



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

E.LC CASE NO. 42 OF 2019

PETIRO ONGWACHO ONGWACHO T/A BLUU NILE INTERNATIONAL HOTEL.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....DEFENDANT

RULING

Introduction & Background

1. The applicant filed an application by way of Notice of Motion dated 2nd December 2019 pursuant to sections 1A, 1B 3, 3A and 63(e) of the Civil Procedure Act Cap 21 of the Laws of Kenya, Order 40 rule 1(a) and 2(1) of the Civil Procedure Rules, 2010, Articles 40 and 159(2) of the Constitution of Kenya, Section 97(1) and Section 99 of the Land Act, 2012. In the said application the applicant seeks a temporary injunction to restrain the defendant, its agents, derivatives, assigns representatives or any other person acting under its name or authority from selling by public auction that piece of land known as **L.R No. WANJARE / BOGIKUMU/4318** and improvements thereon which was charged to the Respondent bank to secure the repayment of the sum of Kshs. 50,000,000/= advanced to the Applicant.
2. The application is premised on the 15 grounds stated on the face of the Notice of Motion which have been amplified in the applicant's supporting affidavit sworn on the 2nd day of December 2019 and supplementary affidavit sworn on 25th July 2020.
3. In his supporting affidavit the applicant avers that he applied for a loan of Kshs.50, 000,000 from the Respondent to complete construction of a hotel on the suit property. The said loan was repayable within a period of 120 months. According to the valuation report dated 15th December 2014 the suit property which was charged in favour of the bank was valued at Kshs. 115,000,000/=.
4. The applicant avers that apart from a few intermittent missed installments, he serviced the loan. However, on or around 13th November 2019 he learnt from a newspaper advertisement dated 11th November 2019 that his hotel had been advertised for sale by public auction on 5th December 2019.
5. He further avers that after obtaining a copy of the valuation report dated 29th July 2019 from the bank, he noted that the same had grossly understated the value of the suit property as it had failed to take into account the developments undertaken on the suit property such as paving the front yard of the hotel using cabro blocks, sinking a borehole and landscaping which all cost about Kshs. 4,900,000/=. He avers that whereas the suit property had been valued at Kshs. 115,000,000/= in 2014, the valuation in 2019 placed the value of the hotel at Kshs. 110,000,000/=. Notably, the value of the land appreciated by 25,000,000/= while the value of the developments depreciated by Kshs.30,000,000/=.
6. The applicant contends that the second valuation does not conform to the requirements of section 97(1) and 97(2) of the Land Act which place a statutory duty on the bank to ensure that it obtains the best price reasonably obtainable at the time of sale based on a valuation undertaken by a valuer.
7. The applicant further avers that the bank acted in breach of section 90 of the Land Act by failing to serve him with a statutory notice before advertising the suit property for sale. He finally avers that if the sale is allowed to proceed, he will suffer monumental loss of an asset he has painstakingly developed over the years.
8. The application is strenuously opposed by the Respondent vide the affidavit of Caroline Kajuju, a Senior Credit Recovery Manager at the Credit Support Unit of the Respondent bank.
9. She deposes that that the applicant fell into prolonged unpaid arrears in repayment of the loan to the bank necessitating a restructuring of

the loan at the applicant's request in July 2018.

10. Despite the terms of repayment having been restructured, the applicant still fell into arrears in the repayment of the loan causing the respondent to issue the two mandatory statutory notices contemplated under the provisions of sections 90(1), (2) and (3) and 96 (2) and (3) of the Land Act.

11. The Respondent then instructed an auctioneer who issued a Notification of sale as contemplated under the Auctioneer's Act as part of the bank's exercise of its statutory power of sale to recover the outstanding arrears. She annexed copies of the applicant's bank statements, the bank's letters to the applicant reminding him that he had defaulted in repayment of the loan and 2 statutory notices dated 2.4.2019 and 14.8.2019 and their respective copies of receipts for payment of the registered mail thereon. Also annexed is a copy of the Notification of sale by Ms Keysian Auctioneers together with proof of service of the same, copies of the newspaper adverts and the auctioneer's report indicating that the sale had failed as the bids did not meet the reserve price.

12. She avers that before embarking on the process of sale, the bank undertook an appropriate valuation of the suit property by Damon Appraisers Ltd who valued the suit property at Kshs. 110, 000, 000/= as compared to the valuation conducted in January and December 2014 which placed the value of the suit property at Kshs100,000,000/= and Kshs. 115,000,000/= respectively. Copies of the valuation reports dated 9.8.2019 and 15.1.2014 are annexed to her affidavit as annexure CK/4. And CK/5.

13. It is her averment that the applicant's complaint that the bank failed to secure the best reasonable price based on a valuation report in accordance with the provisions of sections 97(1) and (2) of the Land Act is not genuine and cannot found the basis of the instant application for an injunction to stop the bank from exercising its statutory power of sale as the valuation reports are reflective of the progressive value of the land and improvements between 2014 and 2019 taking into account the depreciation of the premises after 5 years of constant use.

14. Ms Kajuju avers that the applicant having charged the suit property to the bank, as security for the loan, it became a commodity which should be available to the defendant in the lawful exercise of its statutory power of sale and it would be unfair for the applicant to allege that he will suffer irreparable damage if the same is sold.

15. She avers that the bank is a very stable financial institution with sufficient capacity to compensate the applicant in the event that it is established at the trial that the bank was not entitled to exercise its statutory power of sale.

16. It is her averment that it would be in the interest of both parties to allow the sale to be concluded as the bank would recover the outstanding arrears and the applicant would raise some money from the excess amount realized from the sale.

17. In response to the Replying affidavit the applicant filed a Supplementary affidavit in which he points out that there are new developments on the charged property as noted in the annexed valuation report by Cambrian Valuers Limited conducted in December 2019 which placed the market value of the suit property at Kshs. 150,000,000/= and the forced sale value at Kshs. 112, 000,000/=.

18. The application was disposed of by way of written submissions and both parties filed their submissions which I have considered.

Applicant's Submissions

19. In his submissions, Mr. Nyamurongi learned counsel for the applicant gave a factual background of the case and submitted that the bank had breached its statutory duty of care to the plaintiff by purporting to advertise the applicant's property for sale on the basis of a valuation report which the bank knew or ought to have known does not take cognizance of several developments at the hotel undertaken after the first valuation report had been prepared which materially affect the value of the suit property.

20. He faulted the bank for purporting to exercise its statutory right of sale on the basis of a valuation report compiled without any inspection of the suit property being undertaken.

21. He argued that the valuation report was bereft of factual basis and devoid of logical meaning and reason as it placed a value of Kshs. 70,000,000/= for developments in 2019 as compared to the valuation report in 2014 which placed the value of developments at Kshs. 100,000,000/=. The land was valued at Kshs. 40,000,000/= in 2019 as compared to Kshs. 15,000,000/= in the valuation report done in 2014 without any explanation.

22. He argued that if the said valuation report was used as a basis of the sale, it would contravene the legal threshold prescribed by section 97(1) of the Land Act which enjoins the bank to obtain the best price reasonably obtainable at the time of sale based on a valuation undertaken by a valuer. It was his submission that if the sale was allowed to proceed on the basis of the impugned valuation report, the property would be sold at less than 25% of its actual market value.

23. Counsel cited that case of **Minolta Limited v National Bank of Kenya Limited (2018) eKLR** where the court observed that the valuation report had not been properly prepared due to unreasonable deterioration in value of the suit property between 2014 and 2016. He also cited the case **Joshua Kamau Willie & Another v Unaitas SACCO Society Ltd & Another; Brick Holdings & Engineering Ltd (Interested Party) (2019) eKLR** where the court relied on the Court of Appeal decision in **Orion East Africa Ltd v Ecobank Ltd (2015) eKLR** for the proposition where a court finds fault with a forced sale valuation, the appropriate remedy is to direct that a fresh valuation be undertaken.

24. Counsel further submitted that the intended sale was illegal as the bank did not serve the applicant with a statutory notice under section 90 of the Land Act.

25. He was of the view that that the applicant had met the conditions for the grant of an injunction and it would therefore be in the wider interest of justice if the application was granted.

26. Conversely, Mr. Ragot learned counsel for the Respondent submitted that the Respondent had met the requirements of section 97 (1) and (2) of the Land Act as it undertook a valuation of the suit property by a competent valuer before advertising the suit property for sale.

27. He argued that the forced sale value of Kshs. 82, 500,000 is not less than 25% of the established market price of Kshs. 110,000,000/= as per the valuation report. He submitted that the Applicant had not presented an alternative valuation report with the likely market value of the suit property. He cited the decision of **Ben Gitonga Muiruri v Equity Bank Ltd (2019) eKLR** where Justice Otieno PJ relied on his finding in **Patrick Kangethe v Co-operative Bank of Kenya Ltd (2017) eKLR** where he held 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 less than 25% of the given market value.

Issues for determination.

28. Having considered the Notice of Motion, the parties' affidavits together with annexures thereto as well as the rival submissions, the main issue for determination is whether the Applicant has met the conditions for the grant of an order of temporary injunction.

Analysis and determination

29. In exercising its discretion to grant injunctive relief the court is guided by the principles set out in the case of **Giella v Cassman Brown & Co Ltd (1973) E.A 358** which are as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) stated as follows:

“A prima facie case is one 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”

Whether the Plaintiff has established a prima facie case with a probability of success:

30. The plaintiff's case is hinged on two grounds. The first one is that in an attempt to exercise its statutory right of sale, the defendant breached its statutory duty of care as outlined in sections 97(1) and (2) of the Land Act by failing to ensure that it obtains the best price reasonably obtainable at the time of sale. The second ground is that the intended sale is illegal as the defendant failed to issue a statutory notice under section 90 of the Land Act.

31. With regard to the first ground, I have to determine whether the plaintiff has demonstrated that his rights under section 97(1) and (2) of the Land Act have been infringed. The said section provides as follows:

97. *“Duty of chargee exercising power of sale*

(1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court owes a duty of care to the chargor, any guarantor of the whole or part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.

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

(3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market-

(a) there shall be a rebuttable presumption that the chargee is in breach of the duty imposed by sub-section (1) and

(b) the chargor whose charged land is being sold for that price may apply to court for an order that the sale be declared void, but the fact that the plot of charged land sold by the chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the chargee has complied with the duty imposed by sub-section (1)

(4) It shall not be a defence to proceedings against a chargee for breach of the duty imposed by sub-section (1) that the chargee was acting as an agent or under a power of attorney from the chargor or any former chargor

(5) A chargee shall not be entitled to any compensation or indemnity from the chargor, any former chargor or any guarantor in respect of any liability arising from a breach of the duty imposed by sub-section (1)

(6)...

(7) Any attempt by a chargee to exclude all or any of the provisions of this section in any charge instrument or any agreement

collateral to a charge or in any other way shall be void.”

32. The above-mentioned section embodies the duty of care owed to the chargor by the chargee in the exercise of the chargee’s statutory power of sale. The duty is clearly stated as “*to obtain the best price reasonably obtainable at the time of sale*”. In order to discharge this duty section 97 (2) requires the chargee to undertake a valuation of the property before the sale. The valuation report is intended to guide the chargee as to the forced sale value which should not be less than 25% of the market price.

33. In the instant suit there are 4 valuation reports:

The first valuation report was prepared on 15th January 2014 by Real Appraisal Valuers, Estate Agents and Consultants. They valued the suit property as follows:

- Open Market value: Kenya shillings eighty -five million only (Kshs. 85,000,000)
- Land value: Kenya shillings fifteen million only (Kshs. 15,000,000)
- Improvements: Kenya Shillings Seventy million only (Kshs. 70,000,000)
- Forced sale value: Kenya shillings sixty- three million seven hundred and fifty thousand only

The second valuation report was prepared on 15th December 2014 by Seven Degrees North Limited. It expressed value of the suit property as follows:

- Open Market value: Kenya shillings one hundred and fifteen million only-
(Kshs.115, 000,000)
- Land Value: Fifteen million only (Kshs.15,000,000)
- Development value: Kenya shillings one hundred million only (Kshs. 100,000,000)
- Mortgage value: Kenya shillings ninety-two million only (Kshs. 92,000,000).
- Forced sale value: Kenya shillings eighty -six million only (Kshs. 86,000,000)

The third valuation report was prepared by Damon Appraisers on 9th August 2019. The value of the suit property is as follows:

- Current market value: Kenya shilling One hundred and ten million only (Kshs. 110,000,000)
- Land: Kenya shilling forty million (Kshs. 40,000,000)
- Buildings: Kenya shillings seventy million only (Kshs. 70,000,000)
- Forced sale value: Kenya shillings Eighty- two million, five hundred thousand only (Kshs. 82,500,000)

The fourth valuation report was prepared by Cambrian Valuers Limited on 3.12.2019 and it valued the suit property as follows:

- Open market value: Kenya shillings One hundred and fifty million shillings only) Kshs. 150,000,000)
- Forced sale value: Kenya shillings one hundred and twelve million only (Kshs. 112,000,000)

34. The plaintiff’s complaint is that the defendant breached its statutory duty of care by relying on an inaccurate valuation report which did not take into account the improvements on the suit property between 2014 when the property was charged and 2019 when the property was advertised for sale. I have looked at the valuation reports presented by both parties. It is clear that as at December 2014 the suit property had a market value of Kshs. 115,000,000. The land was valued at Kshs. 15,000,000 while the improvements were valued at Kshs. 100,000. The forced sale value was Kshs. 86,000,000.

35. The valuation report relied on by the defendant at the time of sale is the one prepared by Damon Appraisers on 9th August 2019 which placed the market value at Kshs. 110,000,000. The land is valued at Kshs. 40,000,000 while the improvements are valued at Kshs. 70,000. The forced sale value is Kshs.82,500,000.

36. Granted that the valuation report by Damon Appraisers did not take into account the developments carried out on the suit property between 2014 and 2019 and purports to devalue the hotel by Kshs.30,000,000 in the space of five years without any explanation, the forced sale value of Kshs. 82,500,000 is not below 25% of the market value which is the threshold forbidden by section 97 of the Land Act. Even assuming that the market value is Kshs.150,000,000 as indicated in the valuation report presented by the plaintiff’s valuers- Cambrian Valuers, a forced sale value of Kshs. 82,500,000 would not be in breach of section 97 of the Land Act.

37. The second complaint by the plaintiff is that the defendant did not serve him with a statutory notice under section 90 of the Land Act. This allegation has been rebutted by Caroline Kajuju, the Senior Credit Recovery Manager of the defendant bank at paragraph 5 of her Replying Affidavit where she depones that the bank was constrained to issue the two appropriate mandatory statutory notices contemplated under the provisions of sections 90(1), (2), (3) (e) and (6(2) and (3) of the Land Act. The bank later instructed auctioneers who issued the Notification of sale as contemplated under the Auctioneers Act. Copies of the said statutory notices dated 2.4.2019 and 14.8.2019 and their respective copies of receipts for payment of the registered mail together with a letter from Keysian Auctioneers forwarding the Notification of sale and certificate of service are among the documents annexed to Caroline's affidavit. These averments were not challenged in the plaintiff's Supplementary affidavit.

38. The sum total of the above analysis is that the plaintiff has not demonstrated that he has a prima facie case with a probability of success. That being the position, I need not interrogate the other conditions for injunction. However, let me state that with regard to the second condition as to whether the plaintiff will suffer irreparable loss which cannot be compensated by damages, the plaintiff was aware that by charging the suit property the same would be sold in the event he defaulted in repayment of the loan. The valuation report prepared by the plaintiff's valuers clearly gives the value of the suit property and the defendant's Senior Credit Manager has deponed that the defendant is a stable financial institution with the capacity to compensate the plaintiff should they be called upon to do so.

39. Finally, since I am not in any doubt as to whether or not the plaintiff is entitled to an injunction, I need not consider the balance of convenience.

40. The upshot is that the application lacks merit and I dismiss it. The costs of the application shall be in the cause.

Dated, signed and delivered at Kisii this 5th day of November 2020.

J.M ONYANGO

JUDGE