



Patrick Kimathi Muchema t/a Arimi Kimathi & Co. Advocates v Kilonzo; Waitiki (Purchaser); John Mbiyiwe t/a Bealine Auctioneers (Auctioneer) (Civil Suit 483 of 2015) [2023] KEHC 1336 (KLR) (Commercial and Tax) (28 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1336 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 483 OF 2015
A MABEYA, J
FEBRUARY 28, 2023**

BETWEEN

**PATRICK KIMATHI MUCHEMA T/A ARIMI KIMATHI & CO.
ADVOCATES ADVOCATE**

AND

MICHAEL MWASA KILONZO CLIENT

AND

JULIUS CHUMBI WAITIKI PURCHASER

AND

JOHN MBIJIWE T/A BEALINE AUCTIONEERS AUCTIONEER

RULING

1. There are 2 applications before Court for determination. The first one is a Motion on Notice by the Advocate dated 14/9/2021 while the second one is by the Purchaser dated 29/9/2021. I propose to determine them seriatim.
2. The Motion dated 14/9/2021 was brought, inter-alia, under Order 22 Rule 75 and Order 51 Rule 1 of the *Civil Procedure Rules* 2010. The prayers sought therein are spent save for a prayer for the Court hear and determine the issues of fact and law raised herein and in HCCOM No.E734 of 2021 concerning the attachment and sale by public auction of LR No.337/1500 (the suit property) and an order requiring the client or such other person to give up possession of the suit property to the purchaser.



3. The grounds for the application included that the Advocate filed various Bills of Costs in HCCC Misc. App. Nos. 173/2010, 124/2010, 175/2010, 126/2010 and 177/2010 which were consolidated in this matter. The costs were taxed and allowed in favour of the Advocate as against the Client and decrees extracted.
4. Subsequently, it was ordered that the suit property be attached in execution of the decrees. That the Client failed to pay the decretal sum plus interest within 15 days as ordered on 22/2/2011 and as further consented on 27/5/2015. Therefore, the Advocate instructed the Auctioneer to advertise the Suit Property for sale in a public auction which was held on 26/2/2016 whereby the Purchaser emerged as the successful bidder.
5. That the advocate received the total decretal sum of Kshs.12,618,212/- from the proceeds of the sale and lifted the aforesaid Orders that had been registered against it. Subsequently, on 9/6/2016, the Court granted orders vesting the suit property on the Purchaser and the Deputy Registrar executed a transfer to that effect.
6. The Advocate averred that the Purchaser filed an application in this suit dated 19/7/2016, seeking orders against the Client to grant access to the government valuers to undertake valuation of the suit property. However, the valuer indicated to the Purchaser that he was unable to undertake the valuation as the suit property constituted a portion of the land where the building and improvements erected were spread over 3 other parcels of land, being L.R. Nos. 337/1498, 337/1499 and 337/1501, respectively.
7. This led the Purchaser to file suit No. HCCOMM E734 of 2021. That the said suit arose from the vesting order issued herein and therefore, the institution of the said suit to rescind the sale of the suit property was irregular and a disregard of this Court's authority and sanctity of its orders and directives.
8. In opposition, the Purchaser filed a replying affidavit sworn on 29/9/2021 by himself.
9. He averred that that the application is incompetent for having been supported by a defective affidavit. That one cannot in law amend an affidavit and instead a fresh affidavit should be filed. That the Advocate received a sum of Kshs. 17 Million from the Purchaser for the purchase of the suit property but has never been keen to complete his part of the bargain and only filed this application upon service of the suit filed by the Purchaser and which suit the Advocate now seeks to have stayed in order to forestall the inevitable.
10. That the sale process cannot be completed which fact is well within the knowledge of the Advocate as the property sold contains a house which is constructed both on the suit property and three other titles for which there was never any order for sale. That therefore, seeking to enforce the sale as sought for in prayer 5 of the instant application will essentially be seeking to enforce an illegality.
11. That he opted to file HCC E734 OF 2021 seeking a declaration that the sale conducted over the suit property cannot be completed and for an order for refund of the purchase price.
12. That since the proceedings before this Court were proceedings between an Advocate/Client and the orders issued were orders issued in execution of the taxed certificate of costs, substantive proceedings arising from a contract of sale could not be brought within the said cause.
13. However, the Purchaser contended that he has no objection if the Court determined the matters raised herein in the interest of a speedy determination of the same.
14. The Client opposed this application vide a replying affidavit sworn on 24/11/2021 by himself.



15. He asserted that he was never served with the pleadings in this miscellaneous application and all notices leading to the purported sale of the suit property. That the Advocate and the Auctioneer fraudulently tried to sell LR. NO.337/1500 knowing very well that it had a house which overlapped to three other titles. That in seeking to enforce the purported sale as prayed for in prayer 5 of the amended notice of motion essentially means an attempt to enforce an illegality.
16. That since proceedings in this suit were between an advocate/client and the orders issued were orders issued in execution of taxed certificate of costs, the purchaser being aggrieved by the purported sale could not bring in his claim within this miscellaneous application.
17. The issue for determination is whether HCC E734/2021 ought to be stayed and the issues therein be determined in these proceedings.
18. The Advocate's bill of costs were taxed against the Client and the court ordered the suit property attached in execution of the decrees. The suit property was sold via public auction on 26/2/2016 to the Purchaser for Kshs.17,000,000/-. However, it was later discovered by the government valuer that the building erected on the suit property straddled 3 other titles.
19. This led the Purchaser to file HCC E734/2021 whereby he sought to rescind the sale of the suit property and for a refund of the purchase price. The Purchaser and Client argued that the proceedings before this court were between an advocate-client therefore substantive proceedings arising from a contract of sale could not be brought within the case.
20. The issues raised I HCC 734/2021 arose out of the execution of the decrees arising out of these proceedings. It is therefore wrong to state that the issues therein are not for this forum. Section 34 of the *Civil Procedure Act* clear on the issue of subsequent proceedings. It dictates that all proceedings that arise out of execution of a decree or order of the court are to be determined in the same proceedings and not elsewhere.
21. Accordingly, it was not necessary to institute HCC 734/2021. HCC 734/2021 is therefore stayed and the issues emanating from the impugned sale shall be determined herein.
22. The 2nd application was filed by the Purchaser pursuant to Section 3 and 3A of the *Civil Procedure Act*, Order 1 Rule 10, Order 22 Rules 76 and 78 of the *Civil Procedure Rules*.
23. He sought an order to have the sale by public auction of the suit property set aside, an order to set aside the Vesting Order issued on 10/6/2016 and an order directing the Advocate and Auctioneer to refund the sum of Kshs.17,000,000/- together with interests thereon from the date of payment.
24. The grounds for the application were that the Purchaser bought the suit property at the public auction held on 26/2/2016 by the Auctioneer on behalf of the Purchaser. That the suit property was described as containing a "building and improvements standing thereon". That a Vesting Order was issued on 10/6/2016 vesting the property to the Purchaser in order to facilitate transfer thereof.
25. However, the sale could not be completed since a valuer from the Ministry of Lands directed by the Court undertook valuation for purpose of determining stamp duty payable declined to do so indicating that the suit property had a structure that straddled into three other titles.
26. The Purchaser averred that the advert carried out by the Auctioneer was false and misleading as the purchase price was paid for the suit property which was described as containing a house. That however, the house under reference extended onto three other parcels of land. That the sale was fraudulent as it sold both the suit property and the other properties disguised as the sale of one property. That the Purchaser has never been in possession of the property despite undertaking to do so several years later.



27. In opposition, the Auctioneer filed a Preliminary Objection dated 1/11/2021. He argued that the Purchaser's Notice of Motion dated 29/9/2021 was res judicata to the Client's Notice of Motion dated 21/6/2016 in which the Purchaser had actively participated and where all the matters raised in the instant Motion were determined. That in particular, the issues pertaining to setting aside of the Vesting Order made on 09/6/2016 in favour of the Purchaser were substantially heard and determined by this court vide a ruling/order made on 24/1/2017 declining the application to review and/or set aside the subject Vesting Order.
28. The auctioneer contended that the Motion dated 29.09.2021 was incompetent and untenable in law and should be struck out with costs.
29. Res Judicata, as provided under Section 7 of the *Civil Procedure Act*, refers to matters which have been in issue and have been determined previously.
30. In the ruling dated 24/1/2017, annexed as 'JMM2' in the Auctioneer's replying affidavit, the court declined to review the vesting order that was granted upon the Purchaser. The basis of the Client seeking a review was that the public auction where the suit property was sold was illegal and unprocedural as the requisite statutory notices were not served upon him therefore if the auction was invalid then the vesting order ought to be reviewed.
31. However, in the present application, the Purchaser seeks to have the vesting order and auction set aside on the grounds that the subject property was sold fraudulently after the discovery that the house erected thereon extended onto three other properties.
32. I therefore find that the instant application has not violated the res judicata doctrine.
33. The Auctioneer further filed a replying affidavit sworn on 1/11/2021 by himself. He averred that he made available to all and sundry including the Purchaser, the requisite "Terms and Conditions for Sale" comprised in the particulars of the property under sale and which documents the Purchaser had the privilege to peruse in the course of him carrying out due diligence over the suit property prior to his participation at the public auction.
34. That by executing the subject Memorandum of Sale, the Purchaser had agreed to all the terms and conditions for sale contained therein which expressly stated that the auctioneer shall not be liable for any misstatement contained in the particulars of the property. That all the interested Purchasers were required to view and verify the details of the property for themselves in the course of carrying out due diligence pertaining to all matters affecting the property before participating in the public auction.
35. The issues for determination is whether the subject sale ought to be rescinded thereby setting aside the Vesting Order issued on 10/6/2016 and whether the Purchaser ought to be refunded the purchase price paid.
36. It is undisputed that the Purchaser paid the full purchase price to the Advocate and a Vesting Order was issued by this court ordering the transfer of the suit property to the Purchaser. However, to date, the transfer has not been effected and neither has vacant possession been given to him.
37. The government valuer discovered that he could not value the property as the building erected thereon straddled three other properties. Therefore, if a valuation could not be carried out, stamp duty could not be paid and no transfer could be effected.



38. The Auctioneer's advertisement annexed as JW2 in the Purchaser's Supporting Affidavit described the suit property as including buildings and improvements thereon. Order 22 Rule 76 of the Civil Procedure Rules provides: -

“The purchaser at any such sale in execution of a decree may apply to the court to set aside the sale on the ground that the judgement-debtor had no saleable interest in the property sold.”

39. The Advocate did not have a saleable interest in the suit property as the property sold included a building that was part of other properties. The property has never been transferred to the Purchaser nor has he obtained possession of it after all these years. I therefore find justifiable reasons to set aside the sale and to order for a full refund of the purchase price from the Advocate.

40. I find merit in the application dated 29/9/2021 and grant prayers B, C and D. Costs of the application are awarded to the Purchaser.

41. Prayer 4 of the application dated 14/9/2021 is granted while the rest of the prayers are dismissed. Costs of the application is granted to the Advocate.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2023.

A. MABEYA, FCIArb

JUDGE

