



**REPUBLIC OF KENYA**

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

**(CORAM: R MWONGO, J)**

**CIVIL CASE NO. 9 OF 2018**

**EQUIP AGENCIES LIMITED.....PLAINTIFF / APPLICANT**

**-VERSUS-**

**I & M BANK LIMITED.....DEFENDANT / RESPONDENT**

**RULING**

**Background**

1. The plaintiff's application was filed under certificate of urgency on 29<sup>th</sup> November, 2018. The court scheduled it for inter partes hearing on 4<sup>th</sup> December, 2018, directing all parties to file responses and skeletal submissions before then.

2. The Applicant is the owner of **Title No. Gilgil Township Block 2/210** ("The Land") on which Gilgil Treatment Industries, a plant which treats, processes and sells wooden poles stands. According to a report of valuation of inspection of the property on 15<sup>th</sup> and 16<sup>th</sup> November, 2018 annexed to the applicant's supporting affidavit, the value of the Land is stated as follows

***"The fair current market valuation of the property L.R. No. Gilgil Township Block 2/210 - Gilgil Treatment Industries Limited Gilgil Town Nakuru County, free from all encumbrances save the ground lease and in vacant possession is Kshs 700,000,000/-."***

The valuation is prepared by R.R. Oswald & Company Ltd, Surveyors.

3. The Land is scheduled for public auction tomorrow, 6<sup>th</sup> December 2018, pursuant to an advertisement published on 19<sup>th</sup> November 2018. The sale is in exercise of the defendant's foreclosure rights.

4. The application seeks injunctive relief against the defendant, its agents, employees or servants from advertising for sale, selling whether by public auction or private treaty disposing of or otherwise completing by conveyance or transfer of any sale concluded by private treaty or public auction or in any way interfering with the Plaintiff's possession of the Land. Prayer 1 seeks the injunctive relief pending inter partes hearing and determination of this application, and Prayer 2 seeks such injunctive relief until there is full compliance with statutory provisions.

5. It may be pointed out here that the Land is charged by the defendant, and has been the subject of foreclosure proceedings for several years. The present application is the latest in a multiplicity of applications by the plaintiff seeking to stop the auction of the Land pursuant to the provisions of the defendant's charge.

6. It is also apt to point out that the tenant or operator of the Gilgil Treatment Industries plant situated on the Land, is a company known as Gilgil Treatment Industries Limited. It is a tenant of the plaintiff on an unregistered tenancy agreement for two years from January 2016. The said tenant has also separately applied for injunctive relief against the same auction sale in **HCCC No. 6 of 2018 Gilgil Treatment Industries v I & M Bank Ltd and Equip Agencies Ltd**.

7. The tenant's application for injunction was also filed on 29<sup>th</sup> November 2018 under urgency, and the court scheduled it for hearing on 4<sup>th</sup> December 2018. On that date, both the present application and the tenant's application being before court, it was proposed that the matters be consolidated but this was resisted by the plaintiff herein, and it was agreed that the matters proceed concurrently.

8. The court also proposed, and the applicant was agreeable, that instead of hearing the applications, it would be more expeditious, overall, to adjourn the application and hear the substantive suits on a fast-tracked basis in early 2019. To allow a decision on the point, it was agreed to convene on 5<sup>th</sup> December 2018 with the decision making director of the bank being present.

9. On 5<sup>th</sup> December 2018, Mr. A. V. Chavda Director of the Defendant appeared in court with counsel but after lengthy off record discussions, it was finally agreed to proceed with the applications.

### **The Application**

10. The grounds on which the application is premised are summarized essentially as follows:-

- a. That the Land has not been valued since 2011 despite the advertisement for sale;
- b. That the fair current market value of the Land is Shs 700,000,000/= and the failure to value the Land is in breach of **Section 97** of the **Land Act** and exposes the Applicant to great loss;
- c. That a Chargor cannot rely on a valuation that is more than twelve (12) months old pursuant to Rule 11(b)(x) of the **Auctioneers Rules**;
- d. That a sale by a Chargee is required under **Section 97** of the **Land Act** to obtain the best price reasonably obtainable at the time of sale.
- e. That **Section 98 (1) (d)** of the **Land Act** is intended to ensure that a Chargee should not effect a statutory sale of property below the market price;
- f. That the advertisement of the sale in the dailies is incorrect and misleading as it incorporates into the sale assets not forming part of the Land, or said the charged property;
- g. That **Rule 16 (d)** of the **Auctioneers Rules** was flouted in that it requires an accurate description of the property;
- h. That contrary to the mandatory provisions of **Section 21 (3)** of the **Auctioneers Act** the conditions of sale of the Land did not state whether the sale shall be subject to a reserve price of not;
- i. That the condition imposed by the auctioneer for a bid eligibility deposit in the amount of Kshs10,000,000/= without declaring whether the sum is refundable or not, is harsh and unreasonable as it restricts members of the public from participating in the public auction;

11. At the hearing, all these grounds were argued by the applicant through Counsel Mr. Mirie. He supported his arguments with, inter alia, the following authorities, some of which I may, where apt, refer to in my analysis hereafter.

**JohnKuria Mathenge T/A Aberdare Filling Station v Caltex Oil (K) ltd & Another [2015] eKLR** which held that a chargee owes a statutory care to a chargor to ensure that property sold is subject to a reserve price;

In **Harrischa Bhovanbhai Jobanputra & Another v Paramount Universal Bank Ltd & 3 Others [2011]eKLR** the court again held that:

*“failure to indicate the reserve price is therefore an express breach of Rule 11 (1)(b)(x) which is couched in monetary 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 applicants property to be sold unless and until the legal procedure adhered to...”*

In **Peter Gichora Mwaura v Joseph Weru Ndungo & Anotehr [2007] eKLR** it was held that:

*“... any condition that restricts the rights of the members of the public to participate in a public auction is contrary to the purpose and essence of holding a public event...”*:

12. Mr Wawire for the defendant opposed the application. The key limbs of his opposition to the application are that:

- a. The application is res judicata as this court has previously dismissed multiple similar applications;
- b. That the allegations about lack of a valuation report are false, and that in fact a valuation prepared by Dunhill Africa Valuers Limited satisfies all statutory requirements;
- c. That with regard failure to indicate a reserve price, equity looks at the substance and not the form, thus a technicality should not trump substance;
- d. That the bid eligibility deposit was informed by a previous failed auction in which a successful bidder failed to follow through on the auction contract having paid only Shs 100,000/= as eligibility bid money. Further that it is not for a Chargor to impose and determine the condition of a sale.

13. Mr. Wawire also referred to, inter alia, the following authorities, some of which I may, where apt, refer to herein.

**Zum Zum Investment Co Ltd v Habib Bank Limited [2014] eKLR** which held that **section 97(2)** of the **Land Act** requires of the forced sale valuation be undertaken and that the standard of proof to discharge the burden of proving the defendant's valuation of the property was below the market value lay on the plaintiff. Further the plaintiff's valuation reports did not contain the forced sale value which is the mandatory requirement for purposes of statutory power of sale.

14. I have carefully considered the parties submissions, authorities referred to and documents availed, and now make my determination.

#### **Issues and Analysis**

15. In my view only two issues arise for determination:-

- a. Whether the application is res judicata.
- b. Whether the conditions for grant of injunctive relief in **Giella v Cassman Brown & Company Ltd [1973] EA 358** are fulfilled by the Applicant.

#### **Res Judicata**

16. I have carefully perused the application for injunction and the grounds on which it is premised. Whilst it is true that it is an application to injunct the aforesaid sale by public auction scheduled for 6<sup>th</sup> December 2018, and whilst similar injunctions have been sought in the past by the applicant against the bank, I note that the sole issue herein is the alleged failure to comply with statutory provisions in particular the alleged failure to prepare a valuation and to set a reserve price for the statutory sale.

17. To the extent that these issues have not been addressed in any of the previous applications which were highlighted to this court, I am hesitant to find that the present application is truly res judicata.

18. In the previous application dealt with by Meoli J, the injunction sought was against the exercise of the power of sale on the ground that, although the applicant admitted it had taken loan facilities, it had allegedly:

**“fully repaid the same with interest and that the Respondent was not entitled to exercise a statutory power of sale.”**

The above quotation was the finding of the Court of Appeal in **Civil Appeal No. 2 of 2017 Equip Agencies Ltd v I & M Bank Ltd** on appeal against the ruling of Meoli J of 9<sup>th</sup> December 2016.

19. In the application previously heard by me a suspension, not an injunction, was sought was of the exercise of the Defendant's statutory power of sale for twenty (24) months. The suspension was intended to enable redemption by the applicant pursuant to the exercise by the court of powers under **Section 104** and **105** read together with **Section 10** of the **Land Act**. In my Ruling of 17<sup>th</sup> May, 2018, upheld by the Court of Appeal in **Civil Application No. 73 of 2018 Equip Agencies Ltd v I & M Bank Ltd**, I held as follows:

**“27. Accordingly I am not satisfied under the circumstances that this is a proper case for exercise of the court's discretion under the cited provisions of the Land Act.”**

20. Viewed against the aforesaid and for the foregoing reasons, the present application is not, in my view, res judicata. I so find and hold.

**Whether the conditions in Giella -Vs- Cassman Brown & Co. Ltd for injunctive relief are satisfied.**

#### **Valuation:**

21. The applicant's first, and overriding complaint was that there was no valuation, which would consequently imperil its rights and be a blight on the respondent's statutory duties.

22. The respondent, however, produced a valuation report for the Land prepared by Dunhill Africa Valuers Limited. It is dated April 12<sup>th</sup> April, 2018. The valuation certificate gives the opinion of the value of the Land as at that date as follows:

<b>“1.</b>	<b>Open Market Value</b>	<b>Kshs 470,000,000/=</b>
<b>2.</b>	<b>Mortgage Value</b>	<b>Kshs 376,000,000/=</b>
<b>3.</b>	<b>Forced Sale Value</b>	<b>Kshs 352,000,000/= ”</b>

23. In my view the Dunhill Valuation Report answers the applicant's complaints in respect of **section 97as** follows. That section imposes a duty on the Chargee:

***“To obtain the best price reasonably obtainable at the time of sale.”***

This provision must be read together with **Section 97 (2)** which provides that:

***“(2) A Chargee shall before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer”***  
(emphasis supplied).

24. My understating of these two provisions, read together, is that a court will be satisfied that a sale by a chargee exercising its statutory power of sale has or will obtain the best price reasonably obtainable provided that a forced sale value has been obtained and such value will be relied upon by the chargee at the auction. I take cognizance of the fact that the valuation by R.R. Oswald & Co. Ltd which was availed by the Applicant was premised on the following parameters and did not comply with the statutory expectation. It was a “fair market” valuation, it assumed the property was “free from all encumbrances” and it also assumed the land was “in vacant possession”.

25. Where a charge is presented with a valuation based on a fair market valuation that assumes the property is free from encumbrances and that the charged property is in vacant possession, such charge cannot be expected to utilise such a valuation at a forced sale, and is entitled to ignore it.

26. I note that **Section 97 (3)** of the **Land Act** provides that a rebuttable presumption that a chargee is in breach of the duty in **Section 97 (1)** if the forced sale price is less than twenty five (25%) per centum or below of the market value at which comparable interests in land of the same character and quality are being sold in the open market. Here, however, no valuation was provided by the applicant to indicate what the comparable interests of similar character and quality in the region were valued at.

27. In light of the foregoing, the court cannot treat the valuation by R.R. Oswald & Co. Ltd on any other basis except on the basis of the untenable assumptions made by the valuer – that the land was unencumbered and in vacant possession. Accordingly, the open market valuation by Dunhill Africa Valuers Limited stands unchallenged, as it also indicates the forced sale value.

28. A quick calculation shows that the forced sale value of Shs 352,500,000/= indicated in the Dunhill valuation is exactly 25% less than the open market value. As such, there would be no breach of duty on the part of the chargee if the Land were sold at that price and no less.

29. As earlier pointed out the Dunhill valuation is dated 12<sup>th</sup> April 2018 and therefore satisfies the twelve month period specified under **Rule 11 (b) (x)** of the **Auctioneers Act** which provides that the content of a warrant or instruction shall have:

***“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 date.”***

30. Thus, on the whole issue concerning the complaints as to valuation it is clear that the respondent has satisfactorily responded to the applicant's assertions to the satisfaction of the court.

#### **Reserve Price and Advertisement:**

31. The Applicant complained that the advertisement for sale by public auction did not comply with the law in that it did not indicate whether or not the sale was subject to a reserve price. A perusal of the advertisement shows this to be the case. The Applicant also asserted that the advertisement did not give an “accurate description of the property.”

32. I will deal with the latter complaint on accuracy of description first. **Rule 16 (1) (d)** of the **Auctioneers Rules** which the Applicant relied on in this regard provides as follows:

***“(1) An advertisement by an auctioneer should.....contain –***

***(a).....***

***.....***

***(d) in respect of movable property other than perishable goods and livestock, an accurate description of the goods to be sold and a statement as to whether or not they are to be sold subject to a reserve price.”***

Clearly, this provision is not the one applicable to immovable property such as the Land in this case.

33. As regards reserve price in relation to immovable property, **Rule 11(1) (b) (x)** of the **Auctioneers Act** does not specify that an advertisement shall contain a reserve price. What **Rule 11** is concerned with is the contents of a court warrant or letter of instruction. The rule provides as follows:

**“(1) A court warrant or letter of instruction shall include, in the case of.....”**

**(b) Immovable property-**

**(i) .....**

**.....**

**(x) 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.**

**(2) The letter of instruction shall be the sale Form 1 set out in the Appendix.”**

34. The Applicant did not avail a copy of the letter of instruction in the format of Sale Form 1 or any letter of instruction at all made by the respondent and showing that there was no reserve price. To that extent their argument is speculative.

35. The final complaint on reserve price was that the respondent failed to comply with **Section 21 (3)** of the **Auctioneers Act**. That Section provides that:

**“It shall be stated on the particulars or conditions of any sale by auction of any property whether such sale shall be subject to a reserve price or not or whether a right to bid is reserved.”**

36. Other than in the advertisement, no particulars or conditions of sale have been exhibited by either party. The provision of **Section 21** is also not explicit as to where the particulars or condition of sale are to be stated. Under the **Auctioneers Rules**, as already shown, **Rule 16** provides as follows:-

**“(1) An advertisement by an auctioneer shall in addition to any other matter required by the court, contain-**

**(a) .....**

**(b) the conditions of sale or where they may be obtained.” (emphasis supplied)**

This Rule clearly gives the auctioneer an option to specify the conditions of sale in the advertisement or to indicate in the advertisement where the conditions of sale may be obtained.

37. The advertisement did not contain either the conditions or an indication as to where they may be obtained. Is this a sufficient ground for stoppage of the entire sale? I think not. In light of the fact that the conditions of sale are usually availed to the purchasers bidding at the sale, and thereafter signed by the successful bidder, I am not satisfied that there are no conditions for the sale of the Land. Where the only point against the continuance of a sale is an unproved allegation that there are no conditions of sale, and this allegation is made in circumstances where the applicant has not disputed the outstanding advances, it would be unsafe for that reason alone to cancel the sale.

38. On this I have in mind the words used by the Court of Appeal in **Civil Appeal No. 2 of 2017 Equip Agencies Ltd v I & M Bank Ltd** when dealing with the appeal against the Ruling of **Meoli J** of 9<sup>th</sup> December 2016, in this matter. The Court found as follows:

**“The Charge, as we have shown, allowed for tacking and consolidation of debts as did the Land Act. The Appellant (the applicant herein) after taking the first loan, applied for many more facilities which were granted. It would appear that the Appellant did not service the loan as required and, upon requesting for restructure of the same, did not service more loans. The Appellant was not entitled to the protection of an interim order of injunction.....” (emphasis supplied).**

39. The above quotation was contained in the Court of Appeal’s decision of 27<sup>th</sup> September 2017. That was over one year ago. There has been no indication that since that time the Applicant has been servicing the loan, which continues to balloon due to interest and other charges. Is this Applicant entitled to stop the sale on the ground that **Section 21 (3)** was not complied with in that the reserve price has not been indicated either in the advertisement or in conditions which are referred to in the advertisement?

40. In the case of **Jan Bolden Nielsen v Herman Phillipus Steyn Alias Hemannus Phillipus Steyn & 2 Others (2012)eKLR Mabeya J**, stated as follows:

**“I believe that in dealing with an application for interlocutory injunction, the court is not necessarily bound to the three principles set out in the *Gilla vs Cassman Brown* case. The court may look at the circumstances of the case generally and the overriding objective of the more. In *Suleiman vs Amboseli Resort Ltd [2004] eKLR 589 Ojwang’Ag. J (as he then was) at page 607 delivered himself thus:-***

**‘... Counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago in *Giella v Cassman Brown* in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counselling that point, for the law has always kept growing to greater levels of refinement as it expands to cover new**

*situations not exactly foreseen before..... The fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong”...*

41. I agree that the court is not bound to apply only the three principles under Giella. My view is that given the chequered history of this matter as stated in the Court of Appeal determination above, and in **Civil Application No. 73 of 2018 Equip Agencies Ltd v I & M Bank Ltd**, cancelling the sale would be harsh. In the latter case, the Court of Appeal stated:

*“Given the litigation history of the matter involving the Applicant’s previous bids to restrain the bank from exercising its power of sale and in light of the parameters within which the Applicant will have to demonstrate during the appeal.....we are not persuaded, prima facie, that the Appellant’s appeal is arguable.”*

42. Likewise, I am unconvinced that the sale should be stopped, looking at the entire circumstances of this case, on account of the failure in technicality in strictly complying with **Section 21 (3)** of the **Auctioneer’s Act**. I am of the view that in determining whether to stop a sale it is pertinent to consider whether, overall, the respondent seriously undertook its obligations under law; whether the failure to comply with a single technicality prejudices the applicant; whether if the sale is cancelled to allow compliance with the technicality, the applicant will thereby reasonably be able to redeem the property; the histories of the parties in the transaction, and whether the applicant’s application appears to be merely a delaying tactic intended to delay the auction. In this light, and given that the respondent has satisfactorily complied with all but that one provision of the law as herein demonstrated, I think that the sale should, on balance, not be stopped.

43. Should I be wrong in this conclusion and in declining to stop the sale, there is comfort in the undertaking given by the respondent during the hearing which was as follows:-

*“That in the event that there is any wrongful or defective aspect of the sale the bank is prepared and hereby undertakes to indemnify the Applicant in damages.”*

44. That the respondent gave the above undertaking is an indication that it is prepared for an eventuality where compensation may be or become payable to the applicant in damages for a potentially wrongful sale.

45. In light of the foregoing I am not satisfied that any of the conditions in **Giella v Cassman Brown and Company Limited [1973] EA 358** are fulfilled, or that the broader interests of justice persuade me to issue an injunction to stop the sale in this case.

#### **Disposition**

46. Taking into account all the foregoing circumstances and for the reasons enumerated, I decline to allow the application which is hereby dismissed with costs. Further, I consider that the following order should be given to safeguard the sale by auction, namely:-

a. The court hereby orders that the sale by public auction shall be conducted on the basis that the reserve price shall be the forced sale value indicated in the valuation by Dunhill Africa Surveyors Ltd of Shs 352,500,000/=.

b. This reserve price shall be a condition of sale herein.

47. Orders accordingly.

**Dated and Delivered at Nairobi this 6<sup>th</sup> Day of December, 2018.**

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**RICHARD MWONGO**

**JUDGE**

Delivered in the presence of:-

**1. Ms Ndungu h/b for Mirie.....** for the Plaintiff/ Applicant

**2. Mr Wawire .....**for the Defendant/ Respondent

**3. Court Clerk – Quinter Ogutu**