



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 98 OF 2014

FRANKLIN GAMBO MWAGAMBO PLAINTIFF

V E R S U S

EQUITY BANK LIMITED 1ST DEFENDANT

**ROBERT WAWERU MAIN T/A ANTIQUE AUCTIONS AGENCIES 2ND
DEFENDANT**

RULING

1. **FRANKLIN GAMBO MWAGAMBO**, the Plaintiff has sued the 1st Defendant **EQUITY BANK LTD** and 2nd Defendant **ANTIQUE AUCTIONS AGENCIES**. Plaintiff seeks a declaration that the auction of 8th August 2014, now past, of the charged properties **Plot No. GEDE/KIREPWE 'B'/285** and **KILIFI/MBARAKA CHEMBE/546**, did not comply with mandatory provisions of the Law; for a permanent injunction restraining the Defendants from selling by public auction the charged properties without the Defendants following '*due process*'.
2. Plaintiff filed a Notice of Motion dated 6th August 2014 and on 7th August 2014 obtained interim injunction which restrained the Defendants from selling on 8th August 2014 by public auction the charged properties.
3. The Plaintiff raised three issues which he based as the grounds why injunction should be granted pending the hearing and determination of this suit.
4. The first issue is that the 1st Defendant had failed to have the charged properties valued before scheduling their public auction.
5. Section 97(2) of The Land Act 2012 obligates the charge to obtain a forced sale Valuation before undertaking the exercise of sale of the charged property.
6. 1st Defendant by its replying affidavit, sworn by its Credit Manager Simon Muchemi, deponed that by 1st Defendant's letter dated 22nd July 2014 a request was made for a forced sale valuation to be carried out by Ultimate Valuers. Indeed I have seen the Valuation of Ultimate Valuers dated 31st July 2014. The value given was-

“L.R. NO: GEDE/KIREPWE 'B'/285 as at today's date as follows:-

1. **Open Market Value Kshs. 11,500,000/-**

WORDS: (KENYA SHILLINGS ELEVEN MILLION FIVE HUNDRED THOUSAND)

2. **Mortgage Value Kshs. 9,200,000/-**

WORDS: (KENYA SHILLINGS NINE MILLION TWO HUNDRED THOUSAND)

3. **Forced Sale Value Kshs. 8,625,000/-**

WORDS: (KENYA SHILLINGS EIGHT MILLION SIX HUNDRED TWENTY FIVE THOUSAND)

4. **Insurance Value Kshs. 9,500,000/-**

WORDS: (KENYA SHILLINGS NINE MILLION FIVE HUNDRED THOUSAND)”

Their report on the other charged property is also dated 31st July 2014 which noted thus-

“1. Open Market Value

Land Kshs. 1,000,000/-

Improvements Kshs. 4,000,000/-

Kshs. 5,000,000/-

(WORDS: KENYA SHILLINGS FIVE MILLION)

2. Mortgage Value Kshs. 3,500,000/-

(WORDS: KENYA SHILLINGS THREE MILLION FIVE HUNDRED THOUSAND)

3. Forced Sale Value Kshs. 3,000,000/-

(WORDS: KENYA SHILLINGS THREE MILLION)

4. Insurance Value Kshs. 4,600,000/-

(WORDS: KENYA SHILLINGS FOUR MILLION SIX HUNDRED THOUSAND)”

7. In view of the revelation of the existence of those valuations that issue is no longer before Court. The Valuations were dated 31st July 2014 and the auction which was stopped by the interim injunction was scheduled for 8th August 2014. The 1st Defendant therefore did not violate Section 97(2) of The Land Act.

8. The second issue raised by Plaintiff was that the 2nd Defendant failed to disclose, in the served Notification of Sale the forced sale as required by Rule 15 of the Auctioneers Rules. The Rule provides that an auctioneer on receiving instructions to sell, by auction, the immovable property, the auctioneer is required amongst other things to-

“Prepare a notification of sale in the form prescribed in Sale Form 4 set out in the

second schedule indicating the value of each property to be sold.”

In short the auctioneer is required to issue notification of sale to the chargor.

9. The Plaintiff admits receiving the notification as provided under that Rule, however the Plaintiff faults that notification because it did not state the value of the charged properties. Rather that the auctioneer indicated T.B.A (to be advised) as the value of the properties.

10. I am wholly in agreement with the holding in the case **ERIC O. ODINDO –Vs- NATIONAL BANK OF KENYA LIMITED & 2 OTHERS [2008]eKLR**, which the 1st Defendant relied upon where the Court stated-

“The requirements of Rule 15 of the Auctioneers Rules are obviously mere statutory procedures precedent to the lawful exercise of power of sale by the charge, non-compliance of which is a mere irregularity which would not ordinarily invalidate an auction sale (Civil application No. NBI 165 of 2005 Ngayo Traders Limited vs. Savings & Loan (K) Ltd.”

11. Further in the case **JOHN MWENJA NGUMBA –Vs- KENYA COMMERCIAL BANK LIMITED & ANOTHER [2006]eKLR** the Court in discussing this issue stated-

“With regard to the complaint raised against non compliance with the Auctioneers Rules, reliance was placed upon the case of Jacob Ochieng Muganda –Vs- Housing Finance Company of Kenya Ltd: HCCC NO. 1436 of 1999 (UR) in which Ringera, J as he then was held that irregularity on the part of the auctioneer could not invalidate the sale and that the remedy of a person who can prove he has been damnified by the irregularity would be damages against the auctioneer as per Section 26 of the Auctioneers Act.

... There was yet further reliance placed upon the case of Kiran Ramji Kotedia –Vs- Trust Bank Ltd HCCC NO. 1319 of 1999 (UR) in which Mulwa, J found that non compliance with the provisions of Rule 15 of the Auctioneers Rules would not invalidate a sale and would not by itself entitle the Applicant an injunction.”

12. In my view The Land Act provides the obligation of the chargee before such a chargee can conduct sale of charged property. Once such a chargee fulfils that obligation, sale by public auction can proceed. The provision under the Auctioneer Rules is of subsidiary legislation and such subsidiary legislation cannot contradict an Act of Parliament, such as The Land Act, which sets out procedures to be adhered to before auction. That is what Section 31(b) of The Interpretation and General Provisions Act, Cap 2 provides that-

“No subsidiary legislation shall be inconsistent with the provisions of an Act.”

13. I make a finding that failure by the auctioneer to set out the forced sale value in the notification of sale of the charged properties cannot be a basis of granting an injunction. The Land Act, itself provides that a chargee must have a force sale valuation, which as stated above, this chargee, the 1st Defendant, obtained.

14. The third issue of the Plaintiff is that the 1st Defendant’s Statutory Notices of Sale had contradictory amounts stated as the amount the Plaintiff initially borrowed from 1st Defendant.

15. The 1st Defendants Statutory Notice dated 5th August 2013 addressed to the Plaintiff the amount lent to Plaintiff is indicated to have been Kshs. 9.5 million. The second Statutory Notice is dated 30th December 2013. The initial loan amount is indicated in that letter as Kshs. 9.4 million.

16. That issue by Plaintiff has to be understood in the background that the Plaintiff does not deny his indebtedness towards the 1st Defendant. Indeed there are two letters that the Plaintiff wrote to the 1st Defendant, one dated 31st October 2013 and another 29th November 2013 where the Plaintiff requested the 1st Defendant for indulgence in forestalling the public auction of the charged properties and requesting for restructuring of his repayments of the loan due to financial hardship he was experiencing.

17. Does the misstatement of amount initially loaned meet the threshold of granting an injunction? In my view the answer is NO. It does not show a prima facie case with probability of success as defined in the case **MRAO –Vs- FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS [2003]eKLR** where the Court of Appeal stated-

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the Court, 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.”

18. In the case of **GIRO COMMERCIAL BANK LTD –Vs- MUTESI CIVIL APPEAL NO. 342 OF 2000** (unreported) the Court of Appeal had stated-

“It has been held time and again that a mortgagee cannot be restrained from exercising his power of sale because the amount due is in dispute, or that the mortgagor has commenced a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. See Halsbury’s Laws of England, Volume 32, paragraph 725. In view of the admitted facts, and in view of the fact that the debt was admitted as due and further that the loan was not being serviced, the Superior Court should not have granted an injunction. The first principle as laid down in Giella v. Cassman Brown guidance was not satisfied, that is to say, the Respondent had not made out a prima facie case with a probability of success.”

19. All the issues raised by the Plaintiff fail the test of the case **GIELLA –Vs- CASSMAN BROWN & CO. LTD [1973]E.A 358**.

20. Before concluding this Ruling I will state, for the umpteenth time, that an injunction is an equitable remedy. One of the maxims of equity is delay defeats equities. The Plaintiff was served, and this he acknowledges, with the first Statutory Notice in August 2013. He also acknowledges receipt of the second Notice in December 2013. The auctioneers Notification was received on 3rd and 5th June 2014. The Plaintiff also saw the advertisement of the auction in the newspaper of 21st July 2014. That notwithstanding Plaintiff waited until the day before the public auction to approach the Court to obtain an injunction. As a consequence of that late approach to the Court with a very bulky application, he obtained interim injunction which scuttled the set sale on 8th August 2014. The 1st Defendant was made to incur, no doubt auctioneer’s charges which could have been avoided if Plaintiff had attended Court earlier. It is for that reason and because the 1st Defendant was called upon to urgently respond to the Notice of Motion. I shall invoke the provisions of paragraph 50A of The Advocates (Remuneration) Order of Cap 16.

21. I make the following orders-

- a. **The Notice of Motion dated 6th August 2014 is dismissed. The costs thereof are awarded to the 1st Defendant.**
- b. **Costs awarded in (a) above shall be taxed at a higher scale in Schedule VI.**

DATED and DELIVERED at MOMBASA this 3RD day of MARCH, 2015.

MARY KASANGO

JUDGE