



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 38 OF 2016

SPERO HOLDINGS LIMITED.....PLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYA LTD.....1ST DEFENDANT

MUGA AUCTIONEERS AND GENERAL MERCHANTS.....2ND DEFENDANT

RULING

1. The application before me is for an interlocutory injunction to restrain the defendants from selling the suit property, whether by public auction, private treaty or otherwise howsoever.
2. The suit property had been scheduled for sale on 12th February 2016.
3. As the application dated 11th February 2016 was filed in court on the date when the sale was scheduled to take place, the court gave consideration to it immediately after it was filed. Having taken into account the circumstances prevailing, the court ordered that the sale be put on hold, to allow the parties an opportunity to be heard. However, the plaintiff was ordered to pay the auctioneer's charges, in any event.
4. It is common ground that the plaintiff is the registered proprietor of the suit property, **L.R. No. 14698 LAIKIPIA**. The plaintiff, **SPERO HOLDINGS LIMITED**, offered the suit property to the 1st defendant, **CO-OPERATIVE BANK OF KENYA**, as security for a loan of Kshs. 48,000,000/-.
5. The plaintiff readily admits that it was in default on its obligations in respect to the loan repayment. It explains that the said defaults were attributable to financial hardships which the plaintiff encountered.
6. The plaintiff concedes that the bank issued all the requisite notices that precede the chargee's exercise of its statutory power of sale.
7. The only issue that the plaintiff was relying on to try and obtain the interlocutory injunction was the fact that the bank had not conducted any recent valuation of the suit property, prior to taking steps to auction the said property.
8. In **DAVID GITOME KUHIGUKA Vs EQUITY BANK LTD Hccc No. 94 of 2013**, Havelock J. granted an injunction to stop the bank from auctioning the suit property, because the Valuation Report upon which the reserve price was based was "*over a year out of date*".

9. In this case, the plaintiff says that the Valuation Report which the bank relied upon when the Reserve Price was being fixed, was 3 years old.

10. The bank did not respond directly to the plaintiff's contention on the lack of a recent Valuation Report. In the result, I find that the bank did not carry out a recent valuation of the suit property.

11. Therefore, in the absence of a recent Valuation Report, the bank has not discharged its statutory obligation under section 97 (2) of the Land Act, 2012: that section provides as follows;

“A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer”.

12. Having so held, I find that the plaintiff has established a *prima facie* case with a probability of success. My said finding is based upon the following definition which the Court of Appeal gave to the phrase “*prima facie case*”, in **MRAO LIMITED Vs FIRST AMERICAN BANK of KENYA LTD & 2 OTHERS, CIVIL APPEAL No. 39 of 2002 (At Mombasa)**;

“So, what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court or a tribunal, properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

13. In this case, the bank appears to have infringed the legal obligation imposed on a chargee, to ensure that prior to selling off the charged property by public auction, a forced sale valuation had been undertaken by a valuer.

14. If the suit property was sold on the basis of a Reserve Price pegged on a Valuation which was about 3 years old, the possibility is that the sale price may be so low as to constitute a serious injustice to the plaintiff.

15. The plaintiff pointed out that the Reserve Price in February 2016 was pegged on the forced sale value of Kshs. 41,250,000/-.

16. Considering that on 22nd November 2013, the forced sale value was stated as being Kshs. 75,000,000/-, the discrepancy is already a hefty sum of Kshs. 34,000,000/-.

17. However, even though the discrepancy is so large, I find that the probable losses to be suffered by the plaintiff, in the event of a sale whose reserve price was at variance with the current reality, are quantifiable. In a strict sense, when losses are quantifiable, it is possible for the party who has suffered such losses, to be compensated.

18. The plaintiff said that it was in the process of harvesting hay from a large portion of the property, and was also harvesting beans from a smaller part of the same property.

19. If as the plaintiff says, it already had accounted for the harvest, the court would have expected the said harvests to be reflected in payments to the bank. It does not help either the plaintiff or the bank when the plaintiff does not service its loan.

20. The plaintiff submitted that if the suit property was sold, both the plaintiff and the bank would stand to lose everything. The reasoning was that after the property was sold, the plaintiff would be wound up, thus jeopardizing the livelihood of the plaintiff's employees, directors and shareholders.

21. Of course, if the plaintiff was wound-up that would have foreseeable consequences. However, the plaintiff cannot be allowed to continue existing simply in order to avoid the consequences that would flow from the winding up of the company.

22. The plaintiff should justify its continued existence, by using the income it was allegedly generating from its activities, to service the loans.

23. The very reason why the plaintiff borrowed money was to make enough money, to enable it run its affairs, and to have profits, after servicing such loans as it may have.

24. It would be an insult to the bank to be told that the plaintiff does not wish to disappoint its employees, directors and shareholders, through allowing them to feel the pinch which comes with the obligation to repay the loan that it had borrowed from the bank.

25. The employees, directors and shareholders should actually be at the forefront of ensuring that the company was doing everything possible to service its loan. It is only after the company had taken care of its loan obligations that the employees, shareholders and directors can hope to be looked after by the company.

26. If the plaintiff was not servicing its loan, it knows that the bank was entitled to realize the security. Therefore, the plaintiff cannot expect the court to stop the bank from exercising its statutory power of sale, when the plaintiff was not meeting its contractual obligation of servicing the loan.

27. If the court were to stop the bank from selling the charged property, whilst the plaintiff was not servicing the loan, it would be akin to rewarding the plaintiff for its own failure.

28. In the final result, the plaintiff has not met the other 2 ingredients for the grant of an interlocutory injunction.

29. However, the bank may only take steps to exercise its statutory powers of sale after it obtains a current forced sale valuation of the suit property.

30. Each party will pay its own costs of the application dated 25th April 2016.

DATED, SIGNED and DELIVERED at NAIROBI this 4th day of October 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Owino for the Plaintiff

Wilson for the 1st Defendant

No appearance for the 2nd Defendant

Collins Odhiambo – Court clerk