REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 867 OF 2015

HELLEN JANE ACHIENG' ODEGI.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK.....DEFENDANT

RULING

When the Plaintiff's Notice of Motion dated **10th September 2015,** came up for *inter-partes* hearing, the parties entered into a consent, which was adopted as an order of the Court, that an injunction be issued for **21 days** restraining the Defendant, its servants or agents, advocates or auctioneers or any other person acting for and/or on its behalf, from advertising for sale, disposing off, selling, by public auction or at all in effectuation of the Notification of Sale and Redemption Notice dated **6th July 2015,** or otherwise howsoever from completing by conveyance or transfer of any sale concluded by auction and/or private treaty, leasing, letting or otherwise howsoever interfering with the ownership of title to and/or interest in the property known as **Apartment No. B12 on L.R. No. 209/14990/15 Nairobi.**

It is the aforementioned Order that the Plaintiff seeks to be confirmed pending the hearing and determination of the suit. The Plaintiff's application is premised on grounds that first, the intended sale of the suit property is in contravention of the mandatory requirements of **Section 96 of the Land Act** requiring the chargee to issue to the chargor a Notice to Sell before the sale. Secondly, that it is in contravention of **Section 97 of the Land Act** which obligates the chargee to obtain the best price possible for a security and not dispose at an undervalue. Thirdly, that the intended sale is to recover a sum that is un-contractual, bearing unlawful and un-contractual interests and penalties. Further, that the sale has been orchestrated to clog and bar the Plaintiff's right to redemption of the suit property. Moreover, that the suit property is the Plaintiff's matrimonial home where she is resident with her family.

The Plaintiff swore an affidavit in support of her application wherein she deposed that the suit property was charged to the Defendant on **25th March 2011,** as security for a loan of **Kshs. 11,888,000/-.** In **2014**, she received a Statutory Notice when after she engaged the Defendant amicably for a settlement of account. The Plaintiff deposed that the account as presented by the Defendant was not entirely settled since the Defendant lumped onto the account un-contractual penalties and interests as she had been serving the debt since **March 2011** and had thus far paid an appreciable portion of the debt plus interest but the Defendant now demands **Kshs. 13,374,311.40/-**

Subsequently, she received a Notification of Sale and a **45 day** Redemption Notice dated **6th July 2015** from **M/s Muga Auctioneers & General Merchants,** stating that the property had been valued at an Open Market Value of **Kshs. 15 Million** and forced sale value of **Kshs. 12 Million.** Additionally, that

the Defendant is claiming **Kshs. 13,374,311.40/-** plus interest at **15.5%** together with auctioneers fees of **Kshs. 380,000/-.** It is the Plaintiff's deposition that the suit property, situate in Kileleshwa, upmarket Nairobi has a present market price of **Kshs. 19 Million**. It is her argument that the property at the time of purchase at **2011** had a market price of well over **Kshs. 15 Million** and it cannot have the same market value in **2015**. Thus, **Kshs. 12 Million** stated in the auctioneer's valuation report is a gross undervalue of the suit property.

The Plaintiff further deposed that despite the loan amount having been contractually agreed upon, the Defendant blatantly breached the contract, varied the interest and penalty rates thereby clogging her rights of redemption. The Plaintiff reiterated that the Defendant acted in contravention of the conditions stated in **Sections 96 and 97 of the Land Act** which two requirements are mandatory and irreducible.

Fredrick Mung'athia, the Manager, Credit Support of the Defendant swore the Replying Affidavit on **20th September 2015** wherein he deposed as follows. The Plaintiff approached the Defendant for a loan facility of **Kshs. 11,888,000/-**. This loan was secured by a first legal charge over the suit property, which charge provided for the remedies available for the Defendant in the event of default in repayment. In **March 2014**, the Plaintiff being in arrears for over the statutorily period of one month, the Defendant issued the first Statutory Notice under **Section 90(1)(2)(3)(e) of the Land Act** informing the Plaintiff the nature and extent of default and her rights as the chargor on how to rectify the default. The said notice elicited no response and expired without rectification necessitating the Defendant to exercise its power of sale over the charged property to which end the bank issued a Statutory Notice to sell under **Section 96 (2)(3) of the Land Act**.

It is deposed that the Defendant had no reason to vary the terms of the loan repayment as it did not receive a request for rescheduling of the loan repayments in writing for its consideration. Further, that the amount of **Kshs. 13,374,311.40/-** includes the factoring in of additional interests under Clause 5 of the Letter of Offer. The deponent stated that the auctioneers acted on the Defendant's instructions in exercise of its power of sale and that the sums itemized in the report were arrived at after valuation of the property upon the Defendant's instructions. The deponent contended that the Defendant has observed the relevant laws having issued the two N otices to sell and the notification of sale and redemption notice were hand delivered by the auctioneers and also sent via registered post to the Plaintiff's provided address. The deponent maintained that the Plaintiff is only using recourse to Court as a delaying scheme to frustrate the ends of justice, having acknowledged that she is indebted to the Defendant.

The application was canvassed by way of written submissions. On behalf of the Plaintiff, counsel submitted that the Defendant, pursuant to **Section 97 of the Land Act** is mandated to carry out a valuation of the property and dispose it only at a value that fetches the best price. Thus, disposing of the property at the prices indicated in the Defendant's valuation report would be in breach of the said provision. In regards to receipt of statutory notices, counsel submitted that it was an issue to be adjudged in trial and there is therefore need for preservation of the suit property. It was submitted by counsel that the suit property being the Plaintiff's matrimonial home where she resides with her family, she stands to suffer irreparable loss not compensable by damages in the event that the property is sold. Additionally, the balance of convenience tilts in favour of preservation of the property.

On behalf of the Defendant, it was submitted that the Plaintiff has not established a prima facie case with chances of success for grant of interlocutory orders because it is undisputed that the Plaintiff took a loan from the Defendant securing it with the suit property and has since defaulted in repayment. Counsel referred to **Section 99(4) of the Land Act** and submitted that the Plaintiff would adequately be compensated in damages in the event that the Court eventually finds that there was an improper or irregular exercise of the statutory power of sale or that the Plaintiff has suffered loss. Further, that the value of the property can be ascertained and any loss occasioned to the Plaintiff is remediable by an award of damages. It was also submitted that by the Plaintiff offering the suit property as a security for a loan facility, it became a commodity subject to sale in case of default in loan repayments.

With regards to the balance of convenience, counsel submitted that the same tilts in favour of the Defendant as granting an injunction will result to the amount of debt to continue to rise and in turn the

security may be insufficient to cover the outstanding amount. It was also submitted that the Plaintiff has not taken any steps to redeem the property or clear the outstanding amount so as to convince the Court that the interlocutory prayers sought would enable her remedy the situation. Conversely, that greater injustice would be occasioned to the Defendant. Several authorities were cited including **Halsbury's Laws of England, Vol. 32 (4th ed.) at Par. 725** which reads:

> ***The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagor claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.***

At this stage, all I am required to do is to determine the application before me on the basis of the requirements stated in **Giella v Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. The requirements are that the applicant must establish a *prima facie* case, and that they stand to suffer irreparable loss which may not be compensated by an award of damages. In the event that the Court finds that the two requirements are not satisfied, it may decide the application on the balance of convenience.

The first question is whether the Plaintiff has established that hers is a prima facie case. It is not in contention that the Plaintiff took a loan facility with the Defendant and charged the suit property as security. It is also common that the Plaintiff has since defaulted in the repayment prompting the Defendant to commence the process of realization of the security. The Defendant avers that it issued the requisite Notices to the Plaintiff, and after the Plaintiff failed to rectify the default, carried out a valuation of the property and engaged the services of an auctioneer to auction the property. It is this process that the Plaintiff seeks to challenge in this application based on two folds, first, that the Defendant did not issue all the Notices as is required by law and secondly, that the property is grossly undervalued thereby the Defendant in disposing off the property will not obtain the best price.

The Chargee's power of sale is provided for under **Section 96 of the Land Act**. The Chargee may sell the charged land where the chargor is in default and remains in default at the expiry of the time provided for rectification in a Notice served under **Section 90(1)**. However, before exercising that power, the chargee is required to serve the chargor a Notice to sell and cannot proceed to complete any contract for the sale until at least the lapse of 40 days from the date of service of the notice to sell.

The sections referred hereinabove read as follows:

> ***90 (1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.***
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> ***96.(1) Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90 (1), a chargee may exercise the power to sell the charged land.***
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> ***(2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.***

It can be discerned from the above provisions that for a bank to exercise its power to dispose off a charged property, it must issue a notice **(S. 90[1])**, commonly referred to as "Statutory Notice" and a Notice to Sell **(S. 96[2])**. Further such sale can only proceed after the lapse of 40 days from the date of service of the notice to sell.

The Plaintiff admits to receiving the Statutory Notice but categorically states that she was not served with the notice to sell, a mandatory requirement by law. In response, the Defendant deposed that the notice to sell was sent to the Plaintiff vide registered post. The Court was referred to annexure marked "FM4a" a **Statutory Notice to Sell** under **section 96(2)(3) of the Land Act** addressed to the Plaintiff, dated **1st July 2014** and to be sent vide Registered Mail. Annexure "FM4b" is a copy of Certificate of Postage dated **8th July 2014**. Where service of statutory notices is disputed, the burden shifts to the chargee to demonstrate prima facie service was effected. The Court of Appeal in the case of **Obel Omuom v Kenya Commercial Bank Ltd, Court of Appeal at Kisumu, Civil Appeal No. 148 of 1995 (1996)eKLR** opined that:

> ***That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent..... It would have been a very simple exercise for the bank to produce a slip or slips showing proof of posting of the registered letter or letters containing statutory notice or notices.***

I have perused through the Defendant's supporting documents. The Statutory Notice, Notice to Sell, Letter of Offer, and Charge instrument all contain the Plaintiff's address as 16982 – 00100 Nairobi. It is the same address as the one on the Certificate of Postage. The Plaintiff does not dispute this address at all. In my considered view, the Certificate of Postage is sufficient proof of posting and I am satisfied that the notice was properly dispatched to the Plaintiff's last known address and therefore service was properly effected.

The Plaintiff deposed that she fundamentally disputes the amount of **Kshs. 13,374,311.40** demanded by the Defendant as the later lumped onto the account un-contractual penalties and interests. The Plaintiff contended that the Defendant breached the contract, varied the interest and penalty rates thereby clogging her right of redemption. In response, the Defendant referred to **Clause 5 of the Letter of Offer** which stipulated that the Bank reserves the rights to charge such rate or rates as it may decide and that it shall not be required to advice any change in the rate of interest.

On perusal of the Letter of Offer, indeed the Defendant had the authority to vary the interest rate at any time and was under no obligation to notify the Plaintiff of such variation. The allegation by the Plaintiff that the Defendant is in breach of contract for varying the interest rates is unfounded. It is also noteworthy that there are ample authorities to the effect that a dispute as to the amount of due cannot be a basis for the grant of injunction to restrain a bank from exercising its statutory power of sale. See the case of **Sammy Japheth Kavuku v Equity Bank Limited & another Civil Case Mombasa No. 84 of 2013 [2014] eKLR** where the Court discussed in detail in the issues of variation of interest rates and dispute as to the outstanding amount not being a ground of grant of injunction.

The third ground relied on by the Plaintiff is that the property was grossly undervalued by the Defendant's valuer. It is noteworthy that the issue is not whether valuation of the property was done. Indeed the Defendant did carry out a valuation of the property before realizing the security. The Plaintiff's contention is that the values stated in the Notification of Sale, that is, Open Market Value of **Kshs. 15 Million** and forced sale value of **Kshs. 12 Million,** is a gross undervalue of the property and therefore not the best price. In countering this valuation, the Plaintiff caused a second valuation to be carried out by M/s Roack Consult Limited which arrived at Open Market Value of **Kshs. 19 Million** and forced sale value of **Kshs. 14.3 Million**. Notably, these reports were carried out in **September 2015**.

The Plaintiff bases her allegation of gross undervaluation of the property on the claim that financial institutions cannot lend **100%** on a security. The Plaintiff averages the loan amount of **Kshs. 11,880,000/-** given in **2011 at 80%** of the value of the security. Consequently, that a **100%** would be **Kshs. 14,850,000/-**. It is her argument that if the value of the property in **2011** was upwards of **Kshs. 14 Million**, a valuation of **Ksh. 15 Million** in **2015** is an under value, considering that the property is located in Kileleshwa upmarket of the city.

I have carefully perused the valuation report filed by M/s Kenstate Valuers on behalf of the Defendant. At **Pg. 9** therein, the Valuer outlines that the Open Market Value of the suit property, taking all factors into

consideration is **Ksh. 16.5 Million** and the forced sale value is **Kshs. 13 Million**. The valuer advises that the mortgage value is **Kshs. 14 Million**. This actually confirms the Plaintiff's assertion that the loan amount cannot be 100% value of the property. It is also apparent that there is a disparity between the values in the valuation report and the notification of sale. The Plaintiff also caused a valuation to be carried out and the findings were that the Open Market Value is Kshs. 19 Million whereas the Forced Sale Value is Kshs. 14.3 Million.

I am satisfied that the Plaintiff has cast doubt as to the true market and forced sale valuations of the suit property as at **September 2015**. It is my considered view that the Plaintiff has put forth cogent argument showing the possibility of undervaluation of the suit property by the Defendant's valuer. Interestingly, it is not explained where the values stated in the Notification of Sale were derived from. In my understanding the values in the valuation report is supposed to inform the Notification of Sale.

Based on the sole ground of valuation of the suit property, I enter a status quo order to the effect that the Defendant shall not dispose off the property until the issue of valuation of the property is settled in view of the fact that each party has already carried out individual valuation reports, I do order the parties to select one valuer for purposes of undertaking a joint valuation within **45 days** of the date hereof and a report be filed within **7 days**. Costs of the joint valuation shall be borne by both parties equally.

The upshot of the foregoing is that the Court declines to confirm the orders prayed by the Plaintiff in her Notice of Motion dated 10th September 2015 but orders for status quo to be maintained and Defendant shall not dispose off the suit property until the joint valuation is done and report filed in Court. Costs shall be in the cause.

It is so ordered.

Dated, Signed and Delivered this ***23rd*** day of ***May, 2016***

L.GACHERU

JUDGE

In the Presence of:-

None attendance though notified for the Plaintiff/Applicant

Mrs Ndango holding brief for Mr Kitur for the Defendant

Hilda: Court Clerk

L.GACHERU

JUDGE

23/5/2016

Court:

Mention on ***28th July, 2016*** for joint valuation report and way forward**.**

L.GACHERU

JUDGE

23/5/2016