



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gulf African Bank Limited v Said (Civil Case 91 of 2018)  
[2024] KEHC 2112 (KLR) (26 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 2112 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE 91 OF 2018  
DKN MAGARE, J  
FEBRUARY 26, 2024**

**BETWEEN**

**GULF AFRICAN BANK LIMITED ..... PLAINTIFF**

**AND**

**ABDULRAHMAN ALI SAID ..... DEFENDANT**

**RULING**

1. By an application by way of Originating Summons dated 23/10/2018, the applicant sought several prayers. Two prayers were granted on 20/2/2020 as follows: -
2. The reserve price indicated in the application was Kshs 4,000,000/= as at 23/10/2018. The sale that allegedly took place on 23/5/2023 the plaintiff decree and holder sold the suit land at Kshs 1,875,000. The court had declined to allow the parties to sell below the reserved price.
3. In circumstances where land is sold by public auction though the chargee's exercise of its statutory power of sale, various safeguards are given to ensure fairness. Section 98 of the Land act provides as doth:-
  - “(1) If a chargee or a receiver becomes entitled to exercise the power of sale, that sale may be— (a) of the whole part of the charged land; (b) subject to or free of any charge or other encumbrance or charge having priority to the chargee's charge; (c) by way of subdivision or otherwise; (d) by private contract at market value; (e) public auction with reserve price; (f) for a purchase price payable in one sum or by instalments; or (g) subject to any other conditions that the chargee shall think fit, having due regard to the duty imposed by section 97(1).”



4. Where land is sold via a court order there are two safeguards. The first one is approval by the court while the second while is the notice to show cause where a decree is over one year old. This is meant to ensure current valuation is done. Order 22 rule of the Civil Procedure Rules provide as follows: -

‘48. Attachment of immovable property [Order 22, rule 48.]

(1) Where the property to be attached is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such purported transfer or charge, and the attachment shall be complete and effective upon registration of a copy of the prohibitory order or inhibition against the title to the property.

(2) A copy of the order shall be affixed on a conspicuous part of the property.

5. In the case of NCBA Bank PLC v Cyrus Ndung’u Njeri t/a Digital Tours and Logistics [2021] eKLR, justice G V Odunga as then h was stated as doth:-

“

“ 57. It is therefore clear that consumers of service including banking services are entitled to the protection of their economic interests. Those rights, in my view include the right to the best possible market price when the secured creditor resorts to selling the security to recover its loan. Therefore, where the value of the security being sold can be ascertained, it is the duty of the secured creditor to ascertain the said value as much as possible dispose the property at a price as near as possible to the value of the property in question. Reserve price is not, as the Appellant contends, for the benefit or information to the bidders only but is also meant to protect and safeguard the interests of the customer.

58. Long before the advent of the current Constitution, it was held by the Court of Appeal in *Mbuthia v Jimba Credit Finance Corporation & Another*, Civil Appeal No. 111 of 1986 - as hereunder:

“What is meant by having “regard to the interest of the mortgagor?” there is similar legislations in England (*see section 101 of the Law of Property Act (1925)*)...In *Halsbury’s Laws of England, 4<sup>th</sup> ed. Vol. 32 para. 276* it is stated:

If the mortgager seeks relief promptly a sale will be set aside if there is fraud or if the price is so low as to be in itself evidence of fraud.

...So far as mortgagees are concerned the law is set out in *Cuckmere Brick Co. Ltd v Mutual Finance Ltd (1972) 2 ALL E.R. 633, (1971) Ch.939*. If a mortgagee enters into possession and realizes a mortgaged property it is his duty to use reasonable care to obtain the best possible price which the circumstances of the case permit. He owes this duty not only to himself (to clear off as much of the debt as he can) but also to the mortgagor so as to reduce the balance owing as much as possible...There are several dicta to the effect that the mortgagee can choose his own time for the sale, but I do not think this means that he can sell at the worst possible time. It is at least arguable that, in choosing the time he must exercise a reasonable degree of care.”

59. The learned trial magistrate found that the Appellant had not explained why it decided to ignore its own reserve price and to sell the property at a lower price.



In light of the material placed before me, there is no warrant for me to interfere with the findings of the learned trial magistrate.”

6. The effect of selling below the market price is not to invalidate the sale but place the decree holder at a disadvantage to make good or forebear the different.
7. This is also buttressed by rule 11 of the Auctioneers Rules. The relevant portion of Rule 11 of the Auctioneer’s Rules provides as follows; -

“(1) A court warrant or letter of instruction shall include, in the case of—

(a) movable property—

- (i) the decretal amount, date of decree, date of return to court or where there is no decree, the exact amount to be recovered as at a date not later than the date of the letter of instruction plus the estimated daily or monthly interest or rent to accrue thereafter;
- (ii) the person amongst whom the decree is to be executed;
- (iii) the exact location of goods;
- (iv) the person to point out the goods;
- (v) where ascertainable, a list of the goods to be attached or repossessed;
- (vi) where appropriate, reserve prices or where there are to be no reserves prices, a record of the reasons for not selling subject to such reserve prices

(b) immovable property— (i) as in (i) to (v) in paragraph (a);

- (x) the reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale.

(2) The letter of instruction shall be in the Sale Form 1 out in the Appendix.

8. The court is unable to understand what happened from the file where the value was given as Kshs 4,000,000/= 5 years ago and it has now plummeted to 1,8750,000/=. The application is not opposed. The court cannot delve into conjecture, hyperbole and speculation.
9. Nevertheless, the sale has taken place. It is fair and just that the sale be approved. I allow the application. No order as to costs.

### **Determination**

10. ....
  - a. The Application dated 8/11/2023 is allowed.
  - b. File is closed.



**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 26<sup>TH</sup> DAY OF FEBRUARY, 2024.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

No appearance for parties

Court Assistant - Brian

