMITED VS CONSOLIDATED BANK OF KENYA LIMITED (2014) eKLR.

13. I have no doubt that *Section 97(2) of the Land Act* does not simply enjoin a Chargor to carry out a valuation as an end in itself. In effect, a Chargor is not deemed to have discharged his obligation just by demonstrating that he had gone through the motions of conducting a valuation.

14. The exercise of valuation must be conducted with the seriousness it deserves, for it is intended to be mutually beneficial to both the Chargor and the Chargee. The Chargor’s intention is not limited to the recovery of the outstanding debt. The chargor must strive to obtain the best price reasonably obtainable at the time of sale.

15. Of course, in determining the question of the best price reasonably obtainable, it is necessary to bear in mind the circumstances in which the sale was being conducted.

16. When a sale was being conducted through Public Auction, the best price reasonably obtainable is ordinarily called the “Forced Sale Price.”

17. In this case, the bank has carried out a valuation. Similarly, the chargor has carried out a valuation. As there is a huge discrepancy between the two Valuation Reports, the plaintiff insists that the bank had grossly under-valued the suit property.

18. In the case of PALMY COMPANY LIMITED VS CONSOLIDATED BANK OF KENYA LIMITED (2014) eKLR, the Court said:

***“The Court needs cogent evidence and material in order to say that prima facie, there has been an undervaluation of the suit property, which is an infringement of Section 97(2) of the Land Act, by the Defendant, as to entitle the court to call for an explanation or rebuttal from the Defendant.***

***That approach is necessary to prevent defaulters from filing valuation reports with Value way beyond the open market value just to obtain an injunction.”***

19. I am in full agreement with that approach on the issue of valuation reports.

20. In this case the plaintiff is relying on the valuation reports prepared by both parties. If the plaintiff was placing reliance upon only the report prepared at its instance, it would have been easy for the court to be skeptical.

21. However, the plaintiff has also demonstrated the relatively large disparity in the values cited by the valuers who had been engaged by the bank.

22. The open-market value dropped from Kshs.65,000,000/= to Kshs.42,500,000/=, whilst the forced-sale value dropped from Kshs.48,750,000/= to Kshs.38,000,000/=.

23. In the absence of a reasonable explanation for the huge drop in the value assigned to the suit property, by the bank’s appointed valuers, I find that the Plaintiff has an arguable case, about the possible under-valuation of the suit property.

24. Nonetheless, I find that even if the Plaintiff was to ultimately prove that the suit property was under-valued, that would not be a sufficient reason to warrant the grant of an interlocutory injunction in the circumstances prevailing.

25. I so find because the Plaintiff has admitted being in breach of the terms of the Charge Instrument.

26. The Plaintiff is in substantial arrears.

27. Secondly, the Plaintiff has admitted receiving from the bank, all the requisite Notices which a chargee is under an obligation to issue.

28. Thirdly, the bank is, on a prima facie basis, capable of compensating the Plaintiff if the suit property were sold at an under-value.
29. At any rate, the Plaintiff has not suggested that in the event that it was successful in the substantive suit, but that such success was attained after the suit property had been disposed of, the bank may be unable to compensate the Plaintiff.
30. As the issue at hand is only regarding money, and because the values are already disclosed; if the Plaintiff were to ultimately prove that there had been a sale at an under-value, the Plaintiff could always be compensated by an award of appropriate damages.
31. In the result, the Plaintiff's application for an interlocutory injunction is without merit. It is therefore dismissed with costs.
32. But I feel obliged to add one more thing, before I put my pen down.
33. In the light of the reduction in the value assigned to the suit property, by valuers who were instructed by the bank, it is clear that unless the bank reconciles the said valuation reports, a sale founded upon the Valuation Report of Ardhiworth Real Estate Limited could expose the bank to a claim for compensation.

**DATED, SIGNED and DELIVERED at KISUMU, this 18<sup>th</sup> day of September 2018.**

**FRED A. OCHIENG'**

**J U D G E**