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LEGAL ALERT

**HIGH COURT EMPHASISES THE NEED FOR
INTEGRITY IN AUCTION PROCESS**





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In a Ruling delivered in [Civil Case No. E834 of 2021 Harrogate Limited & another vs. Mwananchi Credit Limited and another](#) the High Court (Mabeya J) granted borrowers injunctive relief pending the hearing and determination of the suit, staying the transfer of the suit property which had been sold at an auction by the lender, due to glaring irregularities in the conduct of the auction.

Ordinarily, where a borrower is in default and all relevant statutory notices have been issued by the lender, the Court is usually slow in curtailing the lender's right to realise its security through exercise of its statutory power of sale, since the borrower's claim, if found to be successful at trial, can sufficiently be compensated by an award of damages. However, in this case, the Court in its Ruling dated 20th January 2023, found that the injunctive Orders were necessary to protect the borrowers from suffering irreparable harm of eviction from their home, based on a possibly illegal and irregular sale of their property.

This Ruling is of significance to lenders and creditors because it highlights the importance of following procedure when exercising the statutory power of sale, failure to which a lender's recourse to fully realise its security, might be curtailed.

Brief Background

The Applicants in this case moved the Court seeking to stop their eviction from the suit property following the lender's exercise of the statutory power of sale.

They argued that the sale of the charged property by auction was unlawful as there was no proof of compliance with statutory conditions of sale which required payment of a twenty-five percent (25%) deposit by the purchaser. In support of their case, the Applicants drew the Court's attention to the fact that the lender had failed to produce a full statement of accounts as directed by the Court and that the valuation report it produced to justify the sale was unsigned and contained an incorrect valuation price. Furthermore, the Applicants alleged that one of the bidders was the Auctioneer's son, further affecting the integrity of the auction sale.

The Application sought several Orders including a temporary injunction restraining the Auctioneer from implementing the eviction notice pending the hearing of the suit; an Order directing the Auctioneer to provide documents relating to the sale of the charged property; an Order directing the lender ([Mwananchi Credit](#)) to provide an updated statement of account including the proceeds of the auction; a declaration that no lawful auction was conducted; and an Order that the Applicants be allowed to pay Mwananchi Credit the sum of KES 86,249,960/- in instalments and in line with the in duplum rule.

On their part, Mwananchi Credit and the Auctioneer argued that the eviction notice was lawfully issued. In their view, the receipt issued by Mwananchi Credit to the Auctioneer, was sufficient proof that the purchaser had paid the twenty-five percent (25%) deposit. They



insisted that the challenge of producing accounts was insufficient cause to restrain the lender from exercising its statutory power of sale. They further contended that the requisite statutory notices had been served and following the auction, the repayment issue had been overtaken by events.

Irregularities in the Auction Process

In granting the Order restraining the Auctioneer and Mwananchi Credit from evicting the Applicants from the charged property and transferring the title to the purchaser, the Court cited the irregular and unprocedural nature in which the auction was conducted.

According to the conditions of sale, the deposit was payable by a banker's cheque. The Court found that the claim by Mwananchi Credit and the Auctioneer that the deposit, amounting to KES 34 Million was paid in cash triggered concerns about possible money laundering and called into question the integrity of the transaction. Given the large sum of money involved, the Court found it dubious that the purchaser would agree to transport such an amount of money physically to the Auctioneer.

Rules 18 (3) of the Auctioneers Rules and Regulations, provides that upon receiving the proceeds of an auction sale, the auctioneer shall issue a receipt for it and in the case of immovable property, sign a memorandum of sale. In this peculiar circumstance, at the point of handing over the sum of KES 34 Million in cash to the

Auctioneer, the purchaser was not issued with a receipt and instead a receipt was issued by Mwananchi Credit to the Auctioneer.

Furthermore, based on the documents provided by parties, there was no evidence to show that the two bidders paid the alleged KES 1 Million to the Auctioneer in order to participate in the alleged auction.

In addition to these irregularities, it was noted by the Court that the valuation report relied upon by Mwananchi Credit was unsigned rendering it a nullity.

Due to the dubious paper trail, the Court concluded that payment of the twenty-five percent (25%) deposit and KES 1 Million reserve price was doubtful, meaning that the auction failed to meet statutory standards and therefore proceeded to grant the Applicants the injunctive reliefs pending the hearing and determination of the suit.

Conclusion

In light of the above, when exercising the statutory power of sale, lenders should be prudent and ensure that they abide by all statutory provisions relating to the sale to avoid it being invalidated. From the issuance and proper service of all the statutory notices as provided for under the Land Act, 2012 to ensuring the integrity of the Auction process is above board so as to avoid any allegations of collusion or money laundering as happened in this case.



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This alert is for informational purposes only and should not be taken to be or construed as a legal opinion. If you have any queries or need clarifications, please do not hesitate to contact John Mbaluto, FCI Arb, Deputy Managing Partner, (john@oraro.co.ke), and Claire Mwangi, Senior Associate, (claire@oraro.co.ke) or your usual contact at our firm, for legal advice.



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