



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL TAX & ADMIRALTY DIVISION
CIVIL SUIT. NO.284 OF 2003

KOMASSAI PLANTATIONS LTD.....PLAINTIFF

VERSUS

BANK OF BARODA (K) LTD.....DEFENDANT

JUDGMENT

The Plaintiff in this case is Komassai Plantations Limited, a limited liability company (herein after referred to as *“the Plaintiff”*) registered in Kenya. The Plaintiff has a sister company called Popatlal Padamshi Company Limited. The Defendant is Bank of Baroda (Kenya) Limited (herein after referred to as *“the Defendant”*).

Komassai Plantations Limited was the owner of the property known as **L.R No. 209/7696** situate at Industrial Area within the City of Nairobi (herein after referred to as *“the suit property”*). On diverse dates between the years 1993 and 1998 the Defendant guaranteed loans in the consolidated sum of Kshs. 15,000,000 to the Plaintiff's sister company Popatlal Padamshi (Kenya) Limited. In lieu thereof, the Plaintiff mortgaged the suit property to the Defendant as collateral. Vide a Charge registered on 26th April 1993, the Plaintiff Charged Land Parcel LR No. 209/7696 (the suit property) with Ken-Baroda Finance Limited for an overdraft facility for Kshs.7,500,000 granted to Popatlal Padamshi (Kenya) Limited. In the year 1996, the said Ken-Baroda Finance Limited transferred all its assets and liabilities in Kenya to the Defendant, Bank of Baroda (K) Limited including the said charge for Kshs.7,500,000 registered on 26th April 1993. The Defendant bank further sanctioned a further loan in the sum of Kshs.7,500,000 to Popatlal Padamshi (Kenya) Limited which sum was also secured by a Further Charge over the suit property. The charge was registered on 18th May 1998 (***Pgs. 4-12 of the agreed bundle of documents***).

The said Popatlal Padamshi (Kenya) Limited defaulted on its repayment obligations despite the Defendant's numerous demand. (***Pg. 15 of bundle of documents***). Accordingly, the Defendant sought to exercise its legal right to recall the debt and realize the security. A Statutory Notice dated 29th November 2002 was duly issued under **Section 69** of the **Indian Transfer of Property Act (1959)** to the Plaintiff, the Defendant demanded the payment of the sum of Kshs. 18,586,372.85 owing as at 12th November 2002, failure to which the Defendant would proceed to realize the security.

Since the Plaintiff failed to service the loan, the Defendant bank, in exercise of its power of sale as mortgagee appointed Baseline Auctioneers to realize the said security to recover monies due and owing from Popatlal Padamshi (Kenya) Limited. M/s Baseline Auctioneers issued a Redemption Notice dated 11th March 2003 to the directors of the Plaintiff Company and its sister company Popatlal Padamshi

(Kenya) Limited. On 28th April 2003, Baseline Auctioneers published a sale notice in the Daily Nation Newspaper. The mortgaged property was to be sold through a public auction which was scheduled to take place on 28th May 2003. On 19th May 2003 vide a Plaint filed in court, the Plaintiff filed suit against the Defendant seeking, *inter alias*, to restrain the defendant from selling the suit property. The Plaint was accompanied by an application filed under certificate of urgency seeking an order of injunction restraining the Defendant from advertising the said sale or selling the mortgaged property by public auction. The Plaintiff contended that the said Statutory Notice of Sale was invalid.

The application came before the Honourable Nyamu J on 27th May 2003 who found that the Plaintiff had an arguable case concerning the validity of the notice and granted the injunction. However, the Honourable Judge observed that the Defendant Bank could issue fresh notices which would comply with **Section 69A (a) of the Transfer of Property Act**. Subsequently, the Defendant made further attempts to realize their security. With this development, the Plaintiff filed another application alleging contempt by the Defendant of the order of court given on 27th May 2003. The Application was brought before the Honourable Mary Kasango J. The same was dismissed.

The property was subsequently sold at a public auction on 5th January 2006 for Kshs.37,500,000 upon which the proceeds were applied towards clearing the outstanding sums due from Papatlal Padamshi (Kenya) Limited. The Plaintiff is aggrieved with the manner in which the sale was conducted and the amount the property was finally disposed of hence this suit. The Plaintiff was granted leave to amend his plaint on 18th October 2006 since the prayer for injunction previously sought in its plaint had been overtaken by events. Therefore, vide an amended Plaint date 23rd October 2006, the Plaintiff claims:-

- I. That the market value obtainable and/or the correct price on the relevant date was Kshs.84,000,000/-;
- II. That the Defendant failed in its duty of care to take reasonable precautions to obtain the correct and/or market value of the property;
- III. The Defendant failed to act in good faith and have regard to the interests of the Plaintiff.

In other words, the Plaintiff alleges that the Defendant acted negligently in selling the subject property at an undervalue. The particulars of negligence and breach of duty being set out at Paragraph 12A of the Plaintiff's Amended Plaint as follows:-

- (a) Selling the suit property at a price of Kshs.37,500,000/- which was grossly below the market or forced sale value of the said property at the time.
- (b) Failing and/or refusing to take reasonable precaution to obtain the true market value of the said property as at the time of the sale. That the Defendant further acted carelessly and recklessly.
- (c) In selling the property at the aforesaid price, the Defendant acted solely to cover its own outstanding debt against the Plaintiff which was harsh and oppressive and resulted in prejudice to the Plaintiff.

The Plaintiff alleges loss and damage in the sum of Kshs.49,311,322/- together with interest at the rate of 22.75%.

In its defence, the Defendant denied that it failed to take reasonable precautions or that it failed to act in good faith and with regard to the interests of the Plaintiff. The Defendant contends that the property was sold at a Kshs.37,500,000/- which was beyond the force sale value/price the time of sale.

When the case came up for hearing, Mr. Sehmi of Mandal & Sehmi Advocates appeared for the Plaintiff and Mr. Anzala of Kittony Maina Karanja Advocates appeared for the Defendant. The Plaintiff and the Defendant formulated twelve issues for determination. Since the suit property had been sold, most of the agreed issues had been overtaken by events and the remaining issues for determination was whether the Defendant acted in bad faith and were negligent in carrying out the sale and whether the Plaintiff was

therefore entitled to damages.

The Plaintiff called five (5) witnesses while the Defendant called three (3) witnesses. PW1 was Subhajiachand Popatal Shah the Managing Director of Popatlal Padamshi (Kenya) Limited. He acknowledged that Popatlal Padamshi (K) Limited borrowed money from the Defendant bank in the sum of Kshs.15,000,000/- at an interest rate of 29% per annum and that the loan was secured by a mortgage over the suit property. His evidence was that mortgaged suit property had 8 go-downs on an acre of land, 7 of which had been let out at a monthly rental of Kshs.250,000/-. According to PW1 a valuation of the suit property carried out in 1996 by Oswald & Co. Ltd as commissioned by the Plaintiff described the suit property as an industrial complex with a potential for development of more go-downs and was valued the same at Kshs.57,500,000/-. This report is dated 17th June 1996. It was PW1's evidence that the Defendant relied on this report in sanctioning the first loan to Popatlal Padamshi (K) Limited. According to PW1, the value of the suit property should have therefore been more when the property was sold in January 2006. His complaint was therefore that the suit property was sold at an undervalue. PW2 Dilesh Sumchand Bid representing Bida Matata Limited who were the successful bidders at the auction testified that they were informed that the first bidder for Kshs.40,000,000/- had failed to raise the deposit amount hence their bid for Kshs.37,500,000/- was successful. It was PW2's testimony that the collector of stamp duty assessed the suit property at Kshs.66,500,000/- when the same was being transferred to Bida Matata Limited. According to him, this assessment by the collector of stamp duty was in fact a bargain for them.

Another report dated 30th January 2006 of the valuation of the suit property undertaken by James Ruitha of NW Realite was produced by PW4 Isaac Lundo Wilunda. PW4 has worked with NW Realite since October 2004. He testified that James Ruitha left the firm in March 2006. It was his testimony that he was familiar with Mr. Ruitha's signature. The valuation report put the market value of the property at Kshs.85,000,000/- and forced sale value at Kshs.62,500,000/-. According to PW4, the investment offer based on any opportunities and the market activity at the time was the basis of the valuation report.

The suit property was again valued in 2008 by PW3 Rajiv Gujral, a Chartered Valuer working with R.R Oswald & Co. following instructions from Imperial Bank on 22nd December 2008. It was his testimony that he personally visited the suit property, inspected the property, carried out physical measurements of the property and took photographs of the property. He assigned the current market value of the property at Kshs.84,000,000/- and forced sale value of Kshs. 62,000,000/-. He used an investment basis and the rate of appreciation in prices of land since 2005 as the basis for valuing the property. On cross examination, PW3 admitted that although he is a Chartered Surveyor, qualified from the United Kingdom, he is not however registered as a Valuer in Kenya. He however reiterated that his report was countersigned by one P.K Nganga who is a registered practicing Valuer in Kenya.

PW5 testified that he had made an offer for Kshs.150,000,000/- to purchase the suit property from Bida Matata were offering the same for sale at Kshs. 180,000,000/-. However, in cross examination, PW5 admitted that did not have any evidence to support his claim neither was his valuation based on any valuation report.

DW1 was David Ogega Nyaboga a Manager of the Defendant Bank testified that the suit property was auctioned on 5th January 2006. He testified that the Reserve price at the auction was Kshs.32,000,000/-. This was premised of the valuation report by Crystal Valuers. According to DW1 the highest bid during the auction was for Kshs. 40,000,000/-. However, it could not be sold to the highest bidder as he was unable to raise the amount. The property was subsequently sold to the second highest bidder for Kshs.37,500,000/-. According to DW1, the Plaintiff was given opportunity to redeem the property. DW1 Admitted that although Defendant Bank did not commission the valuation by R.R Oswald Co. Ltd, the report of the suit property dated 1996, it accepted the same. It was DW1's evidence that the Defendant further commissioned a further valuation report.

Plaintiff's submission

In addressing the issue as to whether the mortgaged property was undersold, the Plaintiff's submission was that the property was undersold at only Kshs. 37,500,000/- yet the evidence of PW3 Rajiv Gujral of

M/s R.R. Oswald & Company in his valuation report of the valuation of the suit property done on 22nd December 2005 (**pgs. 70-74**) had valued the same at Kshs.84,000,000/- with a forced sale value of Kshs.2,000,000/-. According to the Plaintiff, DW1 in his cross examination admitted that the Defendant bank accepted this valuation report and the same was the basis of the first loan facility granted to the Plaintiff.

The Plaintiff further relied on the valuation report prepared by NW Realite Limited dated 30th January 2006 and produced by PW4 Isaac Lundo Wilunda which valued the mortgaged property at Kshs.85,000,000/- with a forced value of Kshs. 62,500,000/-. The Plaintiff further submitted that the Government Valuer valued the property on 19th May 2006 for stamp duty purpose at Kshs.66,500,000/-.

The Plaintiff submitted that the valuation report of M/s Mwaka Musau Consultants which was the basis of the Notification of Sale by the Defendant's auctioneers Baseline Auctioneers (**at pg. 48-49**) based the market value of the property as at 23rd January 2003 at Kshs.43,000,000/- whereas the reserve value was at Kshs.32,000,000/-. It was the Plaintiff's submission that the a second report allegedly of a valuation of the mortgaged property allegedly carried out by M/s Crystal Valuers (**at pgs 127-133**) was not relied upon by the Defendant in his evidence.

Accordingly, the Plaintiff submitted that the Defendant acted negligently by failing to bring to the attention of its Valuer that the mortgaged property had been valued at Kshs.57,500,000/- in 1996. It was also the Plaintiff's submission that Defendant based the market value at the sale relying on an outdated valuation report prepared on 23rd January 2003. In so doing, the Plaintiff submitted that the Defendant failed to appreciate that market prices for the suit property had increased during the period. The Plaintiff also submitted that there were willing purchasers as per the evidence of PW2 and PW5 to buy the property at Kshs.150,000,000/-. The Plaintiff submitted that the Defendant undersold the mortgaged property to the detriment of the Plaintiff and the court should make a finding to that effect. The Plaintiff therefore sought special damages of Kshs. 46,500,000/-, general damages plus interests and costs. Reliance was placed on the case of **Kenya Commercial Bank Limited Versus James Osebe (1982-1988) 1KAR** and **Cuckmere Brick Co. Limited & Anor Versus Mutual Finance Limited (1971) 2ALL ER.**

Defendant's submission

The Defendant's submission was that the valuation reports produced by PW3 & PW4 ought to be disregarded as the same were prepared by person who was not registered as property Valuer in Kenya. It was the Defendant's submission that PW5 did not produce any documentation to support his assertion that he was willing to purchase the suit property at Kshs.150,000,000/-. The Defendant stated that the report by Crystal Valuers produced by DW3 was used to determine the reserve price for the suit property at the auction. According to the Defendant, the Defendant was at all material times given opportunity to redeem the security. The Defendant stated that as per the evidence of PW3, the suit property was valued at Kshs.43,000,000/- in 2003. In his submission, the Defendant disputed the report of the valuation carried out by R.R Oswald Limited in 2005 assessing the suit property at Kshs.84,000,000/- but was more likely to agree with the valuation of the government Valuer at the time. It was stated that the Defendant's auctioneers used the report prepared by Mwaka Musau Consultants in the year 2003 to prepare the Notification of Sale but that they used the report prepared by Crystal Valuers Limited while conducting the auction. According to the Defendant, the highest bid at the auction was for Kshs.40,000,000/- but that the bidder failed to raise the requisite 25% deposit. The second bid was for Kshs.37,500,000/-. This was the person the property was sold to.

It was the Defendant's submission that the onus of proving that the valuation reports relied upon by the Defendant were undervaluation lies on the Plaintiff. According to the Defendant, the Plaintiff did not discharge this burden. It was the Defendant's opinion that an expert opinion ought not necessarily be held as being correct and final. In this regard, reference was made to the observation of Court of Appeal in the case of **David Musyimi Ndeti t/a Oasis Mineral Water Company & Another Versus Safepak Ltd (2005) eKLR.**

It was also the Defendant's submission that the Plaintiff did not prove the particulars of negligence alleged in its amended plaint. The Defendant also submitted that the property was sold at a price higher than the forced sale value. In this regard, the Defendant relied on the case of **Timothy Ogucha Omato versus National Bank of Kenya (2005) eKLR and Guto alias Watson Mogere Mogoko vs Maxwell Okemwa Mogere & Another, Civil Case No. 2287 of 2007 (unreported)**

The allegation that the Defendant acted with the sole purpose to recover its outstanding debt has no basis and should be disregarded. PW1 attended the auction and confirmed there was no higher bid than Kshs.37,500,000/-. PW2 admitted that the auctioneer was willing to take more than Kshs.37,500,000/-.

The prayer for general and special damages be dismissed and the Defendant be granted costs of the suit.

The Law

As a general principle, the Mortgagee owes a duty of care in dealing with the mortgaged property.

Cuckmere Brick Co. Limited –Vs- Mutual Finance Limited (1971) 2 ALLER 633

The case provides a general guidance as to the Mortgagee's duty in exercising its power of sale. The case provides authority for the proposition that in addition to the duty to act in good faith, the Mortgagee is under a duty to obtain the true market value of the property to be sold in exercise of the statutory power of sale. Salmon LJ summarizes the law thus;

(at pg. 643):

“It is well established that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purpose whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained. He has the right to realize its security by turning it into money when he likes. Nor in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at an auction, even though is badly attended and the bidding exceptionally low. Provided none of those adverse factors is due to any fault of the Mortgagee, he can do as he likes.”

The Learned Judge then discussed the question whether a Mortgagee in exercising the power of sale was also under duty at the time of sale to take reasonable care to obtain the true market value of the property to be sold and he stated thus at *(Pg. 644):*

“Given that the power of sale is for the benefit of the Mortgagee and that he is entitled to choose the moment to sell which suits him, it would be strange indeed if he were under no legal obligation to take no reasonable care to obtain what I call the market value at the date of the sale.”

And finally concluded thus *(at page 646):*

“I accordingly conclude, both on principle and on authority, that a mortgagee in exercising his power of sale does not owe a duty to take reasonable precautions to obtain a true market value of the mortgaged property at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty, the facts must be looked at broadly and he will not be adjudged to be in default unless he is plainly on the wrong side of the line”

The legal position is that if it should appear that the Mortgagee or the receiver has not used reasonable care to realize the assets to the best advantages then the Mortgagor, the company, and the guarantor are entitled in equity to compensation. They should be given credit for the amount which they would have realized if reasonable care had been used – **Standard Chartered Bank Limited Versus Walker & Anor (1982) 3 ALL ER 938**

In **KCB –Vs- James Osebe (1982-99) IKILR 48**, the Court of Appeal held that Chargee has a duty to obtain reasonable price. To hold otherwise, Hancox J.A observed, it would be not only unrealistic, but also harsh, oppressive and uncompromising.

This court has carefully considered the evidence adduced in this case and the applicable law. It was a conceded fact that the Defendant, as the mortgagee, had the legal right to realize the security once the Plaintiff defaulted in repaying the loan that was advanced to it. It was clear that at the time the Defendant exercised its statutory power of sale that right had accrued. The Plaintiff had fallen in serious arrears in repaying the said loan that was advanced to it. That is not an issue for determination by this court. The issue for determination by this court is whether the suit property was sold at a price that was undervalued. Whereas the Plaintiff asserts that the suit property was sold at a price that was grossly undervalued, it was the Defendant's case that the property was sold at the best possible price in the circumstances taking into account that it was a forced sale.

Both the Plaintiff and the Defendant adduced evidence of various valuations that were undertaken in respect of the suit property before the property was charged, during the subsistence of the loan and finally, just before the property was sold in a public auction. The valuations done were as follows:

1. The property was first valued for the Defendant's purpose in the year 1996 at Ksh.57,500,000/-. This was at the time the property was offered as a security to the bank.
2. The Defendant commissioned Mwaka Musau Consultants to conduct a valuation of the suit property in the year 2003 where it was said to have a value of Kshs.43,000,000/- with a forced sale value of Kshs.32,000,000/-.
3. R.R Oswald & Company Limited, at the instruction of the Plaintiff, valued the suit property at Kshs.84,000,000/- with a forced sale value of Kshs.62,000,000/- as at 22nd December 2005. Further, the evidence of N.W Realite Limited, also at the instruction of the Plaintiff, valued the suit property at Kshs.85,000,000/- with a forced sale value of Kshs.62,500,00/- as at 30th January 2006 .
4. The Government Valuer valued the property on 19th May 2006 for stamp duty purposes at Kshs.66,500,000/-.
5. Crystal Valuers at the instruction of the Defendant valued the suit property at 45,000,000/- with a forced sale value of Kshs.32,000,000/- as at 26th November 2005.
6. The Defendant's evidence (DW1) is that they took the valuation reports of Crystal Valuers Limited into account in setting a reserve price of Kshs.32,000,000/-

The suit property was sold on 5th January 2006. The issue for determination by this court is whether the Plaintiff made a case for this court to award the damages it craves on account of the alleged undervaluation of the suit property at the time of sale. As stated earlier in this judgment, the Defendant, as the Mortgagee, had a duty to take into account the interest of the Plaintiff, as the Mortgagor, when exercising its statutory power of sale. This court agrees with the submission made on behalf of the Defendant that it had no legal obligation to obtain the then prevailing market price of the suit property. The Defendant was under obligation to obtain the best possible price taking into consideration the prevailing conditions and the value of the property.

In any sale by public auction, the auctioneer is guided by the reserve price set by the Mortgagee. This reserve price is informed by a valuation done immediately before the sale of the property. In the present case, it was the Defendant's case that it had discharged its legal obligation by commissioning Crystal Valuers to undertake valuation of the suit property two months prior to the sale by public auction. According to Crystal Valuers, the market value of the suit property was Kshs.45,000,000/- with a force sale value of Kshs.32,000,000/-. The Defendant argued that since the property was sold at Kshs.37,500,000/-, that was a good price taking into consideration that it was more than the reserve price.

On the other hand, it was the Plaintiff's case that it was inconceivable that a property which had been valued at Kshs.57,500,000/- at the time the property was offered as security would lose its value at the time of its sale. The Plaintiff urged the court to take into account the fact that two valuers had given the market value of the suit property at Kshs.84,000,000/- and Kshs.85,000,000/- respectively. The two valuers are R.R. Oswald & Company Limited and N.W. Realite Limited. The two valuers gave the force sale value of the suit property respectively at Kshs.62,000,000/- and Kshs.62,500,000/-. After the property was sold, the government valuer assessed the value of the property at Kshs.66,500,000/- for stamp duty purposes.

Having evaluated the rival positions taken by the Plaintiff and the Defendant, this court is of the firm view that the Plaintiff indeed established its case that the Defendant failed to exercise its duty of care to the Plaintiff. This duty required the Defendant to obtain the best possible price taking into consideration the then prevailing market conditions and the fact that the property was being sold in a forced sale. The Defendant urged the court not to ignore the valuation commissioned by the Defendant two months prior to the sale by public auction which gave the force sale value of the property at Kshs.32,000,000/-. What was interesting in this case is the wide disparity in the respective valuations by valuers either commissioned by the Plaintiff and the Defendant. This court noted that the valuation made by Crystal Valuers was more or less similar to the valuation report made by Mwaka Musau Consultants two years earlier. This court is of the view that the valuation report by Crystal Valuers more or less reproduced the value of the suit property two years prior with the sole objective of enabling the Defendant to sell the property at a value that did not reflect the true market and force sale value. The only independent valuation that was available to the court was that of the government valuer which valued the suit property at Kshs.66,500,000/-. This court holds that the two valuation report prepared by the valuers commissioned by the Plaintiff reflected the correct market and forced sale value of the suit property. This court reached this conclusion based on the fact that the Defendant itself had previously relied on valuation reports prepared by R.R. Oswald & Company Limited to advance the loan the Plaintiff. The Defendant cannot therefore disown the valuation report made by the said valuer.

In the premises therefore, this court holds that the Plaintiff did establish that the Defendant breached its duty of care to the Plaintiff by selling the suit property at a value that was grossly undervalued. It was clear to this court that the Defendant did not act in good faith to secure the best possible forced sale value of the suit property. The valuation commissioned by the Defendant prior to the sale was not reflective of the true market value. It did not reflect the forced sale value of the property. This court finds that the forced sale value of the suit property ought to have been Kshs.62,000,000/- and not Kshs.32,000,000/- as submitted by the Defendant. Since the suit property was sold at Kshs.37,500,000/-, the Plaintiff is entitled to pay damages which this assesses as the difference between the forced sale value of the property and the price that the Defendant sold the property. The Plaintiff shall therefore be paid the sum of Kshs.24,500,000/- plus interest at the rate of 22.75% from 23rd October 2006 until payment in full. The Plaintiff shall be paid the costs of the suit. It is so ordered.

DATED AT NAIROBI THIS 1ST DAY OF OCTOBER 2015

L. KIMARU

JUDGE