



KCB Bank Kenya Limited v Transwide Africa Petroleum Dealers (Environment & Land Case 43 of 2023) [2024] KEELC 4656 (KLR) (13 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4656 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 43 OF 2023

J OMANGE, J

JUNE 13, 2024

**IN THE MATTER OF PARCEL OF LAND KNOWN AS TITLE NO. NAIROBI
BLOCK 97/1827 IN THE NAME OF PHANUEL OKWENGU SILVANO**

AND

**IN THE MATTER OF SECTION 90(1)(2)(3)(E),
96,97,98, 104 (1) OF THE LAND ACT NO.6 OF 2012**

AND

ORDER 37(4) OF THE CIVIL PROCEDURE RULES OF THE LAWS OF KENYA

BETWEEN

KCB BANK KENYA LIMITED PLAINTIFF

AND

TRANSWIDE AFRICA PETROLEUM DEALERS DEFENDANT

JUDGMENT

1. In the Originating Summons dated 25th January, 2023 the Plaintiff seeks that the court determines the following questions;
 - i. Whether the Plaintiff in this suit can seek the Court’s leave to sell the suit property as Title No. Nairobi Block 97/1827 at the best, reasonable obtainable price but not necessarily one above the forced sale value as the Plaintiff has conducted four auctions between 2016 and 2021 but both failed due to low bids or no bids.
 - ii. Whether the Plaintiff has exercised a reasonable degree of care to ensure that the suit property obtains the best market price during its sale.



- iii. Whether this Honourable court is obliged to grant the Plaintiff leave to sell the suit property known as Title No. Nairobi Block 97/1827, at the best obtainable price but not necessarily one above the forced market value as the four auctions done on the suit property have failed due to having law or no bids at all.
 - iv. Whether the sale of the suit property at the best obtainable price but not necessarily above the forced sale value is the only viable solution to reduce a greater part of the balance owed by the Defendant to the Plaintiff.
 - v. Whether the sale of the suit property at the best obtainable price but not necessarily above the forced sale value is the only viable solution to reduce a greater part of the balance owed by the Defendant to the Plaintiff.
 - vi. Whether the Defendant shall bear the costs of this suit.
2. The essence of the summons is that the Plaintiff seeks leave of court to sell the suit property Nairobi Block 97/1827 at the best obtainable price but not necessarily one above the forced market value.
 3. In the affidavit in support of the Originating Summons, Lilian Sogo Head Counsel of Litigation for KCB Bank Kenya Ltd. avers that the Plaintiff did advance the Defendant an overdraft facility of USD 100,000 and an SME loan of USD 120,000 for purposes of providing a working capital.
 4. That a legal charge was thereafter created on 12th July, 2013 over the suit property. This charge was registered on 19th July, 2013. That on 12th July, 2013 a Deed of Guarantee of indemnity was made by the property owner of the suit property one Phaniel Okwengu Silvano. That a further deed of guarantee and indemnity against fluctuation and depreciation of the US Dollar was created dated 12th July, 2013.
 5. The counsel depones that the bank issued several notices to the Defendant who had defaulted in repaying the loan facility to no avail. Efforts by the bank to exercise its statutory power of sale bore no fruit as the offers for the suit property were below the forced sale value.
 6. In determining the questions which the court was asked to determine, the court identifies the following issues; Whether the chargee has tried to obtain the best price after following the due process for exercise of the statutory power of sale. Whether this court should allow the chargee to sell the suit property at a price below the forced sale value.
 7. On the first issue it is trite that before exercise of the statutory power of sale, the charge must issue the statutory notices as envisaged by Section 90 of the Land Act. In the instant case the notices which are attached to the supporting affidavit of the counsel are addressed to the Defendant and not to the guarantor who is the title holder and who will suffer the most from the sale of the suit property. Even though he had agreed to indemnify the Plaintiff he must be notified. The guarantor must have an opportunity to redeem his property. In this case no evidence has been presented that the guarantor was offered this opportunity. On this ground alone, this suit would fail.
 8. However even if the guarantor had been notified of the default through issuance of the statutory notices before the court could consider allowing sale of the property below the forced sale value, the court would have to be satisfied that the chargee is not able to exercise the other remedies in Section 90 of the Act. No evidence has been adduced in this regard. For the foregoing reasons, I find that I cannot allow the orders sought by the Plaintiff.

As such the Plaintiff's suit is dismissed with no orders as to costs since it was undefended.



JUDGEMENT DATED, SIGNED AND DELIVERED ON 13TH DAY OF JUNE, 2024 VIA MICROSOFT TEAMS.

J. OMANGE

JUDGE

In the presence of: -

Ms. Ndirangu for the Plaintiff/Respondent

-Court Assistant -Steve

