



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C. CASE NO. 125 OF 2017**

**MESGO LIMITED.....PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA LTD.....DEFENDANT**

**RULING**

1. By a notice of motion dated 19<sup>th</sup> July 2017 brought under the provisions of **Order 40 Rules 12 and 9 of the Civil Procedure Rules, section 3 of the Civil Procedure Act (Cap 21) and all other enabling provisions of the law**, the Plaintiff sought an order of injunction to restrain the Defendant from selling, alienating or transferring **Title No. Embu/Municipality/931** (hereinafter described as the suit property), pursuant to the latter's statutory power of sale, pending the hearing and determination of the suit. The Plaintiff later on sought and obtained leave to amend the said application.
2. The application was based on the several grounds shown on the face of the motion. The main grounds were that the Defendant was intending to sell the suit property at a gross undervalue and that the value of the suit property and developments thereon were worth threefold the amount of money the Plaintiff owed the Defendant.
3. The said application was supported by an affidavit sworn on 18<sup>th</sup> July 2017 by Njue Mugo who was a Director of the Plaintiff. The said Director conceded that the Plaintiff had defaulted on servicing a loan of Kshs 15,000,000/- from the Defendant whose payment was secured by a charge over the suit property.
4. The Plaintiff's main complainant was that the Defendant had through a valuation report dated 20<sup>th</sup> September 2016 undervalued the suit property at Ksh 41 million with a forced sale value of Ksh 31 million. The Plaintiff's own valuation carried out in May 2017 indicated that the suit property was worth about Ksh 50 million with a forced sale value of Kshs 40 million. The Plaintiff exhibited copies of the two reports.
5. The Defendant did not file a replying affidavit but chose to file only grounds of opposition dated 26<sup>th</sup> July 2017. The Plaintiff's said application was opposed on two grounds only. First, it was contended that the application offended the mandatory provisions of **Order 50 Rule 4 of the Civil Procedure Rules**. Second, it was contended that the suit and application were a duplication of Embu CMCC No. 228 of 2016 between the parties which was still pending.
6. When the said application was listed for hearing on 21<sup>st</sup> November 2017, the advocates for the parties agreed to canvass it through written submissions. Consequently, the Plaintiff filed its submissions on 11<sup>th</sup> January 2018 whereas the Defendant filed its submissions on 4<sup>th</sup> April 2018.
7. The court has considered the Plaintiff's said application, the Defendant's grounds of opposition thereto and the parties' written submissions. In my opinion, the following three issues fall for determination;
  - a) Whether the Plaintiff's said application offends Rule 4 of the Civil Procedure Rules and, if so, what is the consequence thereof.
  - b) Whether Embu CMCC No. 228 of 2016 is still pending and if so, what is the consequence thereof.
  - c) Whether the Plaintiff has made out a case for the grant of an order of interlocutory injunction.
8. The provisions of **Order 51 Rule 4** state as follows;

**“4). Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.”**

9. It was submitted by the Defendant that although the Plaintiff's original application dated 19<sup>th</sup> July 2017 was supported by an affidavit, the one dated 27<sup>th</sup> July 2017 was not supported by any affidavit in clear breach of **Order 51 Rule 4 of the Civil Procedure Rules**. The court is aware that the Plaintiff sought leave to amend his original notice of motion and such leave was granted. Instead of filing an amended notice of motion, the Plaintiff appears to have filed a new application altogether.

10. The later application dated 27<sup>th</sup> July 2017 still referred to the affidavit of Njue Mugo although no new affidavit was annexed thereto. The court is of the view that such flaw does not go to the root of the matter. In my view, it does not affect the jurisdiction of the court to entertain the application. There is no indication that the Defendant has thereby suffered any prejudice. The court is bound by the provisions of **Article 159 (2) (d) of the Constitution of Kenya and section 19 (1) of the Environment and Land Court Act (Cap 12A)** to dispense justice without undue regard to technicalities of procedure.

11. The second issue relates to the pendency of Embu CMCC No. 228 of 2016 before the Magistrate's Court. Although the Defendant alleged the pendency of the said case, there is very scanty information on record regarding the matter. None of the parties provided copies of the pleadings therein or a copy of that court's ruling on jurisdiction. The Plaintiff referred to a copy of the ruling as exhibit ML 5 in paragraph 11 of the supporting affidavit but the same was not annexed to the affidavit. The last exhibit on record is ML 4.

12. Be that as it may, this court is satisfied that the value of the subject matter herein is beyond the pecuniary jurisdiction of the Magistrate's court hence the provisions of **section 6 of the Civil Procedure Act (Cap 21)** would not be applicable because the Magistrate's Court is not competent to grant the relief sought by the Plaintiff.

13. The 3<sup>rd</sup> issue is whether or not the Plaintiff has satisfied the requirements for the grant of an interlocutory injunction as set out in the case of **Giella Vs Cassman Brown & Co Ltd [1973] EA 358**. The main issue is whether the Defendant severely undervalued the suit property in violation of the provisions of the Land Act.

14. The Defendant's valuation of April 2016 put the value of the suit property at Kshs 41 million whereas the Plaintiff's valuation of May 2017 put the value at Kshs 50 million. Although the difference in valuation is about Kshs 9 million, it should be borne in mind that the two valuations were carried out about one year apart. The value of the suit property may have appreciated between April 2016 and May 2017. So, the mere existence of that variance, without more, is not evidence of mischief on the part of the Defendant. It is also quite possible that two different valuers undertaking a valuation of the same property on the same day may arrive at different values, without any of them being actuated by malice.

15. So, has the Plaintiff demonstrated that the Defendant has deliberately undervalued the suit property? In the case of **Zum Zum Investment Ltd Vs Habib Bank Ltd (2014) eKLR** which was cited by the Plaintiff, the court found that the Plaintiff had failed to demonstrate that the suit property was undervalued by the bank at Kshs 390 million. In the said case Kasango J stated as follows;

**“...It is not sufficient for the Applicant to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The Applicant must satisfactorily demonstrate why the valuation report the Respondent intends to rely on in disposing of the suit property does not give the best price obtainable at the material time.”**

16. In the case of **Olkasasi Ltd Vs Equity Bank Ltd [2015] eKLR** the Plaintiff's own valuation was Kshs 60 million whereas the Bank's valuation of the suit property was Kshs 35 million. The court found that the Plaintiff had not demonstrated that the bank's valuation was a gross undervaluation.

17. In the said case Gikonyo J held, *inter alia*, that;

**“...It should be known that, the fact that the latest valuation by the Applicant places a valuation which is significantly higher than that by the valuer appointed by the bank does not mean the Respondent undervalued the suit property. The report must be dislodged on real items, terms, and legal parameters which are acceptable in the practice and profession of valuers. There is no evidence of that caliber here and, therefore, the arguments by the Applicant that the Respondent failed to discharge the duty of care under section 97 do not hold sway.”**

18. In the circumstances of this case, the court is not satisfied that the Plaintiff has demonstrated that the Defendant has undervalued the suit property. The court is, therefore, not satisfied that the Plaintiff has made out a *prima facie* case with a probability of success as enunciated in the case of **Giella Vs Cassman Brown & Co Ltd** (supra). The court is not satisfied that there is a breach or threatened violation of the legal rights of the Plaintiff under **section 97 of the Land Act**. The Plaintiff's application, therefore, fails on that account.

19. In view of the court's finding that the Plaintiff has failed to demonstrate a *prima facie* case with a probability of success, it shall not be necessary to consider the 2<sup>nd</sup> and 3<sup>rd</sup> principles for the grant of an injunction.

20. The upshot of the foregoing is that the court finds no merit in the Plaintiff's application for injunction and the same is hereby dismissed with costs to the Defendant.

21. It is so ordered.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this 21<sup>ST</sup> day of **JUNE, 2018**.

In the absence of the Plaintiff and the Defendant.

Court clerk Mr Muinde.

**Y. M. ANGIMA**

**JUDGE**

**21.06.18**