



REPUBLIC OF KENYA



**KENYA LAW**

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**Cedarwood Hotels & Resorts Investment Company Ltd v Kenya Commercial Bank Limited & another (Civil Appeal E008 of 2023) [2024] KECA 1067 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KECA 1067 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL E008 OF 2023  
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA  
APRIL 12, 2024**

**BETWEEN**

**CEDARWOOD HOTELS & RESORTS INVESTMENT COMPANY  
LTD ..... APPELLANT**

**AND**

**KENYA COMMERCIAL BANK LIMITED ..... 1<sup>ST</sup> RESPONDENT  
GARAM INVESTMENTS AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the ruling of the High Court of Kenya at Nyeri,  
(F. Muchemi, J.) dated 10th November 2022 in HCCC No. E008 of 2022)*

**JUDGMENT**

1. Pursuant to a charge dated 22<sup>nd</sup> November 2013, Kenya Commercial Bank Limited, the 1<sup>st</sup> respondent, advanced a loan of Kshs.295,000,000 to Cedarwood Hotels and Resorts Investment Company Limited, the appellant. A further loan of Kshs.175,000,000 was advanced following a further charge dated 2<sup>nd</sup> April 2015. All that property known as Title No. Nyeri/Municipality Block 1/175 (White Rhino Hotel) (the charged property) was the collateral. Through a letter dated 10<sup>th</sup> August 2017 the 1<sup>st</sup> respondent amalgamated all existing facilities into one term loan of Kshs.520,665,987.
2. In the midst of the Covid -19 pandemic, the appellant ceased to service the loan. Its case was that the pandemic triggered extreme government measures that had a systematic impact on the hospitality sector leading to its closing business from the period between February 2020 and September 2020. This closure affected its obligation to service the loan. There were negotiations between the parties, but the bottom line was that the appellant was not able to service the loan.
3. On 9<sup>th</sup> March 2018 the 1<sup>st</sup> respondent issued a statutory notice under section 90 of the [Land Act, 2012](#) (the Act) demanding the outstanding arrears and informing the appellant of its intention to



exercise its statutory power of sale if payment was not received within three months. When there was no payment, on 15<sup>th</sup> July 2019 the 1<sup>st</sup> respondent issued the statutory notice under section 96(2) and (3) of the Act. The appellant did not challenge the amounts indicated in the said notices. The 1<sup>st</sup> respondent proceeded to engage Acumen Valuers Limited to value the charged property. Their first valuation report dated 15<sup>th</sup> July 2021 gave a market value of Kshs.741,000,000 with a forced value of Kshs.555,750,000. A second valuation report dated 27<sup>th</sup> August 2021 was carried out giving a market value of Kshs.841,955,463 and a forced value of Ksh.631,466,597. In a report dated 6<sup>th</sup> June 2019, Centenary Valuers Limited had valued the property and given a market value of Ksh.1,223,181,000 and a forced value of 875,000,000.

4. In exercising its statutory power of sale, the 1<sup>st</sup> respondent relied on the valuation report dated 27<sup>th</sup> August 2021 by Acumen Valuers Limited. Acting on instructions given by the 1<sup>st</sup> respondent, Garam Investment advertised the charged property for sale by public auction. The sale was slated for 2<sup>nd</sup> June 2022.
5. It was this threatened sale that led the appellant to move the High Court at Nyeri by a notice of motion dated 30<sup>th</sup> June 2022 seeking that the notification of sale be revoked/rescinded/ voided; there be an interlocutory injunction restraining the 2<sup>nd</sup> respondent from further advertising the charged property for the public auction; the court declares that the 1<sup>st</sup> respondent breached its duty of care to the appellant by undervaluing the property; and that there be a finding that the intended sale was unlawful because of the undervaluation of the charged property by the 1<sup>st</sup> respondent. The appellant's case was basically that the 1<sup>st</sup> respondent had undervalued the charged property; that the 1<sup>st</sup> respondent's three valuations were ill-conceived, in bad faith and contrary to section 97(2) of the Act. The appellant stated through its Director Patrick Munene that, aggrieved by the three valuations, it had itself carried out a valuation in February 2022 to find that the charged property had a market value of Kshs.1,150,223,800 and a forced sale value of Kshs.862,667,850.
6. The 1<sup>st</sup> respondent filed a replying affidavit dated 27<sup>th</sup> June 2022 to oppose the notice of motion. It denied that it had undervalued the charged property. It stated that when the appellant challenged the valuation in the statutory notice of sale saying that Centenary Valuers Limited's valuation of 6<sup>th</sup> June 2019 had given the true reflection of the charged property's value, it had got Centenary Valuers Limited to give an explanation on the drop in the value. The explanation was contained in a letter dated 21<sup>st</sup> August 2021 in which it was stated that the drop in valuation between the reports was due to the decline in property values given the Global economic crisis as a result of Covid-19 pandemic. It was on that basis that the 1<sup>st</sup> respondent denied the allegation that it had intentionally undervalued the charged property to deprive the appellant of the charged property's market value.
7. In a ruling delivered on 10<sup>th</sup> November 2022, the learned F. Muchemi, J. dismissed the application with costs, finding that the appellant had not shown that it was entitled to an order for injunction. The learned Judge found that, because the appellant had taken the loan from the 1<sup>st</sup> respondent which it had failed to service, the 1<sup>st</sup> appellant had exercised its statutory power of sale by issuing the notices, and, that the 1<sup>st</sup> respondent had complied with section 97(2) of the Act as the appellant had failed to challenge the notices as being invalid or having been issued irregularly.
8. Regarding the valuation reports, this is what the learned Judge stated:-

“ 49. The applicant submits that the 1<sup>st</sup> respondent has grossly undervalued the suit property as it is eager to dispose of the property. The applicant further states that if the suit property is sold at a loss, it shall cause irreparable damage that cannot be compensated by way of damages. The 1<sup>st</sup> respondent on the other



hand submits property once charged becomes a commodity of sale and in any event, any damage that the applicant alleges it shall suffer can be compensated by way of damages.

50. Section 97(2) imposes a duty on the chargee to ensure that a forced sale evaluation is undertaken by a qualified valuer. The 1<sup>st</sup> respondent has complied with this requirement by availing the report by Acumen Valuers Limited dated 27<sup>th</sup> August 2021. The applicant challenges this report on the grounds that the security was grossly undervalued. A report dated 6<sup>th</sup> June 2019 by Centenary Valuers Limited was filed by the applicant that gave the property a value way above that of Acumen Valuers. The defendant explains that the difference between the two reports was due to the inset of COVID -19 which depressed the market value of properties and had a significant impact on businesses especially the hospitality industry.
51. I have perused the two reports and noted the substantial difference in the applicants and the respondent's reports. However, it was held in the *Olkasasi Limited -vs- Equity Bank [2015]KLR:-*

“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 charged property. The report must be dislodged on real items, terms, and legal parameters that are acceptable in the practice and profession of valuers.”

52. The principle in the case of *Olkasasi* applies to this case that it has not been shown that the respondent's valuation is incompetent. It is trite law that any loss suffered due on irregular exercise of statutory power by the charge shall be remedied by way of damages. Any undervaluation if any is not a good ground to grant an interlocutory injunction against the charge”

9. Aggrieved by the learned Judge's decision, the appellant has come before us on this appeal. The grounds are contained in the Memorandum of Appeal as follows:-

- “ 1) The learned Judge erred in law and fact in her finding that the appellant failed to demonstrate that the valuation carried out by Acumen Valuers Limited was an undervaluation of the suit property. A finding that is not supported by the evidence on record.
2. The learned Judge erred in failing to consider the fact that the valuation carried out by Acumen Valuers Limited was for recovery purposes only and not for ascertaining the value of the property. A fact admitted by the 1<sup>st</sup> respondent.
3. The learned Judge failed to consider the fact that the valuation report done on Title No. Nyeri/Municipality Block/175 (White Rhino Hotel) that is relied on by the respondents was done more than a year from the date of the intended public auction and reliance on the same for auction in 2022 would be in breach of provisions of Section 97(2) of the *Land Act*.



4. The learned Judge erred in law and fact in her finding that the appellant failed to demonstrate prima facie case.
  5. The learned Judge erred in law and in fact in not ordering fresh valuation prior to any proposed auction noting this was the most equitable remedy in the circumstances.
  6. The learned Judge erred in law and fact in failing to consider the facts of the case against the evidence on record and the applicable laws thus arriving at the wrong conclusion.”
10. When this appeal came before us for hearing, learned counsel Mr. Githiri was holding brief for learned counsel Mr. Njuguna for the appellant while senior counsel Mr. Kiragu Kimani was appearing with learned counsel Mr. Ondieki for the respondents. Counsel had filed respective written submissions which they highlighted.
  11. The crux of the appeal, according to the appellant’s counsel, was that the valuation report relied upon by the 1<sup>st</sup> respondent grossly undervalued the charged property; that there was a substantive difference of Kshs.400,000,000 between November 2019 and August 2021 that had not been explained. It was submitted further that, the prevailing tough economic conditions had been factored in and therefore the undervaluation of the charged property had failed to safeguard the appellant’s statutory rights under section 97(2) of the Act. It was the learned counsel’s case that, section 97(2) of the Act applied where the charged property was to be sold in the exercise of power of sale; that the section provided that a chargee shall, before exercising the statutory right of sale, ensure that a forced sale valuation is undertaken by a valuer; that the 1<sup>st</sup> respondent owed the appellant a duty of care, which was to obtain the best price reasonably obtainable at the time of sale; that the 1<sup>st</sup> respondent had failed the appellant by undervaluing the charged property. Reference was made to the High Court decision in *Koiten Ole Kipolonka Orumos -v- Mellech Engineering & Construction Limited & 2 others (2018)KLR* in which Gikonyo, J. observed that the forced sale valuation is not only for the purposes of carrying through the public auction or solely for recovering the debt, but was for reinforcing the rights of the chargor to have a reasonable price for his property.
  12. Lastly, it was submitted that the charged valuation by Acumen Valuers Limited did not reflect the value of the charged property as it failed to consider some relevant factors -
 

“as it was solely prepared for purposes of carrying through a public auction and recovering the debt. The appellant submits that the unexplained differential between the values of the past two valuations carried out by the bank in 2017, 2019 is a clear indication that the Valuer considered some irrelevant considerations or failed to consider some relevant considerations. In the case of *Levi House Constructions and Engineering Ltd –vs- ABC Bank Limited and Another [2021]eKLR* the court stated. “It is common ground that the value of the land always appreciates and even then, the figures are always constantly rising every other year.” There is no proper explanation of why the value of the land given in 2019 has fallen with almost Kshs.500,000,000 and Kshs.400,000,000 in 2021 and 2022 respectively, the excuse given of Covid - 19 cannot hold any water.”
  13. In response, it was pointed out that, because the learned appellant’s counsel had not, either in the written submissions or orally, addressed the Court in respect of grounds 5 and 6 of the memorandum of appeal, the Court should consider the two grounds as having been abandoned. We are of the same view.



14. According to the learned senior counsel, the issue that the High Court had to determine, based on grounds 1, 3 and 4 of the injunction application dated 30<sup>th</sup> May 2022, was whether the 1<sup>st</sup> respondent had complied with section 97 of the Act before exercising its statutory power of sale. Senior counsel submitted that under section 97(2) of the Act, the 1<sup>st</sup> respondent had discharged its burden by ensuring that a forced sale valuation had been undertaken by a valuer. It was common ground that the competence of the valuer in question had not been attacked. The High Court, submitted senior counsel, had correctly found that the charged property had been valued for the purposes of sale valuation. The High Court had found that seeking an injunction to stop the exercise of the statutory power of the sale based on a higher valuation report was contrary to the law. Senior counsel pointed out that the injunction application dated 30<sup>th</sup> May 2022 was intended to stop the public auction set for 2<sup>nd</sup> June 2022. An interim order was obtained to stop the auction. It followed, that when the injunction application was heard and determined, the intended sale had been enjoined, and therefore the issue whether the charged property was sold at less than 25% of the market value did not arise in the proceedings before the High Court.
15. It was submitted on behalf of the respondents that the valuation report dated 27<sup>th</sup> August 2021 was admitted by both sides to be the forced sale valuation that the 1<sup>st</sup> respondent was relying on to exercise its statutory power of sale. The learned Judge, it was submitted, had considered the valuation and found that:-
  - a. the appellant had not adduced evidence to show that the valuation done was a complete undervaluation of the charged property;
  - b. the appellant had not demonstrated that Acumen Valuers Limited were unqualified and did not outline any irrelevant factors considered by the valuers in undertaking their valuation; and
  - c. the appellant's main focus was on the drop in the market price of the charged property which had been explained by the 1<sup>st</sup> respondent through a letter dated 21<sup>st</sup> September 2021 by Centenary Valuers Limited who attributed the drop in the market value to the Covid – 19 pandemic.
16. Regarding the complaint that the High Court had erred in not granting an injunction because the valuation report relied on the 1<sup>st</sup> respondent was done more than one year before the date of the intended auction, it was submitted by the learned senior counsel that the valuation report was dated 27<sup>th</sup> August 2021 and the public auction was for 2<sup>nd</sup> June 2022, therefore it was factually not correct that the valuation report relied upon by the 1<sup>st</sup> respondent was more than one year old.
17. We have anxiously considered the ruling subject of the appeal, the grounds of appeal and the rival submissions. As the first appellate Court, our responsibility is to reconsider the evidence that was adduced before the trial court, re-evaluate it, and satisfy ourselves that the conclusions reached by the trial Judge were consistent with the evidence. (See *Sanitam Services (E.A.) Ltd -vs- Rentokil* [2006] 2 KLR 70).
18. It is common ground that the bone of contention was the valuation report dated 27<sup>th</sup> August 2021 by Acumen Valuers Limited. There was no allegation that Acumen Valuers Limited were not competent and/or qualified valuers. The valuation report put the market value at Kshs.841,955,463 with a forced sale value of Kshs631,466,597. We note that this valuation before the 1<sup>st</sup> respondent sought to exercise



its statutory power of sale satisfied the requirements of section 97(2) of the Act which provides as follows:-

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

19. The appellant’s case before the trial court was that the 1<sup>st</sup> respondent had grossly undervalued the charged property, and had thereby compromised its right to have a reasonable value for its property. The basis upon which the appellant claimed that the 1<sup>st</sup> respondent had grossly undervalued the charged property was that, in 2019 the 1<sup>st</sup> respondent had instructed Centenary Valuers Limited to value the property. They had returned the market value of Kshs.1,223,181,000 and a forced sale value of Kshs.875,000,000. On 15<sup>th</sup> July 2021 Acumen Valuers Limited had given the market value as Kshs.741,000,000 and forced sale value of Kshs.555,750,000. The appellant objected to these valuations through letters dated 27<sup>th</sup> August 2021 and 14<sup>th</sup> September 2021. It went ahead and caused the charged property to be valued. The market value was indicated as Kshs.1,150,223,800 with a forced sale value of Kshs.862,667,850. It was the appellant’s case that the 1<sup>st</sup> respondent ought to have relied on the valuation report done on 6<sup>th</sup> June 2019 by Centenary Valuers Limited in exercising its statutory power of sale.
20. We note that, following the objections to the valuations, the 1<sup>st</sup> respondent got Centenary Valuers Limited to address the concerns. Centenary Valuers Limited did respond in letter dated 21<sup>st</sup> September 2021. The letter reads as follows:-

“ ....

Reference is made to the above, our valuation report dated 6<sup>th</sup> June 2019 and your letter dated 15<sup>th</sup> September 2021.

Please note that we adopted fairly conservative figures in our valuation for both land and construction considering that the new wing of the hotel has exclusive design, finishing, and fittings. For example, land values then within the specific area were ranging between Kshs.150,000,000 to Kshs.200,000,000 per acre but we used Kshs.100,000,000 per acre.

The discrepancy between the two valuations is however due to the decline in property values from 2019 due to tough economic times.

The situation has been worsened over the past two years by the COVID -19 pandemic, with the hospitality industry being the worst hit.

We also wish to clarify that loose assets depreciate with time depending on the case.

Further, note that market value is the estimated amount for which an asset should be exchanged on the valuation date between a willing buyer and a willing seller depends greatly on the prevailing economic situation.

It is therefore normal for a property to either appreciate or depreciate in value depending on the prevailing economic circumstances at the time of the valuation.”



21. Under section 97(1) of the Act, the 1<sup>st</sup> respondent owed a duty of care to the appellant to obtain the best reasonably obtainable price at the time it sought to exercise its statutory power of sale in respect of the charged property. Section 97(3) of the Act provides as follows:-
- “(3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market—
- a. there shall be a rebuttable presumption that the chargee is in breach of the duty imposed by subsection (1); and
  - b. the chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the chargee has complied with the duty imposed by subsection (1).”
22. We have to point out that the appellant did not complain before the trial court that the 1<sup>st</sup> respondent’s valuation of the charged property omitted to adequately capture the developments of the property. The mere fact that the valuation by the appellant placed a valuation that was significantly higher than the valuation by the 1<sup>st</sup> respondent did not mean, without more, that the 1<sup>st</sup> respondent had undervalued the property. (See *Olkasasi Limited -vs- Equity Bank Limited* [2015]eKLR). The appellant was required to dislodge the 1<sup>st</sup> respondent’s valuation report by placing on record real evidence and legal parameters that were acceptable in the practice and profession of valuers.
23. If the basis of the appellant’s complaint before the trial court was that the 1<sup>st</sup> respondent’s valuation was wanting because it did not take into consideration a relevant issue or considered an issue it ought not to have considered while valuing the charged property, then it ought to have provided the particulars of the relevant considerations or the irrelevant considerations. Without such particulars, we find that the trial court’s ruling cannot be faulted. The learned Judge cited the decisions in *Zum Zum Investments Limited -vs- Habib Bank Ltd* [2014]eKLR and *Palmy Company Limited -vs- Consolidated Bank of Kenya Limited* [2014]eKLR whose principles can be generally summarized as follows:-
- a. it is not enough for the appellant to merely claim that the intended selling price is not the best price obtainable at the time of producing a counter valuation report;
  - b. the applicant must through evidence show that the valuation report that the bank is relying on to exercise its statutory power of sale does not give the best price obtainable at the time; and
  - c. a prima facie burden rests with the applicant, who is seeking an injunction, to demonstrate that its right to obtain the best reasonably obtainable price at the time is being infringed through the undervaluation of the bank of the charged property.
24. The 1<sup>st</sup> respondent, through the letter from Centenary Valuers Limited, explained that the drastic drop in the market price of the charged property from Kshs.1,223,181,000 in 2019 and Kshs.841,955,463 was due to the decline in property values resulting from the economic challenges caused by the Covid – 19 pandemic. It was on that basis that the 1<sup>st</sup> respondent had persuaded the trial court that a valuation report presenting a higher market value than the one it sought to rely on did not warrant the grant of injunction. The trial court accepted the explanation by the 1<sup>st</sup> respondent as was contained in the letter dated 21<sup>st</sup> September 2021 by Centenary Valuers Limited. We have no reason to find otherwise.



25. After considering the evidence that the application presented, this is what the learned Judge stated in paragraph 44 of the ruling under challenge:-

“ 44. Guided by the principles set out in the cases above, it is my considered view that the applicant has not offered evidence to show that the valuation done was a complete undervaluation of the suit property. The applicant has not demonstrated that the Valuer Acumen were unqualified. Furthermore, the applicant did not outline any irrelevant factors considered by the valuers in undertaking their valuation. In any event, the applicant’s main focus is that there has been a drastic drop in the market price of the suit property. This discrepancy has been explained by the 1<sup>st</sup> respondent through its letter dated 21<sup>st</sup> September 2021 by Centenary Valuers Limited who attributed the drop in market price to the Covid - 19 impacted negatively on the economy and the hotel sector was one of the worst hit. As such, I am satisfied that the 1<sup>st</sup> respondent discharged its duty of care under section 97 of the Land Act.”

26. On our part, we have reconsidered and re-evaluated the evidence that the learned Judge was dealing with. After considering the grounds and the rival submissions, we have come to the conclusion that the learned Judge was correct in her findings as contained in the ruling.

27. The consequence is that the appeal lacks merits, and is dismissed with costs to the respondents.

**DATED AND DELIVERED AT NYERI THIS 12<sup>TH</sup> DAY OF APRIL 2024**

**W. KARANJA**

.....

**JUDGE OF APPEAL  
JAMILA MOHAMMED**

.....

**JUDGE OF APPEAL  
A.O. MUCHELULE**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

