



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISHI

MISC. APPLICATION NO. 20 OF 2017

ECOBANK KENYA LIMITED.....CLAIMANT/APPLICANT

VERSUS

FIRST CHOICE MEGA STORES LIMITED.....RESPONDENT

RULING

1. The claimant/applicant through a Notice of Motion application dated 21st August, 2017 premised under Sections 90, 97, 98, 100, 104 and 150 of the Land Act No. 6 of 2012, Sections 3, 13 and 19 of the Environment and Land Court Act No. 19 of 2011 and Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya seeks leave to be granted to it as the chargee to purchase the property title number **Central Kitutu/Daraja Mbili/3577** charged to it as security for loan facilities advanced by the claimant to the respondent. The grounds upon which the application is premised are set out on the body of the application and the supporting affidavit and further affidavit sworn by Sammy Miringu an officer with the claimant bank.

2. The thrust of the claimant's application is that the claimant advanced to the respondent loan facilities aggregating kshs.62,000,000/= secured under a debenture dated 24th December 2014 and a supplementary charge dated 19th December 2014 over land parcel **Central Kitutu/Daraja Mbili/3577** (hereinafter referred to as "**the charged property**"). That the respondent defaulted on the servicing of the loan facility as agreed prompting the claimant to initiate the process of recovery of the debt through the realization of the security held. In that regard the claimant issued the requisite statutory notices under Section 90 and 96 of the Land Act 2012. The claimant avers that the respondent inspite of being served with all the requisite notices failed to regularize their account with the claimant rendering it necessary to seek to enforce the security. The claimant asserts that inspite of making several attempts to sell the charged property by public auction it has not been possible to get a buyer at the forced sale value and hence the sales have aborted. On that account the claimant seeks to be permitted as chargee to purchase the property to arrest the further continued escalation of the debt through the application of interest. The claimant asserts that the option of the chargee being authorized to purchase the charged property represents the most viable and advantageous position having regard to the duty and obligations placed on the chargee under Section 97(1) of the Land Act.

3. The respondent filed a replying affidavit through its Managing Director, Dennis Maina Omai dated 19th September, 2017 in response to the claimants application. The respondent admits being advanced banking facilities by the claimant aggregating kshs. 62,000,000/= in regard whereof a debenture and a supplemented charge over land title **Central Kitutu/Daraja Mbili/3577** was offered as security. The respondent stated that after being granted the banking facilities by the claimant the chargor's business from about March 2015 started experiencing financial constraints leading to default in servicing of the loan facility which led the claimant to seek to realize the security through public auction. The respondent avers that the claimant has failed to disclose that the respondent has sought to restrain the claimant from disposing the charged property in exercise of its power of sale in Nairobi HCCC No. 16 of 2016 [**First Choice Mega Store Ltd -vs- Ecobank Ltd**] where the court though declining to grant an injunction noted that the valuation of the property carried out by the chargee for the purposes of the auction sale had an unexplained variance and/or discrepancy in the forced sale value having regard to the valuation as at the time of taking the charge. Under paragraph 55 of the ruling rendered by the court on 9th February 2017 the Judge observed thus:-

“In Spero Holdings Limited –vs- Co-operative Bank of Kenya Ltd & Another [2016] eKLR, the court held that though a discrepancy in the forced sale value of over kshs. 34,000,000/= was “a hefty sum”, it was not good enough reason to stop the chargee from exercising its statutory right of sale as the chargor’s loss would in any event be quantifiable. The discrepancy herein which is kshs. 20,000,000/= is also hefty, in my view. There is, in my view, an almost blatant disregard of the duty to ensure an appropriate price is obtained at the time of sale. The discrepancy is so obvious so as to warrant questions being posed.”

4. The respondent argues that the claimant's attempt to sell the charged property by public auction was not in good faith and was a flagrant breach of the claimant's statutory duty of care it owes the respondent. The respondent points to the variances in the valuation reports of the charged property in support of its assertions. The respondent contends that the claimant has brought the instant suit in an effort to run away from the statutory duty of care imposed on the claimant under Sections 97, 100(1) and (3) of the Land Act and further avers that the claimant

has not exhausted all the remedies available to it under the securities held so as to be entitled to foreclose and at any rate for the claimant to purchase the property would not be the most advantageous remedy in the circumstances.

5. The claimant in a further affidavit sworn on 16th January 2018 by one, Sammy Miringu in response to the claimant's replying affidavit averred that the amount due by the respondent as at 30th June 2017 was kshs. 98,287,514/80 and continued to accrue further interest. The claimant averred that notwithstanding any financial constraints the claimant was facing the claimant was obligated to pay the debt as the claimant is a trustee for the depositors and it was depositors money that is advanced as loans to customers such as the respondent and unless the debts are paid the liquidity of the claimant would be affected to the prejudice of the depositors. The claimant further stated the court in Nairobi HCCC No. 16 of 2016 (referred to above) did not bar the claimant from selling the charged property but rather allowed the sale to proceed in conformity with the law.

6. The claimant further averred that it had on two occasions tried to sell the charged property by public auction but the attempts were unsuccessful as the forced sale value as per the valuation reports could not be attained as per the affidavit sworn by Walter O. Milanya of Garam Investments (Auctioneers) annexed to the application as "SM-9". The claimant stated further that the valuation reports prepared on behalf of the claimant which were used as the basis for the failed auctions were from reputable firms of valuers and were detailed and represented the actual and true value of the charged property. In the premises, the claimant avers that as they had taken every precaution to sell the property at a fair price without success, the only viable option left was for them to be allowed to purchase the property in order to mitigate the impact that the respondent's large outstanding account continues to have on its statement of accounts.

7. The application was canvassed by way of written submissions which the parties advocates highlighted orally before me on 1st March 2018. Mr. Githaiga advocate appeared for the claimant while Gesore advocate appeared for the respondent.

8. Mr. Githaiga advocate in his oral submissions asserted that the claimant had discharged its duty of care to the chargor envisaged under Section 97 of the Land Act. The claimant, he claimed had sourced two valuation reports from two different firms with a view to establish the current market valuation of the suit property. There is a valuation report by Keriasek & Co. Ltd – Valuation Surveyor's and Real Estate Agents dated 28th November 2015 ("WM-2") which places the valuation thus:

(i) Current open market value

(a) Value of land Kshs. 4,000,000/=

(b) Value of building Kshs. 50,000,000/=

Total Kshs. 54,000,000/=

(ii) Value for Mortgage purposes – Kshs.43,000,000/=

(iii) Forced sale value Kshs. 40,000,000/=

Secondly, there is a valuation report by M/s Tysons Ltd – Registered Valuers, Estate and Managing Agents dated 17th March 2017 ("WM-3") which placed the valuation as hereunder:-

(i) Market Value Kshs. 55,000,000/=

(ii) Forced Sale Value Kshs. 46,500,000/=

9. The claimant submitted that by obtaining the valuation reports it was exercising its duty of care to the chargor in conformity with Section 97 of the Land Act. The valuation reports were by duly registered and reputable valuation firms and represented the true market value of the property. The claimant in the premises submitted that the respondent's claim that the property was undervalued was without any basis as the respondent did not adduce any evidence in support thereof.

10. On the basis that the claimant had made at least two attempts at selling the charged property through public auction without success as on each of the occasions the bids obtained fell short of the forced sale value, the claimant submitted it had satisfied the threshold to be granted leave to purchase the property as chargee as per Section 100 of the Land Act as that was the most advantageous option available in the circumstances. Section 100 of the Land Act provides:-

(1) Other than in the circumstances provided for in subsection (3) of chargee exercising the power of sale may, with leave of the court, purchase the property.

(2) A court shall not grant leave unless the chargee satisfies the court that a sale of the charged land to the chargee is the most advantageous way of selling the land so as to comply with the duty imposed on the chargee by Section 97(1).

(3) If the charged land is to be sold by public auction, the chargee may bid for and purchase the charged land at the public auction so long as the price bid for the charged land is the greater of –

(a) The highest price bid for that land at the auction and

(b) An amendment equal to or higher than the reserve price, if any, put upon the land before the auction, whichever amount is the greater.

(4)

11. It is evident from the provisions of Section 100 of the Act, that a chargee can only purchase a charged property being sold in exercise of power of sale conferred under the charge with the leave of the court and even then, such purchase would need to comply with the duty imposed on the chargee by Section 97 (1). The court before giving any leave has to be satisfied the purchase by the chargee given the circumstances would be in the best interest of the chargor such that the purchase by the chargee would represent the highest possible price attainable at the point in time the purchase is being made. That is what is envisaged under Section 100 (3) of the Act. In my view for the sale to the chargee to be the most advantageous way of selling the land as Section 100 (2) envisages, the price obtained must be higher than all the bids obtained for the property at the public auction. Section 100 is couched in such a manner as to ensure where leave is granted for a chargee to participate in the purchase of the land, the interest of the chargor is not prejudiced and in that regard, the chargee is duty bound to exercise the duty of care imposed by Section 97(1) in carrying out the sale.

Section 97 (1) provides:-

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

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

12. The claimant asserts that it complied with the provisions of Section 97 of the Land Act before it attempted to sell the charged property. The claimant carried out valuation of the property to establish the forced sale value which is obligatory under Section 97 of the Land Act (see **David Gitome Kuhiguka –vs- Equity Bank Ltd [2013] eKLR**). The claimant thus submits it discharged its duty of care to the chargor and argues that the respondent's claim that the property was undervalued is not demonstrated as the valuations were carried out by competent professionals. The claimant refers to the case of **Palmy Company Ltd -vs- Consolidated Bank of Kenya Ltd [2014] eKLR** (as adopted in **Olkasasi Limited –vs- Equity Bank Limited [2015] eKLR**) where the court stated:-

“The onus of establishing on prima facie basis, that the applicant’s right has been infringed by the respondent by failing to discharge the duty of care under Section 97(1) of the Land Act lies on the applicant. The court needs cogent evidence and material in order to say that prima facie, there has been an undervaluation of the suit property which is an infringement of Section 97 (2) of the Land Act by the Respondent as to entitle the court to call for an explanation or rebuttal from the respondent”.

13. The respondent in the instant application appears to peg his objection to the claimant being granted leave to purchase the charged property on the ground that there has not been full compliance with Section 97 of the Land Act as relates to establishing the forced sale value of the property. The respondent argues the valuations obtained by the claimant are suspicious as they have discrepancies which are not explained. The respondent's position is that before the facilities were advanced by the claimant in 2014 a valuation report was carried out on the property by M/s Highlands Valuers Ltd - Valuers and Estate Agents and a valuation report dated 13th November 2014 issued which placed the market value of the property at kshs. 83,000,000/= with a mortgage value of Kshs. 66,000,000/= and a forced sale value of kshs. 63,000/= respectively. At the time the claimant had sought to realize the security in 2015, the claimant obtained a valuation report by Keriasek & Co. Ltd dated 28th November 2015 which placed a market valuation of kshs. 54,000,000/= and a forced sale value of kshs. 40,000,000/= in respect to the charged property. It is this variation in the two valuation reports that the respondent and indeed Hon. Justice Onguto in Nairobi HCC No. 16 of 2016 (supra) observed were obvious and were unexplained by the claimant.

14. The subsequent valuation reports made on the property in November 2015 and March 2017 placed the market value of the charged property at Kshs. 54,000,000/= and Kshs. 55,000,000/= respectively. These valuations were by two different reputable valuation firms. Their findings are consistent and most probably represent the correct and true value of the charged property. The initial valuation report by Highlands Valuers Ltd made in November 2014 before the facilities were granted to the chargor may have been overcast and the possibility of influence by the chargor cannot be ruled out given that it would have been in the interest of the respondent to have a high valuation returned. In the premises, I find there is no real basis to discredit the subsequent valuation reports without ascribing any specific reasons. The report by Tysons Limited carried out in March 2017 was after the ruling in Nairobi HCCC No. 16 of 2016 made on 9th February 2017 and I do not suppose the claimant would have had any reason to obtain anything but the true market valuation of the charged property. I therefore accept that the Tyson Ltd Valuation report made in March 2017 represented a correct valuation of the property at the time it was made. The respondent cannot merely allege this was an undervaluation without offering any evidence and/or material on which the assertion is based.

15. There is no dispute that the respondent defaulted in servicing the loan which precipitated the claimant to seek to realize the security it held through public auction resulting in the respondent filing Nairobi HCCC No. 16 of 2016 seeking an injunction to restrain the claimant from exercising its power of sale in regard to the charged property. The court declined to grant the injunction noting that the right to exercise the power of sale had accrued. The court in disposing the matter before it rendered itself thus:-

64. “It would not be proportionate to deny the respondent the right to dispose of the mortgage property by way of a public sale.” The right has both admittedly and apparently accrued. The respondent on the other hand still has a hanging obligation, which is to ensure that it obtains the best possible price reasonably obtainable at the time of sale. I see no reason why the respondent cannot obtain a third opinion, from a valuer of its choice, even as I decline to restrain the respondent from exercising its statutory sale. The respondent is free (in its own interest as well as that of the applicant) to obtain another valuation and may thus of its own volition postpone the sale as it works on the valuation.”

16. The claimant took the court's advise to heart and obtained the valuation report by Tysons Limited in March 2017 where the market value was placed at kshs. 55,000,000/= and the forced sale value placed at kshs. 46,500,000/=. Armed with the Tysons Limited valuation report the claimant sought to sell the property by public auction on 6th April 2017 through Garam Investments Auctioneers when the highest bid obtained was kshs. 22,000,000/= which was well below the forced sale value of kshs. 46,500,000/= (**WM-4**). On 8th May 2017 when a further auction was scheduled as per the auctioneers letter dated 9th May 2017 no serious bid for the property was received.

17. I am satisfied the claimant had prior to having the public auction sales on 6th April 2017 and 8th May 2017 fulfilled the conditionalities attaching to exercise of duty of care as required under Section 97 (1) and (2) of the Land Act. The claimant could not raise acceptable bids for the property at the public auction as no bid matched the forced sale value of kshs. 46,500,000/=. The respondent has not furnished to the claimant any acceptable and/or viable proposal for the repayment of the debt and the debt continues to escalate owing to application of interest and other charges. As is evident, the debt due has now outstripped even the market value of the security held standing at kshs. 98,287,514/80 as at 30th June 2017 as per the statement of account furnished by the claimant. The liability still continues to grow.

18. Having made attempts to sell the charged property by public auction and there being no viable proposal by the respondent to pay the debt the sale of the security held remains the only viable option available to the claimant to recover some of its monies and to reduce the exposure. It has been demonstrated that there are no buyers willing to buy the property at the public auction at the forced sale value as the two attempts have shown. In the premises, I am persuaded the instant application by the claimant to be granted leave to purchase the property at the public auction presents the most advantageous way of selling the property and would ensure the duty of care by a chargee while exercising its power of sale is conformed to as required by Section 97(1) of the Land Act.

19. In the final result, I find the claimant's application dated 21st August 2017 meritorious and I grant the same in terms of prayer (2) of the Notice of Motion. The claimant shall thereof have leave to participate in a public auction to be scheduled within a period of 90 days from the date of this ruling at which auction, members of the public shall be at liberty to place bids for the charged property. If the highest bid received shall be below the forced sale price of kshs. 46,500,000/= the claimant shall be deemed to have placed a bid of kshs. 46,500,000/= and the property shall be sold to the claimant for that amount. If however, a member of the public places a bid greater than the forced sale value, the bid by that person shall be taken unless the claimant places a bid that will be greater than such bid. For clarity and avoidance of any doubt, the valuation report prepared by Tysons Limited dated 17th March 2017 will suffice as the valuation envisaged under Section 97(2) of the Land Act. Each party to bear their own costs for the application.

20. Orders accordingly.

RULING DATED, SIGNED and DELIVERED at KISII this 20TH DAY of APRIL, 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Momanyi for Githaiga for the claimant/applicant

Ms. Moguche for Nyarango for the respondent

Ruth court assistant

J. M. MUTUNGI

JUDGE