



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 50 OF 2016**

**Consolidated with**

**CIVIL CASE NO. 54 OF 2016**

1. PATRICK KANG'ETHE NJUGUNA
2. EDWARD NJUGUNA KANG'ETHE
3. GEORGE JAMES KANG'ETHE.....APPLICANTS

**VERSUS**

1. CO-OPERATIVE BANK OF KENYA LTD
2. ROBERT MAINA NGURU t/a NGURU AUCTIONEERS
3. LEAKEY AUCTIONEERS
4. JOSERICK MERCHANTS AUCTIONEERS
5. JOHN MARIARA KIGOTHO.....DEFENDANTS

**RULING**

1. By an amended Notice of Motion dated the 16/11/2016 and filed in court on the 24/11/2016, together with an amended plaint, the plaintiff's seek from the court orders that:-

1. **THAT this Application be certified as urgent and service thereof be dispensed within the first instance.**
2. **THAT the purported auction sale of the Applicant's property known as LR No. 209/136/44 (IR No. 39769) by the 1<sup>st</sup> and 2<sup>nd</sup> defendant's on 5<sup>th</sup> August, 2016 for Kshs.60,000,000/= to the 5<sup>th</sup> respondent be nullified.**
3. **THAT pending the hearing and determination of this Application *interpartes*, the 1<sup>st</sup> Defendant's their employees, servants, agents particularly the Land Registrar, Nairobi be ordered not to register any alienation of the Applicant's property known as LR. No. 209/136/44 (IR No. 39769) pursuant to the purported sale of the said property between the 1<sup>st</sup>**

and the 2<sup>nd</sup> Defendants jointly to the 5<sup>th</sup> respondent.

**4. THAT Defendants, their employees, servants, agents particularly the Land Registrar, Nairobi be ordered not to register any alienation of the Applicant's property known as LR No. 209/136/44 (IR No. 39769) pursuant to the purported sale of the said property between the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants jointly to the 5<sup>th</sup> respondent and another party whose particulars are unknown as at now.**

**5. THAT the costs of this Application be provided for.**

It is evident that only prayers 2 & 4 and that consequential prayer of costs are due for consideration, the others having been spent.

2. The gravamen of that application is that pursuant to this court's ruling of 26/7/2016 the defendant's staged an auction for the 5/8/2016 but before the date so set for sale, the plaintiffs identified a buyer for the property at a price and consideration of Kshs.127,000,000, did communicate that fact to the plaintiff but the plaintiff did not give it a thought even the courtesy of an acknowledgement and a response and proceeded to sell the property at Kshs.60,000,000 which sum the plaintiffs contend was at a gross undervalue. For that reason the plaintiffs are now seeking that the sale be cancelled and annulled for having been conducted and concluded in an outright affront to the law. Section 97 of the Land Act, is cited to found the application and the orders sought in it. In addition the plaintiffs cited the decision in *Gitobu Imanyara vs Ecobank Kenya Ltd [2015] eKLR*, *Carol Silcok vs Kassim Shariff [2013] eKLR* and *Surya Holdings vs CCI Bank Ltd [2015] eKLR* for the proposition that the protection and cushioning afforded to the chargor under the Land Act ought not to be diminished or subtracted from but rather ought to be strengthened and bolstered. The plaintiff relied on paragraph 19 of the decision in *Gitobu Imanyara* (supra) in which the judge, Kimondo J, said:-

**"I should think that the law has afforded to the chargor the safeguards in the Land Act and Rules and those safeguards should not be fused or limited at all by craft of interpretation of the law or sacrificed at the altar of convenience. I hold the view that the chargor should be accorded all the safeguards provided in law in so far as they are not in conflict with the constitution for better enjoyment of right to property in Article 40 of the Constitution. The chargee is taken to be aware of, and enters into a mortgage with the chargor subject to all these safeguards on equity of redemption".**

3. In making the submissions regarding the safeguards accorded to the chargor, Mr. Gikandi referred the court to the provisions of section 97 which imposes a duty of care upon the chargee exercising its power of sale, to obtain the best price reasonably obtainable at the time of sale. Mr. Gikandi relied on that provision to further submit that duty care can only be best met by a valuer being called upon to determine the market price and that any sale at a price less than 25% of the value invites an inference that there has been a breach of the duty of care statutorily imposed.

4. To align the facts of the case with the law, Mr. Gakandi referred the court to the valuation report prepared by Hectares & Associates Ltd and dated 15/5/2015 (nay 10/6/2015) and contended that it was not a valuation report as contemplated by Rule 11 of the Auctioneers Rules.

5. For the defendant, one John Chege, the defendant's remedial manager, swore and filed a Replying Affidavit in which it is contended, in opposition, that the plaintiff are seeking to get what they sought and obtained in the ruling of 26/7/2016 whose terms they failed to comply with hence the application in *res judicata* and ought to be struck out; that there was exhibited before court in an earlier Replying affidavit of Ann Olango that the open market value of the property was 75,600,000 and a forced sale value of 56,700,000; that the plaintiffs/applicants had failed to disclose the name of the purchaser at the auction hence it would be inappropriate to grant the orders sought; that there having occurred a sale and payment of purchase price the plaintiffs equity of redemption had been extinguished hence no legal basis to stop the transfer.

6. On the accusation that the bank frustrated the plaintiff's efforts to sell by declining to release copies of the document of title, the defendant took the position that it only has the original title having obtained same from the plaintiffs and that by a Replying affidavit sworn by Ann Olango and served on 9/6/2016 the plaintiff had a copy of the title.

7. On allegations of fraud the defendant contend that none had been proved and that the plaintiff remedy, if any, lies in damages for which the defendant contends it is a liquid bank able to pay such damages if proved and awarded.

8. At the hearing Mr. Kongere in his submissions relied on a series of decisions and laying down principles of *re-judicata*, when bad faith would be imputed, how a fair market value of the property can be ascertained and when to nullify a sale by public auction. Decisions were equally cited on when the equity of Redemption get extinguished.

9. I have read and taken due regard of the submissions offered and the law relied upon by the parties. In my view there are only two (one substantive and one preliminary) issues for determination. These are as follows:-

**(i) Is the application Res judicata?**

**(ii) Was the sale bad for being in violation of the law under the Land Act and Auctioneers Rules.**

10. I will deal with the preliminary issue, whether or not the application is *re-judicata*, first. My understanding of the *re-judicata* as a principle of law is that for an issue to become *res judicata*, it ought to have been directly or indirectly in issue in the matter previously handled and adjudicated by the court, between the same parties or between the parties who claim rights under those parties. It applies to both the facts the court was called upon to make a determination on and those that the court was not called upon to make a determination but, although not brought forward for such determination, properly belonged to the litigation, and which the parties exercising due diligence and foresight ought to have availed to court and asked for its dissemination at the time of the first litigation.

11. It however, as a principle, does not place upon the parties some onus, expectation or ability to prophesy for the future happenings. The dispute to be construed for belong to a litigation must be a live dispute at the time the matter is litigated and not one that emerges thereafter or emerges pursuant to the determination that ensues.

12. In the context of this case, this court delivered itself on an application for injunction seeking to stop a sale on the 26/7/2016 and granted injunction on terms that the plaintiff's pay the debt in a particular way over a period of time. That order, it is apparent and conceded, was never complied with hence the sale now challenged. In my opinion and finding, the question of sale to the 5<sup>th</sup> defendant on 5/08/2016, in the amended plaint and Notice of motion, was never an issue that was placed before the court for determination nor could it have been counterplated by the parties at the time the application for injunction was argued and ruling delivered on the 26/7/2017. It is a matter that ensued after the ruling and did not exist before.

13. It was an issue that was alien to those proceedings and it would be stretching the principle of *res judicata* too far to hold that any due diligence would have made it part of the litigation. May be this is explained by the need to amend the plaint.

14. For the foregoing reasons, I would disregard and dismiss the preliminary issue and hold that the current application is not *res judicata*. I shall seek to determine it on the merits based on the facts and the law availed to court.

**Is the sale by public auction conducted on the 5/8/2016 vitiated by failure to comply with section 97 Land Act and Rule 11 Auctioneers Rules?**

It is not in doubt that the Land Act 2012, provides stronger and wider safeguards to the chargor just to underscore the fact that a charge is not a transfer but a mere security for the payment of the debt so secured.

15. It is also not in doubt that the statute now enacts the hitherto troublesome question as to whether a chargee was a trustee for the chargors' interest while exercising statutory power of sale. It is now plain that there is a statutory duty imposed upon the chargee to take care of the chargors' interests and any guarantor's or surety and to obtain the best reasonably attainable price at the time of sale. To realize that protection a duty is put on the chargee to ascertain the market value of the property. My reading of subsection 97(2) & (3) Land Act give me the understanding that once the valuation is undertaken, a chargee would only be deemed to have failed or breached its duty of care where the sale is at a price of not more than 25% of the given market value.

16. In his submission Mr. Gikandi relied on the valuation report prepared by Ms. Cephas Valuers and dated 17/8/2016, after the impugned sale, and submitted that valuation having placed the open market value at 127,000,000, the sale at 60,000,000 was at a grave and gross undervalue. That valuation, in my view, was exhibited to challenge that by Hectare and Associates dated 10/6/2015 and putting the open market value at Kshs.75,000,000 and a reserve price (forced sale value) of Kshs. 56,700,000/-

17. Now the hallmark of the plaintiff's' application is that the defendants did not undertake a recent valuation to conduct the sale of 5/8/2016 and that the valuation used was older than 12 months hence went contrary to Rule 11 of the Auctioneers Rules.

18. To decided this point, a little history must be delved into. This suit was filed in court on the 27/5/2016 and on the same day the court granted orders which stopped the sale. As at the date of those orders the valuation report now impugned was still in compliant as to be less than one year old and therefore met the requirements of the too designed by the legislature for the realization of the safeguards under section 97, Land Act. To this court, the fact that the court aborted the auction did not make it mandatory that the chargee conducts another valuation just because the earlier one had become stale by virtue of compliance with the court orders. I find and hold that such would go towards exhalation of costs which the overriding objective of the court frowns upon.

19. But even then Rule 11(b) x of the Auctioneers Rules provide:-

**“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.”**

I have perused the Replying affidavit of Ann Olango and it exhibits not only the valuation report by Hectares & Associates Ltd but also a 45 DAYS Redemption Notice by Nguru Auctioneers dated 20/5/2016. That Notice and the valuation report in my view satisfies the requirements of Rule 11(b) x of the Auctioneers Rules to the letter.

20. Even under section 97(3) I find that whichever the valuation report one opts to rely on, be it that provided by the plaintiff pegging the value at Ksh.127,000,000 or that by the defendant, the sale at Kshs.60,000,000 cannot by any arithmetics be seen to be at 25% or below the market value.

21. There being no proof that the sale was at or below 25% of the market value. I see no reason to find that the defendant has breached its statutory duty of care under the law so as to annul the sale. I decline to annul the sale and therefore dismiss the application. I do so noting that none of the safeguards have been violated as against the plaintiff.

22. However even if I was to be wrong on this finding, and on the authority of **Julius Musili Kyunga vs KCB [2015] eKLR**, the plaintiff equity of Reduction got extinguished on the 5/8/2016 at the fall of the hammer. It no longer exists for protection. The plaintiff is however not rendered remediless. He still has a remedy in damages since the loss in their own calculations would be the sum of Kshs.67,000,000, being the difference between their valuation and the sale price. That would be the case after full trial and after

resolution by the court as to which between the two valuation reports and the price achieved at the public auction represent the fair and accurate market price. There being ascertainable pecuniary loss, I hold that it is not the kind of a loss qualifying to be called irreparable to warrant the intervention by the court in the manner sought.

23. The upshot is that I find no merit in the application and therefore dismiss it with costs.

24. I will reiterate that the parties to this litigation move with haste and set down the suit for hearing. Let a date for case conference be the **7<sup>th</sup> June 2017**.

**Dated at Mombasa this 06th day of March 2017.**

**P. J.O. OTIENO**

**JUDGE**