



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 199 OF 2015

1. MWAWAKO SHIPPING AGENCIES LIMITED

2. PETER OSEKO MATANG.....PLAINTIFF

=VERSUS=

GUARANTY TRUST BANK (KENYA) LIMITED

(formerly FINA BANK LIMITED.....DEFENDANT

R U L I N G

Introduction:

1. What is before me is the Application by the Plaintiffs dated 2nd November, 2014. In the Application, the Plaintiffs are seeking for the following orders:-

(a) THAT a temporary injunction do issue restraining the defendant/respondent itself, its agents, servants, and or employees by whatever name called from advertising, offering for sell, selling, disposing of, auctioning, or transferring the property known as KILIFI/KAWALA "A" KADZONZO/313 situate within Kilifi county pending hearing and determination of this suit.

(b) THAT the Defendant/Respondent be ordered to undertake a forced sale valuation for the purpose of determining true current market value of the subject before invoking/exercising the chargee's power of sale over the property; Kilifi/Kawala "A" Kadzonzo/313.

(c) That cost of this application be provided for.

The Plaintiffs'/Applicants 'case:

2. According to the deposition of the 2nd Plaintiff, he is the registered owner of parcel of land known as Kilifi/Kawale "A" Kadzonzo/313 (the suit property); that he applied for a loan facility for the 1st Plaintiff in the year 2011 and that a charge instrument dated 7th February, 2012 was registered over the suit property to secure a loan of Kshs.5,000,000.

3. The 2nd Plaintiff has deponed that a Further charge dated 24th October, 2012 was registered to secure a loan facility of Kshs.13,600,000; that the 1st Plaintiff has made substantial repayment of the loan and that

as at 24th November, 2014, the 1st Plaintiff had a balance of Kshs.7,953,136.28 to pay to clear all the obligations.

4. It is the 2nd Plaintiff's case that he received several notices and demand letters from the Defendant prior to September, 2015; that in the month of July 2015, he proposed to the Defendant to allow him dispose of his other property to pay the outstanding loan but was instead served with a notification of sale of the suit property.

5. According to the 2nd Plaintiff, the Defendant owes him a duty of care to obtain the best price reasonably obtainable at the time of the forced sale; that the Defendant has commenced plans to dispose of the charged property without first undertaking a forced sale valuation and that the notification of sale lacks validity and is illegal.

6. The 2nd Plaintiff has deponed that the Defendant adjusted the interest on the loan upwards whimsically from the contractual percentage to 31% per annum without disclosure or notice to him; that he instructed M/S Tyson Limited to value the property and that the forced sale value of the suit property is not less than Kshs.37,500,000.

7. It is the Plaintiff's case that the value indicated in the Notification of Sale that was served on him is based on the market rate as per the valuation that was done in the year 2011 and that he has since improved the suit property.

8. In response, the Defendant's receiver manager deponed that the Defendant granted to the Plaintiffs credit facilities totaling to Kshs.17,600,000 and USD100,000 exclusive of interest; that the Plaintiffs' account with the Defendant has become grossly irregular with huge outstanding balances and that the Plaintiffs have not regularised their account despite numerous demand notices.

9. It is the Defendant's case that Real Appraisal Limited conducted a forced sale valuation of the property and submitted their report on 15th September, 2015.

10. The Defendant's Manager deponed that a dispute as to accounts cannot be a ground in law to restrain a chargee from exercising its statutory power of sale and that the intended sale of the suit property is lawful and a legitimate exercise of the chargees' statutory power of sale.

11. In his Supplementary Affidavit, the 2nd Plaintiff deponed that when he applied a top up loan in the month of December, 2013, the Defendant instructed M/s Tysons Ltd to carry out a valuation on the suit property which they did and found the commercial building which he had improved was valued at Kshs.36,000,000.

12. The Plaintiff's and the Defendant's advocate filed their submissions which I have considered.

13. It is not in dispute that the Plaintiffs charged the suit property on 7th February, 2012 and 24th October, 2012.

14. It is also not in dispute that the Defendant served on the Plaintiff the requisite notices, thus setting in motion plans to sell or dispose the charged property.

15. The Plaintiffs have however challenged the interest rates that the Defendant has been applying on the loan and that the Defendant is in breach of Section 90(1), 96(3)(b), 97(1) and (2) of the Land Act, 2012.

16. According to the Plaintiffs, the sale is premised on an inapplicable valuation report and that the said sale is being exercised improperly, capriciously and in a manner that is oppressive to the Applicant.

17. Section 97(1) of the Land Act provides that a chargee who exercises a power to sell the charged land owes a duty of care to the chargor to obtain the best price reasonably obtained at the time of sale.

18. The law further provides that a chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.
19. The Notification of Sale dated 14th September, 2015 that was served on the Plaintiffs by the auctioneer appointed by the Defendant shows that the Market value of the suit property is Kshs.16,500,000 while the forced sale reserve price is Kshs.13,000,000.
20. According to the Plaintiff, the value of the suit property has been improved tremendously since the year 2011.
21. The Plaintiffs have deponed that the Defendant instructed the firm of Tyson Limited to conduct a valuation on the property in the year 2013 when the Plaintiff requested for a top up on their loan.
22. The Plaintiffs have annexed the copy of the valuation report that was prepared by Tysons Limited on the Defendant's instructions. The report shows that Tyson Limited inspected the suit property on 7th December, 2013. The said firm valued the suit property at Kshs.45,000,000 with a forced sale value of Kshs.36,000,000.
23. The Plaintiff went further to instruct Tysons Limited to conduct a valuation of the same property in the year 2015. The report of Tysons shows that the suit property is valued at Kshs.47,000,000 with a forced sale value of Kshs.37,500,000 as at 16th September, 2015.
24. If indeed the Defendant instructed Tyson Limited to value the property in the year 2013, and the said firm valued the property at Kshs.40,000,000, it is highly unlikely that the same property, which is a fixed asset, could have depreciated to a value of Kshs.16,500,000 as shown in the Notification of Sale dated 31st August, 2015 and 14th September, 2015.
25. A perusal of the two Notifications of sale shows that the market value of Kshs.16,500,000 and the Reserve price of Kshs.13,000,000 is the same as the figures that were given by NW Realite in its valuation report of 14th September, 2011, which is the same valuation report that the Bank used while granting to the Applicants the loan.
26. I have perused the valuation report dated 14th September, 2015 which the Defendant's Manager claims was used to instruct the auctioneers.
27. The said valuation report gives the market value of the suit property as kshs.12,500,000 and the forced reserve price at Kshs.9,375,000, which is below what was valued in the year 2011. In fact, those are not even the figures in the Notifications of sale that were served on the Plaintiffs.
28. Although the first Notification of sale annexed on the Defendant's affidavit is dated 31st August, 2015, the valuation report that the Defendant is relying on to exercise its statutory powers of sale is dated 15th September, 2015, meaning that the property was valued after the Notifications of sale of 31st August, 2015 had already been issued to the Plaintiffs, which quotes prices lower than what was valued in the year 2011.
29. Considering the valuation reports of NW Realite and Tysons Limited, and even allowing a huge margin of error, it appears that the Defendant did not exercise a duty of care to the chargor to obtain the best price reasonably obtainable at the time of sale when it instructed the auctioneer.
30. What the Bank intends to do is to sell the charged property at a price that is much lower than when the property was valued as at the time it advanced the loan. That is an action that smacks of fraud on the part of the Bank and an indication that the Bank does not have the slightest interest of its client.
31. In the circumstances, I am satisfied that the Plaintiffs have established a prima facie case with chances of success.

32. The Plaintiffs are likely to suffer irreparable injury that cannot be compensated in damages in the event that the suit property is sold to a third party before the best price of the suit property can be ascertained.

33. For those reasons, I allow the application dated 2nd November, 2014 as prayed.

Dated, signed and delivered in Malindi this **16th** day of **September**, 2016.

O. A. Angote

Judge