



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 436 OF 2014

MARGARET WANJIKU KAMAU.....PLAINTIFF

VERSUS

JOPPA VILLAS (IN RECEIVERSHIP)..... 1ST DEFENDANT

JOPPA VILLAS LLC..... 2ND DEFENDANT

WALL STREET BUSINESS PARK LIMITEDINTERESTED PARTY

RULING

INTRODUCTION

1. Before the Court are four **Notice of Motion** applications the subject matter of this ruling. The 1st application (1st application) is a Notice of Motion dated and filed herein on 3rd October, 2014 by the Plaintiff, seeking to secure the following orders;
1. *That this application be certified urgent and heard ex parte in the first instance and service thereof be dispensed with.*
2. *That an injunction do issue restraining the Defendant/Respondent whether acting by themselves, their agents, Receivers, employees, servants, officers, directors or whosoever from advertising, selling offering for sale, transferring or alienating the suit property being Land Reference Number 27253/42 and in particular maisonette number 335, which is the subject of the agreement dated 20th June 2006 pending the interpartes hearing and determination of this application.*
3. *That an injunction do issue restraining the Defendant/Respondent whether acting by themselves, their agents, Receivers, employees, servants, officers, Directors or whosoever from advertising, selling, offering for sale, transferring or alienating the suit property being Land Reference Number 27253/42 and in particular maisonette number 355, which is the subject of the agreement dated 20th June 2006 pending the hearing and determination of this suit.*
4. *That this Honourable Court be pleased, in the interests of justice, to direct the Defendant/ Respondent to furnish this Honorable court and the Plaintiff with a detailed status update of the Jopa Villas project on the suit property being Land Reference Number 27253/42 and in particular the progress on the construction of the maisonette number 355, the expected completion date if at all and the progress of the sale of the other maisonettes as envisaged*

- under recital (b) in the said Lease and to further direct the Defendant to allow the Plaintiff access to the project site to inspect the progress thereof.*
5. *That this Honorable Court be pleased to give such other further orders and/or directions as it deems fit, just and reasonable in the circumstances of this case.*
 6. *That the costs of this application be provided for.*
2. The 1st application is premised on the grounds set out therein and is supported by the Plaintiff's affidavit sworn on 3rd October, 2014. It is the Plaintiff's case that on 20th June 2006, she entered into a composite agreement with the 1st Defendant, which agreement was in part for the subscription of one share in the Defendant Company (JOPA VILLAS LLC IN RECEIVERSHIP), and for the lease of the Maisonette No.355 to be constructed by the 1st Defendant on parcel of land known as L.R No.27253/42 along Mombasa Road (the suit property). The said Maisonette was part of an extensive project being undertaken by the Defendant in the said property, which is approximately 20 acres for sale to prospective members of the public under an elaborate arrangement that would render each purchaser a shareholder in the 1st Defendant company as well as a lessee of a maisonette to be put up by the 1st Defendant in the said property. Before the completion of the said construction, the Plaintiff/Applicant has become aware through newspaper advertisement that the Defendant has been placed under Receivership, and is now inviting offers, through Deloitte Consulting Limited, from the members of the Public to purchase the said entire property. The Plaintiff states that the turn of events smacks of impropriety, illegality, unfairness, and is oppressive, manifestly unjust and in flagrant breach of the agreement dated 20th June 2006. This is the reason why the Plaintiff seeks injunctive orders to stop the sale of the suit property pending the hearing and determination of the suit.
3. The application is opposed by the 1st Defendant through its Receiver's replying affidavit sworn by HARVEEN GADHOKE on 7th October 2014. The Receiver also on behalf of the 1st Defendant filed a defence to the suit on 19th November, 2014. Harveen Gadhoke, describes himself as the Receiver/Manager appointed jointly with Daniel Ndonge to receive the 1st Defendant. The deponent objects to the application mainly on the grounds that the Plaintiff has no locus to bring this suit and application on the grounds that the application for injunction is resjudicata, the same having been determined in several separate application brought by JOPA VILLAS LLC. It is further argued for the Receiver that the Plaintiff's interest in the matter does not supercede the secured interests of OPIC, the chargee herein. Being an unsecured creditor, the Plaintiff's right cannot rank in priority to those of the chargee, and so the injunctive orders being sought herein to restrain the chargee from realizing the security cannot stand.
4. The application is also opposed by the Interested Party – Wall Street Business Park LTD, on largely the same grounds.
5. The application is supported by the second Defendant JOPA VILLAS LLC.
6. The Second Application (the 2nd application) is dated and filed in court on 8th September, 2015 by the 2nd Defendant. The application seeks to secure the following orders;
1. *That this application be certified as urgent and heard ex parte at first.*
 2. *That any funds received so far by the Respondent and any funds expected in respect of any sale agreement relating to LR NO.27253/42 located at Mlolongo be deposited in court pending the hearing and final determination of the application herein.*
 3. *That an order for injunction do issue restraining the first Defendant by itself, its servants, agents or any one of them from interfering with the property known as LR No.27253/42 located at Mlolongo area either by sale, offering for sale, auction, sale by private treaty, transfer or disposal by any means whatsoever and however pending the hearing and final determination of the application herein.*
 4. *That an order for injunction do issue restraining the first Defendant by itself, its servants, agents or any one of them from interfering with the property known as LR. NO. 27253/42 located at Mlolongo Area either by sale, offering for sale, auction, sale by private treaty, transfer or disposal by any means whatsoever and howsoever pending the hearing and final determination of the suit herein.*

5. ***That if the defendant has started a process of sale, then the same be conducted under the supervision of the court and any proceeds from a sale be deposited in court and disbursed under the direction of the court.***
6. ***That JOPA VILLAS LLC be enjoined to these proceedings as the second Defendant.***
7. ***That the costs of this application be provided for.***

7. The application is premised on the grounds set out therein, and is supported by affidavit of JOHN PAUL NJOROGGE sworn on 8th September 2015. Mr. Njoroge depones that he is a director of the 2nd Defendant and is qualified to swear the affidavit. The applicant learnt of the existence of this case after speaking with a Mr. Muchiri of Delloitte, from which firm the receivers come. The Applicant learnt that the suit property which belongs to the Applicant was in the process of being sold without any fresh issuance of statutory notice. This is despite the fact that there is a pending case in Machakos being HCCC NO.215/2008 and a pending court of Appeal ruling. The Applicant's case is that its rights and obligations have not been determined thus it is inherently contrary to the principles of fairness to dispose of the property in the manner sought by the receivers, without any statutory notice, without fresh valuation except the last one having been done 3 years earlier, and without being transparent or accountable in the manner of conducting the proposed sale. The Applicant seeks to be joined to the suit as it has an interest in the suit property and is thus a necessary party to any case dealing with the right and use of the suit property, and it is inequitable, unfair, unjust and unconscionable for adverse and prejudicial orders to be issued in their absence. The Applicant's case is that it has secured a buyer for the suit property for Ksh.1 billion which is enough to pay the charge debt and secure a balance for the Applicant. In this regard the Applicant is not against the sale of the suit property in the event there is a valid sale process ongoing, but prefers that the said process, if any, be supervised by this court and that any amount obtained be deposited in court and then disbursed as per court orders and subject to a proper account being provided.
8. When the 2nd Applicant came to court ex-parte under certificate of urgency on 8th September 2015, the court certified the application urgent and granted temporary injunction in terms of prayer 3 of the application. Those temporary orders have since been extended to date.
9. The 2nd application is supported by the Plaintiff who is also the applicant in the 1st application. The application is opposed by the Interested Party vide a replying affidavit sworn by PRAFUL KUMAR PREMCHAND sworn on 14th October 2015. It is also opposed by the 1st Defendant through a Supplementary Affidavit sworn by HARVEEN GADHOKE on 14th October 2015.
10. The Third Application (3rd application) is dated 17th September 2015, and filed herein on 18th September 2015 by the 1st Defendant (Receivers). The 3rd application is in response to the 2nd application and seeks to set aside the interim orders granted in the 2nd application to the 2nd Defendant on 8th September 2015 on the grounds that the proposed 2nd Defendant did not disclose to the court that its previous injunction applications had already been heard and dismissed in Machakos HCCC. 215 of 2008 – JOPA VILLAS LLC –Vs- OPIC & OTHERS culminating in a ruling dated 26th September 2014 by Hon. Justice Charles Kariuki. The applicant's case is that this court has no further jurisdiction to deal with the matter, and that the interim orders should be set aside for material nondisclosure and fraudulent misrepresentation.
11. The application is supported by affidavit of HARVEEN GADHOKE sworn on 17th September 2015. The application is also supported by the proposed Interested Party-Wall Street Business Ltd.
12. The Fourth Application (4th application) is dated 30th September 2015 and filed herein on 6th October 2015 by the Interested Party. The application seeks as the main order the leave of this court to enjoin the Interested Party to this suit, on the grounds that the Interested Party is the purchaser of the suit property and there are interim ex-parte orders issued herein on 8th September 2015 prohibiting the continuation of the sale of the suit property. The Interested Party's case is that it entered into a Sale Agreement with Overseas Private Investment Corporation (OPIC) for the sale of the suit property on 25th August 2015 and are at an advanced stage of completing the sale. Should the injunctive orders sought by the proposed 2nd Defendant be granted, the Interested Party will suffer irreparable harm.

13. The application is premised on the grounds set out therein, and is supported by the affidavit of PRAFUL KUMAR PREMCHAND SALVA, a director of the Interested Party sworn on 30th September 2015. To the supporting affidavit is annexed a copy of the said Sale Agreement between the Interested Party and OPIC.
14. The 4th application is supported by the 1st Defendant, while it is opposed by the Plaintiff and the 2nd Defendant. The opposition by the 2nd Defendant is vide the replying affidavit sworn by JOHN PAUL NJOROGI on 1st October 2015 and filed herein on 2nd October, 2015. The deponent denies that they secured the ex-parte interim orders herein by misleading the court or by failure to disclose all relevant information. The deponent reiterates that the intended sale to the Interested Party is illegal and is being done secretly without public information and without current valuation report, and is an exercise to impoverish the 2nd Defendant and unjustly enrich the Interested Party.
15. By the consent of all the parties recorded herein on 8th October 2015 the 4th application herein by the Interested Party was allowed, and the Interested Party joined these proceedings in that capacity. That position leaves this court with the 1st, 2nd and 3rd applications to consider.

SUBMISSIONS AND ANALYSIS

Parties were represented in the matter as follows:

Mr. Philip Nyachoti represented the Plaintiff

M/s. Easter Opio represented the 1st Defendant

Mr. Makori represented the 2nd Defendant

Mr. Mwaniki Gachoka represented the Interested Party

16. With the leave of the court, parties filed submissions to the applications. Those submissions were orally highlighted together in court on 29th October 2015. I have carefully considered the three applications before the court, and the submissions of the parties in this ruling. In my view, the following are the issues to be determined by this court.
 - i. Whether the applications for injunction herein can be granted.
 - ii. Whether the suit property was regularly sold to the Interested Party by Overseas Private Investment Corporation.
 - iii. Whether the Plaintiff and the 2nd Defendant have sufficient interest in the suit property to demand a lawful regular transparent and accountable sale of the suit property.
 - iv. Whether the 2nd Defendant should be joined to these proceedings in that capacity.
 - v. Who is to pay the costs.
17. Brief History of the applications is that Overseas Private Investment Corporation (OPIC) is an agency of the Federal Government of the United States of America. It is stated as among its objectives, to foster economic development in new and emerging markets, complements the private sector in managing risks associated with foreign direct investment, and supports United States foreign policy. OPIC and the 2nd Defendant – Jopa Vilas LLC (Jopa) entered into a Loan Agreement, Promissory Notes, Debenture and Charge over LR.27253/42 (the suit property) amongst other documents to secure the loan amount of US\$7,100,000. OPIC disbursed to Jopa the sum of US\$2,870,166 which amount Jopa admitted as owing and neglected and /or refused to repay. Jopa defaulted in its loan obligations and OPIC sent a demand notice to Jopa. Jopa failed to pay the demanded amount as a result of which and pursuant to the terms of the Debenture, OPIC appointed Receivers & Managers over the suit property. Harveen Gadhoke and Daniel Ndonge were appointed as Receivers on 13th November 2008 pursuant to a Deed of Appointment under the Security Debenture dated 16th March 2006 in respect of OPIC. The property has been

the subject of various injunction applications which have all been dismissed (they appear in annexure "HG 1" of Harveen's affidavit filed on 8th October 2014). Sample the following rulings: Justice Lenaola's ruling in Machakos HCCC 215 OF 2008 (the Machakos suit), the Court of Appeal in CA 147 OF 2009 JOPA VS. OPIC & OTHERS dismissed Jopa's injunction application pending appeal, Justice Odunga's ruling in HCCC 83 OF 2012 Dr. Jane Weru Vs. OPIC & others. On 6th July 2012, Justice Prof. Ngugi issued a ruling in respect of Jopa's third application in HCCC 215 OF 2008, and indicated that it was time that OPIC realized its security. In the Constitutional Petition filed by OPIC, Justice Majanja inter alia recognized the right of OPIC and the receivers to realise the security. Justice Kamau in HCCC 458 of 2013, SHILLINGI INCORPORATED VS. OPIC, Jopa Villas & others dismissed an injunction application which Jopa was supporting. Justice Charles Kariuki on 26th September 2014 dismissed Jopa's sixth injunction application filed in Machakos HCCC 215 of 2008. M/s. Easter Opio for the 1st Defendant submitted that overall, the suit property has been the subject matter of ten (10) injunction applications. The current outstanding amount is \$ 6,954,962.25 which amount continues to accrue interest and other costs.

18. I have carefully considered the submissions of M/s. Opio on the issue of injunction and pursuant to the above historical background, this court is satisfied that to the extent that the Plaintiff or the 2nd Defendant seek injunctive Orders to stop the sale of the suit property, their application must fail. This position is more so correct since the Plaintiff and the 2nd Defendant have in their submissions conceded ground, and submitted that they are not against the sale of the suit property. This court however, has noted that in some of the said suits, the Plaintiff was not a party thereto. That notwithstanding the fact that in Shillingi Incorporated Vs. OPIC, Jopa Villas & others the court dismissed a similar application in which an applicant with similar interest as the current Plaintiff was involved is indicative enough that the courts have pronounced themselves enough on this issue, that is, that OPIC has the right to the sale of the suit property as long as the loan it advanced to the 2nd Defendant remains outstanding. Perhaps what indeed this court needs to add is that the continued applications for injunction against the sale of the suit property must now be fully condemned, and the chargee given a free reign to sell the suit property in line with the charge and debenture both dated 26th March 2006, under which the said loan was advanced.
19. The second issue is whether the suit property was regularly sold to the Interested Party by Overseas Private Investment Corporation. This issue is crucial to the application before the court because the courts, as we have seen had allowed the chargee to sell the suit property. How the chargee carried or carries out that process is crucial to these proceedings because the Plaintiff and the 2nd Defendant allege that the sale is irregular, unlawful, untransparent and is aimed to deny the 2nd Defendant the value of its property by OPIC agreeing to sell the suit property to the Interested Party at Ksh.840,000,000/= while the value of the property is Ksh.1,300,000,000/= and despite the 2nd Defendant indentifying a buyer at Kshs.960,000,000/=. With these kind of allegations, an enquiry needs to be made as to how the chargee through the Receivers indentified the current buyer, when the suit property was valued and by who, and whether the receivers were aware of the offer given to the 2nd Defendant of Ksh.960,000,000/=. It is also important to investigate at what point in time the sale was entered into, the stage of the sale process and whether any money has been paid towards the purchase. This inquiry is important because Section 99 of the Land Act offers protection to purchasers of properties sold in the exercise of the chargee's Statutory Power of Sale, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which the purchaser has actual or constructive notice.
20. Mr. Gachoka for the Interested Party submitted that the suit property was regularly sold to the Interested Party by OPIC after a due diligence was done. Counsel emphasized that in the event that the sale of the suit property is found to be irregular, the law is clear that the remedy available to the 2nd Defendant or to any aggrieved party is in damages. Counsel cited Section 99 of the Land Act 2012. Counsel further submitted that it is trite law that an Agreement for Sale entered into by a third party as a result of a Chargee's power of sale is valid. I have considered these submissions in light of the law and also in light of the processes that have taken place in the matter.
21. The last ruling by the Machakos Court in HCCC NO.215 of 2008 which paved the way for the

sale of the suit property was on 26th September 2014. Since then the Receivers were at liberty to put in place the process of selling the suit property. On August 14th 2014 the sale of the property was advertised in the Daily Nation and offers were invited for the property. There is no disclosure of the nature of the offers which were received by the Receivers. However, there is evidence of correspondence from the 2nd Defendant informing the Receivers that the 2nd Defendant had secured buyers for the property at about Kshs.1,150,000,000/= (see annexure JPNI to the supporting affidavit of JOHN PAUL NJOROGE sworn on 8th September 2015). Annexure JPW3 of the same affidavit is a letter from ALEX KIBUNJA & ASSOCIATES ADVOCATES giving an offer of Ksh.1,000,000,000/= for the 20 acres comprised in the suit property. There is no evidence that the 1st Defendant considered these proposals. However, on 25th August 2015 OPIC through the Receivers purports to have entered into a Sale Agreement with the Interested Party herein under which agreement the Interested Party purchases the suit property for a sum of Kshs.845,000,000/=, 10% of which was paid to the Vendor's Advocates on 27th May, 2015, approximately 90 days before the Sale Agreement was executed. The second Defendant has questioned this Sale Agreement on the basis that the 10% of the purchase price was paid 88 days before the agreement was executed. However, clause 3.1 of the said Sale Agreement stipulates that the deposit would be paid on or before the signing of the Agreement for Sale. If this was the only apparent irregularity about the Sale Agreement, then perhaps the same may be overlooked. The other irregularity which is discernable is how the value of the suit property was determined. The Interested Party has attached a copy of valuation report to the supporting affidavit of PRAFUL KUMAR PREMCHAND SAVLA filed in court on 6th October, 2015. The valuation Report is by M/S Kiragu & Mwangi Limited and is dated 3rd February 2015. The Valuation Report returns the value of Kshs.840,000,000/=. What is to be noted is that the Valuation Report was procured at the request of the Interested Party and not by OPIC or the Receivers. And, despite the value being Shs.840,000,000/=: the Interested Party was so generous and magnanimous to the Vendors that they decided to buy the property at Kshs.5,000,000/= more than its value, hence at Kshs.845,000,000/= Without attributing any bad motive to the Interested Party, this is not the kind of transaction that satisfies the demand of transparency and accountability. It gives the impression that the Interested Party found the deal so sweet, that it decided to enhance its value by giving Kshs.5,000,000/= more. The following is discernable conduct by the Interested Party:

- On 3rd February 2015, the Interested Party commissions own valuation Report on the suit property, which returns a value of Kshs.840,000,000/=:
- On 27th May, 2014, without absolute knowledge that it would win the sale, the Interested Party pays Ksh.84,500,000/= being 10% of the purchase price to the Vendors Advocates.
- On 25th August 2015, 88 days after paying the deposit, the Interested Party executes an Agreement for Sale over the suit property, and pays Shs.5,000,000/= over and above the Valuation sum.

22. Obviously, the Interested Party was favoured in this transaction, and it is not for nothing that the Receivers totally ignored the 2nd Defendant's offers which were well above the offer by the Interested Party by upto Ksh.155,000,000/=: This difference is not a small amount of money regardless of the nature of the transaction. It must be noted that in exercising its Statutory power of Sale, the chargee is obligated to have due regard to the residue interests of the chargor, and the price at which the property is sold must be reflective of the general price range of property of equivalent value. Where the sale is by Private Treaty, as is the case herein, valid grounds must be provided for accepting a lesser value, and rejecting a higher value.

23. The 1st Defendant (Receivers) attached a Valuation Report of the suit property to the Supplementary Affidavit of HAVEEN GADHOKE filed in Court on 14th October, 2015. The Report is by M/S. TYSONS LTD and is dated 4th October, 2014. The Report returns a value of Kshs.950,000,000/= on the suit property. Besides this, the 2nd Plaintiff submitted without the same being challenged, that the value of the suit property is in excess of Kshs.1,300,000,000/=: This is not surprising since the suit property is 20 acres along Mombasa Road near Mlolongo. It is semi developed with 25 Maisonettes upto 70% complete, and 12 Maisonettes above foundation.

The 1st Defendant ought to have carefully considered the alternative offers given by the 2nd Defendant. At the end of the day, the property to be sold belonged to the 2nd Defendant, and the 1st Defendant's interest is always to the extent of the debt owed to it by the 2nd Defendant. The manner in which the 1st Defendant and the Interested Party settled on the value of the property is at least questionable. The conduct of both parties in the matter is not transparent and this court cannot rule out collusion, fraud or misrepresentation or other dishonest conduct on the part of both the 1st Defendant and the Interested Party. Their action is therefore questionable under S.99(3) of the Land Act, and since this court had stopped the sale by the Interim orders of 8th October, 2015, the sale is not yet complete and can be fully stopped at this stage, and the deposit can be refunded. In any event the purported Sale Agreement dated 25th August 2015 at clause 4.4. acknowledges that the sale may not be completed pursuant to court orders. In the event of the sale being stopped, the deposit is refunded without any of the parties having a claim against the other. Therefore, in response to issue number two herein, it is the holding of this Court that the suit property was illegally and irregularly sold to the Interested Party, and subject to the Orders that I shall give hereunder the said Sale Agreement dated 25th August 2015 between OPIC and the Interested Party is hereby declared null and void ab initio and of no consequence whatsoever.

24. Since the said sale was not yet completed, the Applicants cannot merely have remedy in damages. This is more so because the 2nd Defendant's equity of redemption had not been extinguished because
- a. The second Defendant had presented bids to the Receivers well before OPIC entered into a Sale Agreement with the Interested Party.
 - b. The offers provided by the second Defendant will cover the amount allegedly due and also have a surplus, which is a better deal.
 - c. The second Defendant is thus in a position to redeem its property.

A case in point is **SHAROK KHER MOHAMED ALI & ANOTHER V. SOUTHERN CREDIT BANKING CORPORATION LIMITED [2008]Eklr** where the court stated that:

***“In my understanding a mortgagor is not entitled to redeem the mortgaged property before the time fixed in the mortgage contract for payment of the debt and before the provisions of section 69A is properly complied with. It is only after the time stipulated in the mortgage document, upon default and upon satisfactorily getting and being served with a proper notice that the mortgagee can start the process of sale. The mortgagee has a greater obligation to ensure that he does not wrongfully part with the mortgaged property by putting it out of reach of the lender. He is also required not to put a clog or a fetter on equity of redemption. In my humble view a clog or fetter on the equity of redemption is void, that is nothing or no act can make the right of the mortgagor to release his property irredeemable unless there is evidence to show that the charger was unable due to his own fault omission.*”**

It is also my position that a mortgagee is required to exercise its statutory power of sale in good faith and fairly. The point I am making is mortgagee is not allowed to exercise the statutory power of sale in a manner that can be termed as capricious or oppressive.

I am satisfied a party deprived of his property through an illegal process would suffer irreparable loss and/or damage. In any case a party entitled to a legal right cannot be made to take damages in lieu of his right. In essence the damages and/or loss that would be suffered by the Plaintiffs would be significant if an injunction is not granted. My position is that a party in contravention of the law cannot be rewarded for his contravention. Refusing an injunction in the circumstances of this case will fly in the clear provisions of the law. I am therefore satisfied that the plaintiffs will suffer irreparable loss if an injunction is refused”.

25. From the foregoing I am able to answer the third issue I raised. Yes, arising from what I have stated above, the Plaintiff and the 2nd Defendant have shown sufficient interest in the suit property for them to demand a lawful, regular, transparent and accountable sale process. This transparency

is not merely limited to the valuation process, but also to all the expenses and accounts concerning the entire process. The Receivers must understand that they act in a position of trust, and will be called upon to account for that trust. Where this court is called upon to ensure that accountability on the part of the Receivers, this court cannot be said to lack the jurisdiction. Property rights are protected under the constitution and a party who alleges that an opaque process is being used to deny it its right will be heard. Fortunately, this court has mechanisms of dealing with or settling professional fees. The 2nd Defendant has claimed that the accounts being rendered by the Receivers have been bloated on account of the OPIC disbursement costs, Legal Fees, Receivership costs and other outgoings. The 1st Defendant through HARVEEN GADHOKE'S Supplementary Affidavit filed herein on 14th October 2015 has marked as annexure HGI a Summary of Amounts due from JOPA LLC to OPIC as of October, 2015. The total sum alleged to be due is USD 6,954,962.25. These include disputed legal fees and Receivership fees and other disbursement. I have no way now of knowing the amount that is due. The same shall be subject to taxation under the relevant regimes of law. However, I do not accept the submission by the 1st Defendant that the tabling of correct account should abide the finalization of Machakos HCCC 215 / 2008. This is so because if the sale of the suit property proceeds, as it will soon do, the matter of accounts will be overtaken by events after the suit property is sold and proceeds disbursed. So, in my view, the issue of accounts must be part and parcel of the sale process in this matter, when the said sale finally takes place. I therefore accept the 2nd Defendant's prayer that the court should in some way supervise the sale of the suit property, and ensure the proper rendering of accounts. The 1st Defendant shall not have any problem with this position if their interest is simply to recover the debt due. The residue of the sale, if any, belongs to the 2nd Defendant, and people claiming under it, including the Plaintiff herein. Proper accounts rendered will ensure that the interests of both the Plaintiff and the 2nd Defendant are properly catered for.

26. The Fourth issue I raised is whether the 2nd Defendant can join these proceedings. It is to be noted that if this plea is allowed, then JOPA VILLAS LLC appears as both the 1st and 2nd Defendant. The 1st Defendant is JOPA VILLAS LLC (in Receivership) and the 2nd Defendant is JOPA VILLAS LLC. The 1st Defendant correctly submitted that legally, once a Company has been placed in receivership it lacks the legal competence to institute a suit or be sued in its company name. The Receivers are acting pursuant to their powers derived under the Debenture in respect of the realization of the suit property, which position the director of JOPA VILLAS LLC was initially opposed to. The opinion of this court is that as long as the Directors of JOPA VILLAS LLC are not opposed to the realization of the suit property by the Receivers, and as long as the said Director has shown sufficient interest in the residue of the proposed sale, and which interest it seeks to protect, then JOPA VILLAS LLC can join these proceedings. Arising from the foregoing paragraphs of this ruling, JOPA VILLAS LLC has shown sufficient interest to be allowed to join these proceedings, and since the 2nd Defendant is not opposed to the sale of the suit property, and arising from the orders to be made hereunder, there will be no possible conflict between the 1st and 2nd Defendants which may compromise the realization of the entire debt due to the 1st Defendant. The 2nd Defendant is hereby joined to these proceedings to take care of its interest in the residue accounts pursuant to the sale of the suit property. Therefore, issue number 4 is answered in the affirmative.

CONCLUSION & DISPOSITION

27. As I end this ruling, I want to re-state the position that OPIC can no longer be stopped from exercising its Statutory power of sale of the suit property. It is at liberty to do that as from this moment. However, the process of identifying a buyer, if the same is by way of private treaty, must be transparent and accountable. Where it is possible, and without being bound, the chargee has the obligation to consider available offers which resonate well with the property market, and which do not appear to cast aspersions on the conduct of the process.

28. In the upshot, this court makes the following orders:

- a. The Sale Agreement herein dated 25th August 2015 between OPIC and the Interested Party is hereby declared null and void abinitio and of no effect whatever.
- b. The 1st Defendant and the Interested Party are hereby given the first option to enter into a Sale Agreement over the suit property at the purchase price which matches the best offer given to the 2nd Defendant, which is Kshs.960,000,000/=. This shall be done within 7 days from the date hereof.
- c. If Order (b) above fails to take effect within the said 7 days, the 2nd Defendant shall be at liberty to introduce a purchaser to the 1st Defendant for the suit property at the value of Kshs.960,000,000/= within 7 days of failure of Order (b) above.
- d. If Order (c) above also fails to take effect within the stipulated time, the suit property shall be sold to the Interested Party at Kshs.845,000,000/= pursuant to, and in accordance with a new Sale Agreement to be made between the parties.
- e. If all the above fail, the suit property shall be sold by Public auction under a fresh valuation.
- f. For purposes of accountability, the entire sums due to OPIC Viz
 - i. Total due on Acceleration date
 - ii. Default Interest
 - iii. Maintenance fees due since date of acceleration: shall be paid directly by the purchaser to the Vendor's Advocates through the account given for that purpose in the sale agreement.
- g. The balance of the purchase price shall be deposited in an interest earning joint account to be opened in the names of advocates for the following parties;
 - The Plaintiff
 - The 1st Defendant
 - The 2nd Defendant
- h. The said balance shall be disbursed after proper accounts have been taken.
- i. Any party shall be at liberty to apply for further orders as may be necessary.
- j. Every party shall bear own costs of this application.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI

THIS 4th DAY OF DECEMBER 2015.

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Nyachoti for Plaintiff

M/s. Opio for 1st Defendant

Mr. Makori for 2nd Defendant

Mr. Gachoka for Interested Party

Teresia - Court Clerk