



Bakari (Suing as Administrator of the Estate of the Late Zuhura Salim Ali - Deceased) v Gulf African Bank Limited & 2 others (Civil Appeal E047 of 2022) [2024] KEHC 2012 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEHC 2012 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E047 OF 2022
HK CHEMITEI, J
FEBRUARY 29, 2024**

BETWEEN

FATUMA MOHAMED BAKARI (SUING AS ADMINISTRATOR OF THE ESTATE OF THE LATE ZUHURA SALIM ALI - DECEASED) APPELLANT

AND

**GULF AFRICAN BANK LIMITED 1ST RESPONDENT
DISTRICT /COUNTY LAND REGISTRAR, MOMBASA ... 2ND RESPONDENT
GARAM INVESTMENT AUCTIONEERS 3RD RESPONDENT**

(Being An Appeal Against The Ruling And Order Of Hon C.N. Ndegwa (SPM) Dated 1St March 2022 In Mombasa CMCC E043 Of 2021)

JUDGMENT

1. The appellants father whose estate she was now administering took out a loan facility from the 1st Respondent and land parcel number Mombasa /Block /XII/294 was used as a collateral. The amount advanced to the deceased was Kshs 4,000,000.
2. It's also instructive to note that the above security was registered in the name of one Zahura Salim Ali who acted as a guarantor. The principal debtor passed away on 25th April 2016 before finalising the repayment of the loan.
3. The bank thereafter in its exercise of its statutory power of sale advertised the security for auction after issuing notices to the chargee and the guarantor. This was sent after the deceased had passed on.
4. It appears from the record that the appellant applied to pay the loan when she got wind of the impending sale. The repayment was not however finalised and she sought refuge in court.



5. The trial court after hearing her application for injunction dismissed the same on the ground principally that she was estopped from denying the liability after she had committed herself to repay it.
6. The appellant sought intervention of this court and on 24th March 2023 the court granted temporary stay of execution pending appeal.
7. The appellant has raised 9 grounds in her memorandum of appeal. Much of the grounds deal with issues which essentially ought to be raised during trial. In my view the substantive ground is whether in light of the death of the principal was a valid notice issued?
8. The parties were directed to file written submissions which this court was unable to trace in the court file. In essence therefore the court shall rely on the pleadings on record.
9. What is undisputed is that the respondents issued notices as per the statutory requirements but the same were issued on the face of it after the principal had passed on. In view of this were the notices valid? I think this was an issue which the trial court ought to have taken into account and issue favourable orders to the appellant.
10. There is also other germane issue on whether the appellant admitted the loan and refused to pay. Again if this was the case it meant for instance that the contract had been varied and thus it ought to have been an issue to be considered on trial.
11. This court wished not to go into the merit or otherwise of the matter since it needs further scrutiny which can only be done by a trial court and not this court. The matter is still fresh and venturing into the other grounds raised by the appellant is akin to inviting the court to determine fully the matter.
12. Needless to say and in light of the famous case of *Giella v Cassman Brown* (1973) E A 358, the appellant had established doubt on the whole auction exercise by the respondents and ought to have been granted injunctive reliefs pending the determination of the suit.
13. In the premises the appeal is hereby allowed, the trial court decision set aside and there be a temporary order of injunction to restrain the respondents jointly and severally from exercising its statutory power of sale over land parcel number Mombasa Block XII/294 pending the hearing and determination of the suit.
14. Costs of this appeal shall be in the cause.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 29TH DAY OF FEBRUARY 2024.

H K CHEMITEI

JUDGE

