Mbugua v Diamond Trust Bank Kenya Ltd & another (Environment & Land Case 296 of 2013) [2023] KEELC 18257 (KLR) (15 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18257 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND CASE 296 OF 2013

A OMBWAYO, J

JUNE 15, 2023

BETWEEN

LYDIA NYAMBURA MBUGUA ..... PLAINTIFF

AND

DIAMOND TRUST BANK KENYA LTD ..... 1ST DEFENDANT

JOHN KIGUTHI KIMANI KIBE ..... 2ND DEFENDANT

RULING

1. Lydia Nyambura Mbugua (hereinafter referred to as the applicant) has come to court for orders that this honorable court be pleased to issue an order of temporary injunction restraining the 1st defendant by itself, by agents or servants or auctioneers from selling by public auction or private treaty, disposing of or alienating land parcel No Njoro Ngata Block 1/478 until the defendants herein fully comply with the terms of the decree and judgment of this court. That the 1st defendant be ordered to pay the costs of this application.

2. The application is based on the grounds that that this court in its judgement delivered on March 29, 2019 decreed that the title deed to land parcel No Njoro Block 1 /478 which had been fraudulently sold to the 2nd defendant and registered in the second defendants name be cancelled and restored in the plaintiff's names.

3. That the defendants were dissatisfied with the terms of the judgement and in exercise of their right of appeal they filed notices of appeal to the Court of Appeal. That the title deed remained and still remains in the name of the 2nd defendant and to date the defendants are yet to comply with the terms of the decree.

4. That the 1st defendant has now issued a notification of sale of land parcel No Njoro Ngata Block 1/478 on April 13, 2023. That the 45 days redemption notice was not issued to the applicant or the current registered properties of the land but to Isaac Mbugua Ngethe who is not party in this case.

5. That the sale of this land is predicated to be a claim of Kshs 1 1,684,612.94 as at May 2022, which is actually the very same claim pending for determination in HCCC No 213 of 2003 Diamond Trust Bank Ltd v Lydia N, Mbugua & Lydia Nyambura Mbugua.

6. That in its judgement, this honorable court decreed that the i[st] defendant would not be entitled to any interest on the amount and that the 1st defendant was decreed to work out the actual sum owing in the account.

7. That the 1st defendant has not complied with the mandatory provisions of section 97(2) of the *Land Act* 2012 and therefore section 97(7) comes into play. The supporting affidavit of the applicant reiterates the grounds of the application.

8. The application is opposed. I have carefully read the judgment by this court entered on March 26, 2019 and do find that the court ordered that the suit parcel of land be registered in the plaintiffs name and therefore if borders on contempt of this court by the respondent to attempt to sell the land through auctioneers before complying with the terms of the judgment, however, the orders being sought cannot be granted under order 40 rule 2(1), 4(1) and 10(1) a of the *Civil Procedure Rules 2010* as there is no suit pending and that the court is functus off*icio*. The Court of Appeal in the case of; *Telkom Kenya Limited v John Ochanda* [2014] eKLR, stated that: -

> " Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon...
>
> The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar; is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued."

9. I do decline to grant the orders. Each party to bear own costs. This file is closed save for taxation or execution of the decree if extracted.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU ON THIS 15TH DAY OF JUNE 2023.

A. O. OMBWAYO

JUDGE