



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT IN NAIROBI

E.L.C. NO. 710 OF 2017

SKEME ADVERTISING GROUP LIMITED.....1ST PLAINTIFF

PAMELA NDUKU MUTUA.....2ND PLAINTIFF

VERSUS

PRIME BANK LTD.....1ST DEFENDANT

KEYSIAN AUCTIONEERS AND COURT BROKERS.....2ND DEFENDANT

RULING

Through the application dated 15/11/2017, the Plaintiffs seek an injunction to restrain the Defendants from selling, auctioning, transferring or in any manner interfering with the 1st Plaintiff's proprietary interest and peaceful enjoyment of the property known as Nairobi Block 140/288/103 situated in Nyayo Embakasi Estate, Nairobi ("the Suit Property") pending hearing and determination of this suit.

The Plaintiffs advanced two main grounds for their application. Firstly, that no valuation has been undertaken by the 1st Defendant who seeks to sell the Suit Property at Kshs. 5,625,000/= which will be at a gross under value and amount to a deprivation of the Plaintiffs' property. Secondly, the Plaintiffs contend that no notification of sale was served upon them.

At the hearing of the application the Plaintiffs Advocate appeared to challenge the notification of sale as being unlawful and failing to comply with Section 96 of the Land Act, which contradicts their earlier assertion that the notice was not served on them.

The application is supported by the 2nd Plaintiff's Affidavit in which she admits that the 1st Defendant advanced the 1st Plaintiff the sum of Kshs. 5 Million against the Suit Property which she offered as security for the loan. The Plaintiffs claim that the current market price for the Suit Property is in excess of Kshs. 10 million and that the 1st Defendant wishes to sell it at a gross under value. The Plaintiffs contend that the Defendant ought to get the best price reasonably obtainable at the time of sale since the chargor has a right to have a reasonable price for its property. No evidence was produced to show that the market value of the Suit Property is in excess of Kshs. 10 million.

The Plaintiffs argue that the sale process is premature and that they have satisfied the requirements for the grant of an injunction to stop the auction scheduled to take place on 1/12/2017 so that they can be given time to make arrangements to pay the debt. The debt is admitted by the Plaintiffs. The documents produced by the 1st Defendant show that the debt owing as at 31/10/2017 was Kshs. 8,490,930/= and

that the Plaintiffs last made payment on 30/3/2016.

The Defendants opposed the application and relied on the 1st Defendant's replying affidavit together with the supporting documents. The 1st Defendant argues that no evidence was produced by the Plaintiff in support of their contention that the Suit Property was valued at Kshs. 7.5 million in 2015. The 1st Defendant referred the court to the Plaintiffs loan application dated 20/2/2015 in which the 2nd Plaintiff gave the estimated value of the Suit Property as Kshs. 6.8 million. The Plaintiffs valuation report done by Claytown Valuers Limited dated 25/11/2015 gave Kshs. 6.8 million as the open market value for the Suit Property and the forced sale value is given as Kshs. 5.1 million. It was the 1st Defendant's submission that Section 97 of the Land Act binds the chargee to conduct a valuation to determine the forced sale value before exercising the right of sell to determine the forced sale value.

The 1st Defendant did a valuation on 7/8/2017 which gave the open market value for the Suit Property as Kshs. 7.5 million and the forced sale value of Kshs. 5,625,000/=.

The Defendant relied on the case of **Stephen Kipkatam Kenduiywa t/a Farm V Sidian Bank Limited & Another** [2017] eKLR in support of its argument that what a chargee is enjoined to do is ensure that a forced sale valuation is undertaken by a valuer by dint of Section 97 (2) of the Land Act. In that case, Judge Sila Munyao found that so long as a bank appoints a professional valuer and a report is obtained, its obligation is discharged. The Judge stated that the Bank is not in control and cannot control the professional valuer on the value to give. The court described the forced sale value as the value of a property put into the market for a quick sale; which is expected to fetch a price lower than the market value that can be obtained when the property is properly marketed and time given to obtain the maximum price. Once the Bank conducts a valuation, the rest is left to the market forces to determine the price the auction may fetch. The court observed that the bank's obligation under Section 97 (1) of the Land Act is to obtain the best price reasonably available at the time of sale which may or may not be the market price but will be the best price available considering all factors.

The Defendants annexed copies of the notices of intention to sell the charged property which were sent to the Plaintiff. They are dated 13/2/2017 and 14/6/2017. The Defendant annexed copies of the receipts issued by the Postal Corporation of Kenya showing that the notices were sent to the Plaintiffs on 14/2/2017 and 15/6/2017 respectively. The Plaintiffs advocate later changed her position and stated that she wishes to examine the original receipts issued by the Postal Corporation of Kenya since they do not appear to be similar. Her contention was that the receipts dated 14/2/2017 had the following words; "Merry Christmas and a Happy New Year". While the receipts dated 15/6/2017 had an endorsement at the bottom as follows: "Pay Your Electricity Bill at Your Nearest Post Office". The Plaintiffs' counsel conceded that the receipts were issued by the Postal Corporation of Kenya and not the Defendant. The court will not say much on this since this is not a ground for stopping an option.

The court notes that the statutory notice of sale and the notice of intention to sell the Suit Property were sent to the 2nd Plaintiff through her postal address which is P.O. Box 19154 – 00100 Nairobi which is the address given in the title deed, the charge document and the supporting affidavit of the 2nd Plaintiff. On the face of it, it would appear that the statutory notice and notice of intention to sale were served on the Plaintiffs.

The court is not satisfied that the 1st Defendant failed to ensure that a forced sale valuation is undertaken by a valuer before exercising its right of sale as stipulated by Section 97 (2) of the Land Act. The 1st Defendant has demonstrated to the court that a valuation was done which gives the forced sale price for the Suit Property.

The court finds that the Plaintiffs have failed to demonstrate a *prima facie* case against the Defendants for the court to exercise its discretion in their favour and grant the injunctive relief they seek. The application is dismissed with costs to the 1st Defendant.

Dated and delivered at Nairobi this 30th day of November 2017.

K. BOR

JUDGE

In the presence of: -

Ms. Wanjiku for the Plaintiff

Mr. Mutua for the Defendant

Mr. V. Owuor- Court Assistant



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