REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 026 OF 2018

CECILIA NAMSI MUNYIRI ..... 1ST PLAINTIFF

PAUL MUNYIRI KAGUAMBA ..... 2ND PLAINTIFF

NAMSI LIMITED ..... 3RD PLAINTIFF

VERSUS

HOUSING FINANCE CORPORATION

OF KENYA LTD ..... 1ST DEFENDANT

KEYSIAN AUCTIONEERS ..... 2ND DEFENDANT

GARAM INVESTMENTS LTD ..... 3RD DEFENDANT

AND

BENSON KINYUA MWANGI ..... INTERESTED PARTY

JUDGEMENT

1. This matter involves a commercial dispute arising from a secured lending relationship that spans over a decade. At its core, the suit challenges the legality of the exercise of the statutory power of sale by the 1st Defendant, a reputable financial institution, over the property known as L.R. No. 13867/11 (I.R. No. 101664) situated in Karen Plains, Nairobi ("the suit property"). The Plaintiffs, who are the borrowers and chargors, allege a myriad of irregularities ranging from the illegal variation of interest rates, breach of a consent order regarding valuation, and the fraudulent undervaluation of the property during

the public auction. They seek declaratory reliefs to annul the sale to the Interested Party and monetary restitution for alleged surplus proceeds and overcharged interest.

2. The Plaintiffs commenced these proceedings against the Defendants, seeking judgement against the Defendants as follows:

(i) A declaration that the unilateral valuation of the property by the 1st Defendant was illegal and in contravention of the consent order of 30 May 2018;
(ii) A declaration that the subsequent sale of the subject property by the 1st Defendant herein to the Interested Party was illegal;
(iii) A declaration that the 1st Defendant's action of depositing the proceeds of the sale in a different account was illegal and the subsequent accrual of interest in the Plaintiff's loan account after the sale of the property is also illegal;
(iv) A declaration that increasing the interest rate from 7.5% p.a to 18.5% p.a was illegal;
(v) A declaration that the clandestine agreement between the 1st Defendant and Grofin SGB Limited was illegal, null and void;
(vi) An order directing the 1st Defendant to deposit the sum of Kshs 19,377,402.33 to the Plaintiffs which is the difference in the recouped amounts;
(vii) General damages;
(viii) Interest on (vi) above at court rates;
(ix) Costs of the suit.

3. The 1st and 2nd Plaintiffs are the registered proprietors of the suit property and directors of the 3rd Plaintiff, a limited liability company that was the principal borrower of the facility. The 1st Defendant is the Chargee. The 2nd and 3rd Defendants are auctioneering firms instructed at different times to realize the

security. The Interested Party is the successful bidder who purchased the property at the public auction held on 5 February 2021.

4. The suit was commenced via a Plaint dated 29 May 2018, coinciding with the Plaintiffs' urgent application to stop an imminent auction. This culminated in a Consent Order recorded on 30 May 2018. Following subsequent developments and the eventual sale of the property, the Plaintiffs amended their pleadings. The matter proceeded to a full hearing based on the Amended Plaint dated 10 May 2022.

5. The chronology of key procedural events is summarized as follows:

   (i) 3 March 2008 – A letter of Offer issued by the 1st Defendant to the 3rd Plaintiff established the contract.
   (ii) On 12 May 2017, statutory notices were served upon the Plaintiffs, which signalled default and commencement of realization;
   (iii) On 29 May 2018, the Plaintiffs filed suit and the application for injunction, in an attempt to stop the first auction;
   (iv) On 20 May 2018, a consent order was recorded in court in which parties agreed on repayment terms and, in default, a joint valuation;
   (v) On 7 February 2020, Justice Tuiyott rendered a Ruling, in which the learned Judge sanctioned the 1st Defendant to proceed after the Plaintiffs' default on the consent order;
   (vi) On 17 March 2020, a valuation was done by Lloyd Masika Limited, pursuant to the consent order;
   (vii) On 5 February 2021, a public auction was held. The property was sold to the Interested Party for Kshs 56.6 million;
   (viii) On 10 May 2022, the Plaintiffs filed the Amended Plaint, challenging the sale and valuation process.

The Plaintiffs' Case

6. The Plaintiffs' case is set out in the Amended Plaint, the Witness Statement of Paul Munyiri Kaguamba (PW1) , and their Submissions. They aver that in 2008, the 1st Defendant advanced a facility of Kshs. 18,000,000/= to the 3rd Plaintiff, secured by the suit property. They admit to falling into arrears in 2017 due to business turbulence.

7. The crux of their claim rests on the events following the Consent Order of 30 May 2018. They contend that the Consent Order mandated a joint valuation by Lloyd Masika Limited in the event of default. They allege that the 1st Defendant unilaterally instructed Lloyd Masika without their participation, resulting in a valuation that did not reflect the true market value of the property. They argue that this breach of the Consent Order renders the subsequent sale null and void *ab initio*.

8. PW1 testified that the property was their matrimonial home and the security for the loan. He stated that the terms were that in case of further default, a valuer would be appointed to value the property. He was aware that Lloyd Masika was appointed, without consultation. PW1 further testified regarding the interest rates. He relied on a report by the Interest Rates Advisory Centre (IRAC), which he claimed showed an illegal overcharge of Kshs. 6,305,096.68. He asserted that the 1st Defendant varied interest rates from 15.75% to 19.75% without notice and in contravention of the Banking (Amendment) Act, 2016.

9. Regarding the proceeds of sale, PW1 stated that the property was sold for Kshs. 56.6 million. He claimed that the debt owed to the 1st Defendant was approximately Kshs. 32 million, and the debt owed to the second chargee, Grofin Africa Fund, was capped at Kshs. 5 million by a Court ruling in *High Court Commercial Case No. 208 of 2017*. He, therefore, expected a surplus refund of approximately Kshs. 19 million, but only received Kshs. 268,255/=.

10. The Plaintiffs submitted that the unilateral valuation was illegal. They relied on the definition of "joint" in Black's Law Dictionary as "shared by two or more

persons". They cited ***Frank Phipps v Harold Morrison*** *and* ***Hadkinson v Hadkinson 2 All ER 567*** to argue that consent orders are binding contracts that cannot be varied unilaterally. They urged the Court to find that the sale, being premised on a flawed valuation process, was a nullity, citing ***Macfoy v United Africa Co. Ltd 3 All ER 1169***.

11. On the duty of care, they relied on Section 97 of the Land Act, arguing that the 1st Defendant failed to obtain the best price reasonably obtainable. They cited ***Co-operative Bank of Kenya Ltd v Biwott KEHC 9946 (eKLR)*** regarding the fiduciary duty of a bank to its customer.

The 1st Defendant's Case

12. The 1st Defendant filed a Statement of Defence denying the Plaintiffs' claims. It admitted the facility and the security but averred that the Plaintiffs were serial defaulters. It stated that the statutory power of sale had properly accrued after the service of all requisite notices.

13. DW1, Mary Gathungu, a Debt Management Officer at the 1st Defendant bank, testified that the bank had strictly followed the law. She produced the Charge instrument, the Statutory Notices, and the Valuation Report. Regarding the Consent Order, DW1 testified that the 1st Defendant was under no obligation to appoint Lloyd Masika jointly. Nonetheless, the valuation was done with notice to the Plaintiffs. She explained that the "joint" aspect of the consent referred to the selection of the valuer (Lloyd Masika), which both parties had agreed to in Court. The instruction was administrative. She produced the Valuation Report dated 19 March 2020 which valued the property at Kshs. 75,000,000/= (Market Value) and Kshs. 56,500,000/= (Forced Sale Value).

14. On interest rates, DW1 produced letters dated 18 November 2011 and 30 May 2012 notifying the Plaintiffs of interest rate variations. She denied that the Banking (Amendment) Act 2016 applied retrospectively to the arrears.

15. Regarding the proceeds, DW1 explained that there was an inter-lenders agreement with Grofin (the 2nd Chargee). The proceeds were applied to clear the 1st Defendant's debt of Kshs. 33.6 million and the balance was remitted to the joint account for Grofin's claim, leaving the surplus of Kshs. 268,255/= for the Plaintiffs.

16. The 1st Defendant submitted that the sale was lawful. They relied on Section 99 of the Land Act, which protects a purchaser at a public auction from irregularities. They cited ***Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi eKLR*** on the burden of proof. They argued that the Plaintiffs had failed to prove fraud or that the property was sold at an undervalue.

17. On the consent order, they relied on ***Flora N. Wasike v Destimo Wamboko eKLR***, arguing that a consent judgment cannot be set aside or varied except on grounds that vitiate a contract. They submitted that the Plaintiffs' breach of the repayment terms in the consent order triggered the execution clause.

The Interested Party's Case

18. The Interested Party maintained that he is a *bona fide* purchaser for value without notice. He submitted that he bought the property at a public auction for Kshs. 56,600,000/=, paid the full purchase price, and obtained a title. He relied on Section 99(2) and (3) of the Land Act, arguing that any irregularity in the chargee's power of sale cannot impeach his title. He cited ***Kuwinda Rurinja Co. Limited v Kuwinda Holdings Limited*** to support the sanctity of the title acquired through auction.

Analysis & Determination

19. Drawing from the List of Agreed Issues filed on 7 October 2022 and the submissions of counsel, the Court identifies the following substantive issues for determination:

    (i) Whether the 1st Defendant's Statutory Power of Sale had validly accrued;

(ii) Whether the valuation of the suit property was illegal or in breach of the Consent Order dated 30 May 2018;

(iii) Whether the auction sale to the Interested Party was lawful and whether the Interested Party is protected under Section 99 of the Land Act;

(iv) Whether the interest rates and default charges levied by the 1st Defendant were illegal;

(v) Whether the distribution of the sale proceeds was lawful and whether the Plaintiffs are entitled to the surplus claimed;

(vi) What reliefs are available to the parties?

The Validity of the Statutory Power of Sale

20. The relationship between the Plaintiffs and the 1st Defendant is governed by the Letter of Offer and the Charge Instrument. Under Clause 8 of the Charge, the 1st Defendant reserved the right to exercise its statutory power of sale in the event of default. The Plaintiff unequivocally admitted to being in default during cross-examination.

21. The law is settled that facts admitted need not be proved. The Court of Appeal in ***Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another eKLR*** held that the burden of proof lies on the person who wishes the court to believe in the existence of a fact. Here, the default is an admitted fact.

22. Section 90(1) of the Land Act requires a chargee to serve a notice in writing to the chargor if default continues for more than one month. Section 96(2) requires a further 40-day notice before sale. The 1st Defendant adduced copies of 90-Day Notice dated 12 May 2017, 40-Day Notice dated 28 August 2017, 45-Day Notification of Sale dated 12 March 2018.

23. These notices were accompanied by certificates of posting. Under Section 107 of the Evidence Act, the burden shifts to the Plaintiffs to prove non-service. In their submissions, they vaguely alluded to non-receipt but provided no evidence to rebut the presumption of service via registered post.

24. I find that the 1st Defendant's statutory power of sale had validly accrued. The Plaintiffs were in default, and the requisite notices under the Land Act and the Auctioneers Rules were served.

The Joint Valuation and the Consent Order

25. The Plaintiffs' strongest attack on the sale is the alleged breach of the Consent Order of 30 May 2018. Specifically, Clause (f) states:

THAT in default of the above, execution to issue in forty-five (45) days and a joint valuation be conducted by Lloyd Masika within thirty (30) days, costs to be borne by the Applicants.

26. A consent order is a contract with the seal of the court. In ***Flora N. Wasike v Destimo Wamboko eKLR***, the Court of Appeal held:

> *"It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside..."*.

27. The Plaintiffs argue that joint valuation required joint instruction. The 1st Defendant argues it meant using the jointly agreed valuer.

28. This Court must interpret the consent order to give business efficacy to the agreement. The purpose of naming Lloyd Masika was to avoid a dispute over the choice of valuer. By agreeing on Lloyd Masika in the order, the parties had already jointly selected the valuer. The administrative act of writing the instruction letter does not invalidate the valuation if the agreed professional performs the task.

29. Section 97(2) of the Land Act mandates a forced sale valuation before sale. Section 97(3) warns against selling below 75% of the market value. The 1st Defendant instructed Lloyd Masika on 3 March 2020. Lloyd Masika inspected the property on 17 March 2020 and issued a report. The Valuation Report indicates Market Value of Kshs. 75,000,000/= and Forced Sale Value of Kshs. 56,500,000/=.

30. The 1st Defendant sought leave of this Court to enforce the consent order upon the Plaintiffs' default. By a Ruling delivered on 7 February 2020 by Justice Tuiyott, the Court allowed the 1st Defendant to proceed with execution. This Ruling effectively sanctioned the process the 1st Defendant was about to undertake.

31. The Plaintiffs claim the valuation was unilateral and illegal. However, they have not produced a competing valuation report from the relevant period (2020-2021) to show that Lloyd Masika's figures were erroneous. They rely on a 2017 report estimating Kshs. 90 million, which is temporally irrelevant to a sale in 2021 given market fluctuations. Furthermore, PW1 admitted during cross-examination that he was aware the property was being sold and had been served with notices. DW1 testified that the valuers accessed the property, implying Plaintiff cooperation or knowledge. I find that the valuation by Lloyd Masika was in substantial compliance with the Consent Order. The joint requirement was satisfied by the mutual selection of the firm in the order itself. The 1st Defendant did not breach the consent order in a manner that would vitiate the sale.

Legality of the Auction and Protection of Purchaser

32. The auction took place on 5t February 2021. The reserve price, based on the forced sale value, was Kshs. 56,500,000/=. The Interested Party bid Kshs. 56,600,000/=, which was accepted.

33. Section 99 of the Land Act is the shield for purchasers at public auctions. Section 99(2) provides that:

> *A sale of the charged land by a chargee shall not be actionable nor shall such a sale be set aside on the ground that... the chargee failed to comply with a provision of this section; unless the purchaser had notice of the irregularity.*

34. Section 99(3) provides:

> *A person to whom this section applies is protected even if... the person has actual notice that there has not been a default... except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.*

35. This statutory provision is robust. It reflects the policy of the law to protect the finality of auctions and the title of innocent third parties. In ***Stephen Kibowen v Agricultural Finance Corporation [2017] eKLR***, the Court held that once the hammer falls, the equity of redemption is extinguished, and the sale cannot be impugned for mere irregularities.

36. The Plaintiffs have made no allegation of fraud against the Interested Party. There is no evidence that the Interested Party was privy to the internal disputes regarding the joint valuation instruction letter. He attended a public auction, bid, and paid. In ***Miriam Wambui Gitau v HFC & 5 Others KEHC 7179 (KLR)***, this Court held that a purchaser is not obligated to look behind the curtain of the chargee's internal processes. The Interested Party is the quintessential *bona fide* purchaser for value without notice.

37. The sale to the Interested Party was lawful. Even if the valuation process had procedural hiccups (which I have found it did not), Section 99 of the Land Act acts as a complete bar to the annulment of the sale against an innocent purchaser. The Plaintiffs' prayer to set aside the sale must fail.

Interest Rates and Statutory Caps

38. The Plaintiffs claim the 1st Defendant illegally varied interest rates from 15.75% to 19.75% without notice. They rely on Section 44 of the Banking Act and the Banking (Amendment) Act, 2016.

39. **Clause 2(b)** of the Charge Instrument explicitly states:

The Chargee reserves the right to vary the rate of interest and may from time to time serve on the Chargors... notice forthwith requiring payment of interest at such increased or reduced rate.

40. Contrary to the Plaintiffs' assertion, the 1st Defendant produced evidence of notification. Letter dated 18th November 2011 was the Notice varying rate to 17% p.a. Letter dated 30 May 2012 was notice varying rate to 18.5% p.a. DW1 testified these were sent via ordinary mail, a permitted mode of service under the Charge.

41. The Plaintiffs argue that the interest charged exceeded the cap of 4% above the Central Bank Rate introduced by Section 33B in 2016. However, the law on retrospectivity is clear. In ***Vehicle and Equipment Leasing Limited v Jamii Bora Bank Limited eKLR***, the Court held that Section 33B is not retrospective. It applies to loans and interest accruing after the commencement date, 14th September 2016. The Plaintiffs' arrears had largely crystallized before 2016. For the period between 2016 and the repeal of the cap in 2019, the 1st Defendant was bound by the cap. However, the Plaintiffs have not provided a

breakdown showing that the specific interest charged during that window violated the cap to a degree that would clear the massive arrears.

42. The Plaintiffs relied heavily on a report by IRAC alleging a 6-million-shilling overcharge. This report is based on the premise that the interest variation was illegal because notice was not given. Since I have found that notice was given, the foundational premise of the IRAC report collapses. Expert evidence based on incorrect factual premises has no probative value. As held in ***National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd eKLR***, a Court cannot rewrite the contract between the parties. The interest charged was contractual.

43. The property sold for Kshs. 56,600,000/=. The 1st Defendant appropriated Kshs. 33,393,872.31 to clear its debt. Balance available was Kshs. 23,206,127.69. The Plaintiffs received Kshs. 268,255.84. The controversy is: Where did the remaining ~Kshs. 23 million go?

44. Section 98 of the Land Act dictates the order of application of proceeds: Rates/taxes, prior Charges, costs of sale, then Discharge of the selling Chargee's debt.

45. The 1st Defendant argues it paid the balance to Grofin, the 2nd Chargee, pursuant to an inter-lenders agreement. The Plaintiffs argue Grofin was only owed Kshs**.** 5 million, citing a ruling by Justice Kasango in *HC Comm Case 208 of 2017*. The Plaintiffs' calculation (56M - 32M - 5M = 19M surplus) assumes Grofin's debt remained frozen at Kshs. 5 million for years. This is commercially unrealistic. Default interest and penalties on the second charge would have accrued significantly between 2009 and 2021.

46. The 1st Defendant has a duty to account. It has shown it paid the surplus into a joint account for the benefit of the 2nd Chargee. The Plaintiffs contest the quantum paid to the 2nd Chargee. However, Grofin is not a party to this suit. The Court cannot adjudicate on the validity of Grofin's final payoff figure in Grofin's

absence. The Plaintiffs, knowing Grofin was the recipient of the funds, ought to have joined Grofin or sued Grofin separately for an account.

47. Based on the evidence before me, the 1st Defendant complied with section 98(1)(e) by paying the subsequent chargee. The balance of Kshs. 268,255.84 was admitted as available for the Plaintiffs.

48. The 1st Defendant acted lawfully in prioritizing the 2nd Chargee over the Plaintiffs. The Plaintiffs have failed to prove that the 2nd Chargee was not entitled to the sum of Kshs 23 million paid to them.

49. In conclusion, the right to property is a constitutional safeguard, but it acts in concert with the sanctity of contract. The Plaintiffs borrowed money and secured it with their property. They defaulted. They entered into a Consent Order to save their property and defaulted again. The 1st Defendant exercised its statutory power of sale procedurally. The valuation was proper. The sale was open. The Interested Party is a protected purchaser. The law must protect the enforceability of security contracts to ensure the flow of credit in the economy. The Plaintiffs' case is built on technicalities regarding joint valuation and disputed interest calculations that do not withstand scrutiny against the documentary evidence of notices and the clear provisions of the Land Act. Sympathy for the loss of a home cannot override the law. As Justice Ringera famously stated, *"The court cannot re-write the contract for the parties."*

50. In the upshot, the Plaintiffs' suit lacks merit. It is hereby dismissed. Accordingly, costs are awarded to the 1st Defendant and Interested Party.

Dated and Delivered at Nairobi this 13 day of February 2026

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

For the Plaintiffs: Ms Amutavy h/b Okatch

For the 1st Defendant Ms Kibe

For 2nd and 3rd Defendants: N/A

For Interested Party: Mr Ngari

Court Assistant: Lucy Mwangi