



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 127 OF 2015

ANGWENYI SAMUEL AUNGA.....1ST PLAINTIFF

ESTHER N. ANGWENYI.....2ND PLAINTIFF

UKAY CENTRE FOREX BUREAU LIMITED.....3RD PLAINTIFF

VERSUS

I & M BANK.....4TH DEFENDANT

RULING

On 17th February 2015, this Court issued ex-parte orders of injunction restraining the Defendant from selling by public auction the parcel of land known as **Ngong/Ngong/33337**, pending the hearing of the application *inter-partes*. The Plaintiffs now seek that the order be confirmed pending the determination of the suit.

The application is premised on grounds that the Defendant has illegally advertised for sale by public auction the sale of the suit property without issuing statutory notices and without the auctioneers issuing the 45 day notice as required by law. Secondly, that the Defendant is claiming illegal amounts contrary to **Section 39 of the Central Bank of Kenya Act** computing interest at high rates. Thirdly, that the loan is being serviced based on the agreements and lastly that the Defendant has undervalued the property at **Kshs. 20 Million** whereas its market value is **32.5 Million**.

The application is supported by an affidavit sworn by the 1st Plaintiff. Thereunder, he deposes that the Plaintiffs were granted a loan facility in **August 2013**, meant to boost their business. The suit property was offered as security when after the loan proceeds were released to the 3rd Plaintiff and thereafter servicing of the loan commenced in **September 2013**. However, that the Central Bank of Kenya (CBK) revoked the 3rd Plaintiff's license thereby closing down the business. The deponent states that he wrote to the bank on **27th August 2014** notifying it that he was in the process of selling his other properties in order to offset the loan which proposal was accepted. This sale, however, fell through but the bank was still willing to afford more time to dispose off the properties. Moreover, that the bank was to reschedule the loan to extend the term of the loan to enable him dispose off other properties.

The 1st Plaintiff deposed that in **November 2013**, whilst in the process of sub-dividing one of their properties so as to sell it in smaller portions, he was issued with a notice dated **31st October 2013**, that all land transactions in Kajiado County had been banned until further notice. Thus, he was unable to proceed

with the sub-division and sale of the property. On **2nd February 2014**, while still waiting for the ban to be lifted, he came through the Daily Nation newspaper and saw that the bank had advertised the sale of the property. Further, that the advertisement of sale issued by **Garam Investment Auctioneers** does not indicate the amount allegedly owed to the bank and/or price of the intended sale. The **1st Plaintiff** urged the Court to grant the injunction restraining the bank from auctioning the property since he resides thereon with his family and will be rendered destitute.

Andrew Muchina, the Assistant Manager – Legal Department of the Defendant swore a Replying Affidavit **26th February 2015**, in response to the application. He deposed that on **25th April 2013**, the **2nd Plaintiff** applied and was granted credit facilities of **Kshs. 18 Million**. However, that in breach of the Agreements executed between the parties, the Plaintiff's failed to service the loan facilities advanced on the terms agreed upon. The deponent referred letters of demand to regularize the accounts addressed to the Plaintiff's dated **27th September 2013**, **16th October 2013**, **20th January 2014**, which he deposes the Plaintiffs failed to honour.

It is deposed that on **28th April 2014**, the Defendant instructed its advocates to issue Statutory Notice of Sale and Notice under **Section 44A of the Banking Act**, which were issued to the Plaintiffs on **13th May 2014**, for the total outstanding sum of **Kshs. 19,778,176.92** as at **31st March 2014**. When the Plaintiff's failed to rectify the default, the Defendant sent a further 40 days Notice issued on **27th August 2014**. The deponent stated that the Defendant received a letter from the Plaintiffs dated **27th August 2014**, requesting it for more time to sell other another property to reduce the loan arrears. However, that the Defendant in a letter dated **8th September 2014** declined the Plaintiff's request notifying it that the requisite notices had already been issued and therefore the Plaintiffs had already been given sufficient time to redeem the property. Subsequently, the auctioneers on instruction of the Defendant issued the 45 days **Notification of Sale** on **4th September 2014**.

After the issuance of the 45 days **Notification of Sale**, the Plaintiffs wrote to the Defendant on **3rd November 2014** requesting for a meeting on **19th November 2014** and promised to pay a lump sum of **Kshs. 6 Million**. On the date of the meeting, the Plaintiffs made a further promise to increase the lump sum amount to **Kshs. 7.5 Million** as well as settle the advocates' costs of **Kshs. 462,369.40/-** and the auctioneers fees on or before **31st December 2014**. On **9th December 2014**, the Plaintiffs wrote to the Defendants confirming that the payment of **Kshs. 7.5 Million** would be made on or before **20th January 2015**. Come **20th January 2015**, the Plaintiffs had not paid the promised amounts and the Defendant proceeded to advertise the charged property on **2nd February 2015**, scheduled for auction on **17th February 2015**. In refuting the claim that the suit property had been undervalued, the deponent referred to an annexed valuation report drafted by **Daytons Valuers Limited** on **29th October 2014** which placed the Market Value for Mortgage Purposes at **Kshs. 22 Million** with a Forced Sale Value of **Kshs. 19.5 Million**.

The **1st Plaintiff** swore a Supplementary Affidavit on **17th April 2015** wherein he deposed the Plaintiffs have never received the **Statutory Notices** since the postal address used for the registered mail was closed on **1st December 2013** due to non-payment and renewal. He also deposed that the property had been undervalued by the Defendant an annexed a valuation report by **Tuliflocks Limited** dated **10th September 2014** placing the Market Value of the Property at **Kshs. 32.5 Million**.

The Defendant also filed an application dated **16th March 2015** seeking orders that the interim injunction orders given on **17th February 2015** be discharged and/or set aside and the auctioneer's costs of **Kshs. 297,100/-** and **Kshs. 370,910.70/-** respectively be paid within **7 days** from the date of the order of the Court. In the affidavit in support of the application it was deposed that the Plaintiffs obtained the interim orders by concealing material facts as the requisite notices were issued and served.

The application was canvassed by way of written submissions. On behalf of the Plaintiffs it was

submitted the dispute was whether the Defendant issued the **mandatory Statutory Notice of Sale and Notice** under **Section 44 A of the Banking Act** as well as the one issued under the Auctioneer's Rules. It was submitted that the Plaintiff did not receive the Statutory Notices of Sale under **Section 96(3) of the Land Act** and the Notification of Sale per the Auctioneer's rule in view of the cessation notice that closed the Plaintiff's Post Office Box on **10th December 2013** due to non-payment of renewal charges. Consequently, the onus to prove service to the Plaintiffs shifts to the Defendant that the said notices were received. Counsel referred to **Rule 15 of the Auctioneer Rules** and submitted that the Notification of Sale requires personal service to the defaulter or an adult member of his family akin to service of summons to enter appearance. Therefore, in view of the lack of an affidavit sworn by the Auctioneer detailing the manner in which service was effected, the same was invalid. In that regard, the Plaintiff's equitable right of redemption had not arisen for want of proper statutory notice as well as premature for non-compliance with Auctioneer's Rules.

On behalf of the Defendant, it was submitted that it is a presumption of the law that service shall be deemed effected on the Plaintiff's last known postal address. Thus, in the event that there was any change in the postal address, the Defendant ought to have been informed. Counsel submitted that there was no evidence tendered to show that the Defendant had been notified of such closure. It was further submitted that the Plaintiffs, from their correspondence, were aware of the said notices since as they initiated negotiations on the mode of settlement to avert the looming auction. Counsel also submitted that the Plaintiffs had not met the threshold for the grant of injunction orders first because they misled the court into believing that the statutory notices had not been served. Secondly, that there was an admission that of default in payment. Thirdly, that a security for a loan is a commodity for sale and therefore a chargee cannot claim irreparable loss incapable of compensation by an award of damages. Further, that even where it is found that the property was undervalued, the remedy lies in damages and not an injunction. With respect to balance of convenience, counsel submitted that the same tilts in favour of the Defendant because if the interest charged continues to accumulate at the present rate, the charge debt may become more than the value of the security in which instance the Defendant will not be able to realize the debt.

From the foregoing narrative, it is obvious that the Plaintiffs are in default of a loan facility and the Defendant desires to exercise its power to sell the charged property. The Plaintiffs aver that the Defendant has illegally advertised the sale based on the following reasons; first, they challenge the statutory notices stating that they have not been served with the said notice. The Plaintiffs depose that their Post Office Box was closed in December of 2013 and therefore any notices served upon them through their address were not received. The Defendant, in response, deposes that it was not aware of the closure of the Plaintiff's post office box.

I have perused the Defendant's bundle of documents filed as annexures to its Replying Affidavit. On **6th May 2014**, the Defendant's advocate wrote a letter of demand to the Plaintiffs. Subsequently on **13th May 2014** a demand under **Section 90(1) of the Land Act and Section 56(2) of the Land Registration Act**, being the Statutory Notice of Sale in respect to the charged property was sent to the Plaintiffs. Thereafter, on **27th August 2014** a **40 Days Notice** under **Section 96(3)(h) of the Land Act** was issued to the Plaintiffs. These letters were mailed to the Plaintiffs through **P.O Box 66245 - 00800 Nairobi** and there are Certificates of Postage demonstrating that they were indeed sent via Registered Post. The address used by the Defendant's advocate is the same as that in the Letter of Offer at the time of taking the facility. It is this address that the Defendant claims was closed due to non-payment of renewal charges.

Whilst the Plaintiffs were aware that their Post Office Box has been closed for non-payment of renewal fees, there is no evidence that they informed the Defendants of this development. The general rule is that service via post is done through the last known address. Any change as to the address, in my view, is upon the borrower to notify the lender. In the words of my brother Munyao J. in **Moses Kibiego Yator v Eco Bank Kenya Limited E&L Eldoret No. 426 OF 2013 [2014] eKLR** *There is nothing wrong in sending a statutory notice by registered mail to the last known address of the chargor. One cannot invalidate a statutory notice on the reasoning that it was sent by registered mail. That is a recognized mode of service of a statutory notice.* In that regard, the Plaintiff's claim as to service of these notices fails.

Turning onto the Notification of Sale which is issued and served by the Auctioneer per the Auctioneer's Rules, the requisite provision is Rule 15 which provides as follows:-

Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property—

(a) record the court warrant or letter of instruction in the register;

(b) prepare a notification of sale in the form prescribed in Sale Form 4 set out in the Second Schedule indicating the value of each property to be sold;

(c) locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;

(d) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;

(e) on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement

In the bundle of documents filed by the Defendant, there is a Notification of Sale issued by **M/s Garam Investment** dated **4th September 2014**. The same is also in a prescribed form detailing the outstanding debt, the property to be sold and the auction date and time. On **6th September 2014**, **Joseph Mungai Gikonyo of M/s Garam Investment** swore an affidavit and detailed how service was effected. He deposed that he served the 2nd Defendant at Our Lady of Mercy Secondary School in Shauri Moyo and another Notification through Registered Post. On the foregoing, I am satisfied that service was properly effected upon the Plaintiffs, first because there was personal service upon the 2nd Plaintiff who is an adult member of the registered proprietor and secondly through registered post.

With respect to the issue that the Defendant was computing interest at high rates, the Plaintiff seemed to have abandoned this ground. I say so because no evidence was tendered or submissions made in respect to this issue. As pointed out to this Court, **Section 44A of the Banking Act** limits the amount of interest that can be recovered on defaulted loans. There was no attempt made by the Plaintiffs to show that the Defendant had contravened this provision.

The Plaintiffs also averred that the property has been undervalued at a current market value of Kshs. 20 Million whereas the same is Kshs. 32 Million. The obligation on a chargee to ensure that a forced sale valuation is undertaken by a valuer comes under the heading to **Section 97** of the Land Act, 2012 – **“Duty of chargee exercising power of sale”**.

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

There are two valuation reports each done upon the instruction of either party. The report by **Daytons Valuers Limited** on instructions of the Defendant was done on **29th October 2014** and the intended sale advertised on **2nd February 2015** a period of 3 months. The report by **Tuliflocks Limited** is stated to have been undertaken on **10th September 2014**, a little under 2 months before the one done by the Defendant. What then does a Court do when presented with two valuation reports with conflicting values of the properties? Gikonyo J. in the case of **Olkasasi Limited v Equity Bank Limited HCCC Nairobi No. 222 OF 2014 [2015] eKLR** aptly explained as thus:

“The Applicant has not offered sufficient evidence to show that the valuation is a complete undervaluation of the suit property. The Report was done by a Valuer whose competence has

not been questioned. The newspaper cuttings are not the kind of evidence that would disapprove a valuation by a professional Valuer. It is not even a medium to interrogate the market price. 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. I dismiss it”

I could not agree more with the reasoning by Gikonyo J. above. It is not sufficient to place a parallel valuation report with different figures to show that the property in question is under-valued. The Plaintiff has to do much more than that to prove under-valuation. In that regard, this ground fails.

On the foregoing, I find that the Plaintiff’s application lacks merit and hereby dismiss the same with costs to the Defendant. Having dismissed the Plaintiffs application dated **13th February 2015**, the Court proceeds to allow the Defendants, Notice of Motion dated **16th March 2015** in terms of prayer **No.2,3, and 5** given that this is a matter that deals with realization of security .

Costs to the Defendant.

It is so ordered.

Dated, Signed and Delivered this **31st** day of **July, 2015**

L.GACHERU

JUDGE

In the Presence of:-

None attendance for the Plaintiffs/Applicants

Mr Wawire for the Defendant/Respondent

Nyangweso: Court Clerk

L.GACHERU

JUDGE

Court:

Ruling read in open Court in the presence of **Mr Wawire** for the Defendant and absence of **Mr Nyakiagana** for the applicant.

L.GACHERU

JUDGE

31/7/2015