



**Wanjohi v Karimi & 5 others (Environment and Land Case Civil Suit
17 of 2019) [2023] KEELC 17554 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17554 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND CASE CIVIL SUIT 17 OF 2019**

EC CHERONO, J

MAY 25, 2023

BETWEEN

CYRUS GITHINJI WANJOHI PLAINTIFF

AND

THOMAS THUKU KARIMI 1ST DEFENDANT

CATHERINE WAWIRA MURIUKI 2ND DEFENDANT

MURIUKI SAMSON MUREITHI 3RD DEFENDANT

WESTON KANYIRI MURIUKI 4TH DEFENDANT

JOSEPH KAMAU MURIUKI 5TH DEFENDANT

ISAAC MWANGI MURIUKI 6TH DEFENDANT

JUDGMENT

1. By a plaint dated 11th March, 2019, the plaintiff impleaded the defendants over a parcel of land known as Kiine/Kibingoti/Nguguine/2683 (hereinafter the suit property) alleging that he was the registered owner over the suit property which was advertised for sale pursuant to a judgement of the court in Baricho SRMCC 14 of 2007. That after the suit property was sold by public auction to the highest bidder who only paid the sum of Kshs 5,000/, the auctioneer (Providence Auctioneers) wrote to the court for an order declaring the sale invalid for failure by the highest bidder to pay the 25% of the bid at the fall of the hammer as required in law.
2. Upon declaring the said sale invalid, the 1st defendant opted to sale the parcel by private treaty and subsequently obtained a court order to that effect. The land was then sold to the 2nd defendant who later sold it to the 3rd defendant who eventually transferred the suit land to himself jointly with the 4th, 5th and 6th defendants as proprietors.



3. He therefore averred that the alleged sale by private treaty and the subsequent transfer was tainted with fraud, irregularities and therefore null and void ab initio and now seeks the following reliefs;
 - a. A permanent order of injunction against dealing, alienating and or transfer of the suit property.
 - b. An order of cancellation of the title against the 3rd, 4th, 5th and 6th defendants and reversal to the plaintiff's name.
 - c. Costs of the suit and interest at court rates.
 - d. Any other and further relief the court may deem fit.
4. The defendants duly Entered Appearance and filed their statement of defence and averred that the 2nd and 3rd defendants were innocent purchasers for value without notice to any fraud committed. They also averred that the suit was filed out of time and *res judicata* the suit in Baricho SPMCC No. 14/2007 which has been heard and determined and no appeal has been preferred.
5. They also averred that the plaintiff has been evicted from the suit property which proceeds has never been challenged and that they are in quiet possession and occupation of the suit land.
6. After the close of pleadings and compliance under Order 11 of the [Civil Procedure Rules](#), The suit was confirmed ripe for hearing and the same was set down for hearing.
7. Cyrus Githinji testified as PW-1 and his testimony was that he owed the 1st defendant Kshs 84,000/- whereupon the said 1st defendant filed suit against him and obtained judgement in the sum of Kshs 613,744/- and sought to auction the parcel of land by public auction. When the same failed, the 1st defendant filed an application dated 28/3/2022 and orders obtained on 30/3/2022 allowing the sale by private treaty to the 2nd defendant. He laments that he was never served with the application or called to sign transfer forms nor called to the land control board for consent to transfer. He contends that the suit property was irregularly sold to the 2nd defendant and thereafter to the 3rd, 4th, 5th and 6th defendants.
8. Thomas Thuku testified as DW-1 and stated that as at 28/3/2011, the decretal sum was Kshs 871,519/- which the plaintiff had refused to settle. He then applied to court to sell the land privately to reduce further expenses and the executive officer was mandated to execute transfer forms to effect the transfer and to dispense with the requirement for production of the original title deed.
9. That when he filed the application dated 28/3/2022, he served the same upon the respondent's advocates who filed grounds of opposition. That the application was then heard and a ruling delivered authorizing the sale.
10. DW-2 Catherine Muriuki testified that she is the current registered owner of the suit property jointly with his brothers upon transfer by their father.
11. DW-3, Isaac mwangi, DW-4, Joseph Kamau and DW-5, Newton Mwangi reiterated the testimony of DW-2 that they are jointly registered by virtue of transfer from their father.
12. The plaintiff submitted on the strength of the provisions of Section 6(1) of the [Land Control Act](#), Section 3 of the Contract Act and Section 38(1) of the [Land Act](#) that the sale of the suit property was unlawful and that the proceeds of the sale was not deposited in court as mandated by Order 22 of the [Civil Procedure Rules](#).
13. He submitted that wherever fraud is pleaded, the limitation of time does not apply as established by the authority in [Chauhan vs Omagwa](#) (1985) KLR 646.



14. On their part, the defendants submitted that it is irregular to challenge execution of a decree in a separate suit but any challenge can only be made within the same suit as provided for under Section 34 of the Civil Procedure Act. That the plaintiff herein ought to have filed an appeal to challenge the trial court's judgement. He submitted that his position contention is supported by the following authorities; Joseph Mwangi Theuri & 37 others Vs David Gitonga Gitbinji (2014) eKLR, Nasir Jimnah vs Asmahan Peterson & 2 others (2012) eKLR and James Wainanina & 6 others vs Karana Mbugua & Co. Advocates (2012) eKLR.
15. On whether the sale by private treaty was regular, the respondent submitted that under Order 22 Rule 55 of the CPR, the sale was regularly authorized by the court and cites the authority in Jose Estates Limited & Muthumu Farm Limited & 2 others Civil Appeal No. 96 of 2016 and Ze Yun Yang vs Nova Industrial Producuts Limited (2003) 1EA 362. The respondent also submitted that the plaintiff's remedy was in damages as observed in Nancy kahoya amadiva vs Expert Credit Limited and Another (2015) KLR
16. It is further submitted that the 2nd defendant is protected by Section 99 of the Land Act, No. 3 of 2012 as far as the sale by public auction is concerned. The defendants also fault the plaintiff for failing to join the land Registrar or call him as witness and supports this conetention with the holding in Vijay Morjaria vs Nansing Darbar & another (2000) eKLR.
17. The defendanst also submit that the plaintiff failed to prove fraud. They cite Vijay Moraria (supra) and Katende vs Haridar & Company Limited (2008) 2 EA 173.

Analysis and determination

18. In light of the above facts, I am persuded that the following issues arise for determination;
 - a. Whether the sale by private treaty was procedural.
 - b. Whether the plaintiff is entitled to the orders sought.
19. It is pleaded by the plaintiff that judmenet was obtained against him in Baricho SPMC Civil Suit No. 14 of 2007 in the sum of Kshs 613,744/- and an order for the auction of the suit property issued by the said court. Upon failure to obtain the decretal sum by the auctioneer, an application was made to have the property sold by private treaty which application was allowed and the suit property was sold to the 2nd defendant who later sold to the 2nd defendant and a transfer was effected by the said 3rd defendant to the 4th, 5th and 6th defendants who are now the joint proprietors of the land. A title deed was produced to confirm the same.
20. The issue then that comes to mind is the procdure of excuting court orders as provided for under Section 38 of the Civil Procedure Act which provides;

Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree—

- (a) by delivery of any property specifically decreed;
- (b) by attachment and sale, or by sale without attachment, of any property;
- (c) by attachment of debts;
- (d) by arrest and detention in prison of any person;
- (e) by appointing a receiver; or



(f) in such other manner as the nature of the relief granted may require:

21. This procedure is not disputed by the plaintiff save that his position is that the sale by private treaty was unlawful for failure to serve him with the application seeking such sale. The defendants on the other hand contend that the plaintiff's counsel was served with the application.
22. This being the case, I have perused the defendants' documents and find that by ruling dated 3rd October 2018, Honourable E. H Keago (SPM) delivered a ruling wherein one of the issues framed by the court was whether the sale by private treaty was fraudulent. The court as a matter of fact held that;

.....the suit property was sold in execution of the decree herein pursuant to the order of the court issued and it will appear that the title was issued in the names of the 3rd parties. Pursuant to the said sale, the court upon an application signed all the transfer documents which resulted in the transfer of the property to one Muriuki samson mureithi as per the official search annexed as C7 by the applicant. Bys such action, the sale was completed and if there be any remedy, the applicant may have a different cause as against the plaintiff if thee be any elemmnt of fraud as alleged.
23. In the circumstances, I find that the plaintiff had already challenged the issue of the sale in the subordinate court. There being a ruling already delivered by the court on the subject and there being no evidence that the said order has been set aside, I find that this suit is *res udicata*.
24. The principle of *res judicata* is found in Section 7 of the [CPA](#) and provides;

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.
25. The principle has been the subject of several decisions in the Superior Court, for instance in [Suleiman Said Shabhal vs Independent Electoral & Boundaries Commission & 3 Others](#) (2014) eKLR it was held;

To constitute *res judicata*, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy.
26. In the instant case, the above ruling by the trial court shows that the trial court had conclusively dealt with the issue of auction conclusively. The plaintiff in the circumsnatces ought to have appealed or take steps to have the finding by the trial court set aside. To bring up the issue in a separate suit and not by way of an appeal is irregular and unprocedural in the circumstances.
27. I therefore proceed to hold that the issue of the sale by way of private treaty had been determined by the trial court which is a court of competent jurisdiction and the present suit is *res judicata* and this court is beref of jurisdiction to re-open the issue the second time. The issue of fraud also ought to have been addressed in that court as well and not raise as a new cause of action in a separate suit.
28. On the issue of whether the plaintiff is entitled to the orders sought, I find that the suit property has already been transferred to the defendants by way of court order and the plaintiff has already been evicted, I find no sufficient reasons to grant the equitable orders sought in the circumstances. In any event, such an order would not serve useful purpose.



29. For the prayer of cancellation of title, I find that the transfer was effected by way of a court order which has not been set aside or appealed against. As such, the decision of the court stands unchallenged to date. In the absence of an order to the contrary, such an order cannot be granted in the circumstances.
30. For the foregoing reasons, I find no merit in the suit herein which is hereby dismissed with costs to the defendants.
31. Orders accordingly.

READ, DATED AND DELIVERED AT BUNGOMA THIS 25TH DAY OF MAY, 2023

HON. E. C. CHERONO

ELC JUDGE

In the presence of;

1. M/s Anne Thungu for defendant
2. M/s Brenda Maina for the plaintiff
3. M/s Joy C/A

