



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL CASE NO. 54 OF 2018**

**PRAYOSHA VENTURES LIMITED ..... PLAINTIFF**

**SAMMY KIPKETER CHERUIYOT .....2<sup>nd</sup> PLAINTIFF**

**STEPHEN KIPKIYENY TARUS.....3<sup>rd</sup> PLAINTIFF**

**VERSUS**

**NIC BANK KENYA PLC formerly**

**NIC BANK LIMITED .....1<sup>st</sup> DEFENDANT/APPLICANT**

**GARAM INVESTMENTS AUCTIONEERS.....2<sup>nd</sup> DEFENDANT**

**AND**

**BEATRICE JERUTO KIPKETER.....INTERESTED PARTY**

**RULING**

**1. The Application dated 1<sup>st</sup> December 2020 by **BEATRICE JERUTO KIPKETER (the Interested Party)** seeks that: -**

- i. Spent;
- ii. Pending the hearing and determination of this suit, Peter Kipsigei Sang be enjoined as the 3<sup>rd</sup> Respondent to the suit;
- iii. The status quo as at 2<sup>nd</sup> June, 2020 be maintained;
- iv. The sale and auction of the property known as TITLE NO. ELDORET MUNICIPALITY/BLOCK 41335 held between 26" -- 30" June 2020 be stayed pending the hearing and determination of the Application;
- v. The entire sale and auction of the property known as TITLE NO. ELDORET MUNICIPALITY/BLOCK 4/335 held between 26" -- 30" June 2020 by the 2<sup>nd</sup> Respondent be declared null and void.
- vi. The 2<sup>nd</sup> Respondent be compelled to produce the proceedings of the auction conducted on 26" June, 2020.
- vii. That this Court do grant a stay of the intended sale purported to emanate from the unlawful and or unprocedural Auction conducted on the 26" June, 2020 payment of the purchase price, transfer and/or any other dealings **on Eldoret Municipality Block 4/335 - Kibargoi House** by the Respondents their agents and or servants pending the hearing and determination of the Application herein.
- viii. THAT leave be granted to the Applicant/Plaintiff to further amend the amended plaint in accordance with annexed plaint.
- ix. Costs be in the cause.

The application is premised on grounds that the interested party and the 2<sup>nd</sup> applicant are the bonafide owners of the property known as **ELDORET MUNICIPALITY BLOCK 4/335** which is matrimonial property, and is being put up for auction by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. That there are conflicting facts and a new suit by one **PETER KIPSIGEI SANG V NCBA BANK PLC** has been filed where orders for maintenance of status quo as 2<sup>nd</sup> June 2020 were issued. It is contended that the sale of the property contravened public policy, court orders and directions given by the Chief Justice, and was therefore null and void, and the auction did not sell anything so no interest was transferred in law.

**2. PRAYOSHA VENTURES LTD** (the 1<sup>st</sup> applicant) obtained a loan from **NCBA BANK** (1<sup>st</sup> defendant/respondent) which was guaranteed by **SAMMY KIPKETER CHRUIYOT AND STEPHEN KIPKIYEN TARUS**, and a charge was registered on the title to the property **ELDORET MUNICIPALITY BLOCK 4/335**. It is the applicant's contention that in what is described as a twist of events, the property has been sold through what is challenged as an illegal auction conducted on 26<sup>th</sup> June 2020, to one **PETER KIPSIGEI SANG** who has now sued the bank in **ELD E002 OF 2020** seeking to terminate the transaction done through the auction as no interest was transferred on the land in question.

**3.** It is on account of this narration of events that the applicant seeks for the said **PETER KIPSIGEI SANG** to be enjoined as a 3<sup>rd</sup> respondent in the suit as the applicant contends that the auction was un-procedural, and there was a causal relationship between the bank and the purchaser.

The applicant submits that it is necessary to summon the purported purchase to attend court and attest to the circumstances that surround the dealings with the bank. The said **PETER KIPSIGEI SANG** is also faulted for failing to conduct due diligence such as visiting the Land Registry, so he ought to be added as a party in this matter. In support of this position, the applicant cites the case of **LUCY NUNGARI NGIGI & ANOR V NATIONAL BANK OF KENYA LTD & ANOR [2015] eKLR** which held that where a party who is not a party to a suit is mentioned, he shall be summoned to appear by being served with a copy of the defence. Further, that such power of summoning the affected party can be exercised at any stage even after judgment, and without a party applying, as was held in the case of **TANG GAS DISTRIBUTORS LTD V SAID AND OTHERS [2014] eKLR**.

The court is urged to be guided by the decision in **ANDY FORWARDERS SERVICE LTD & ANOR V PRICE WATERHOUSE COOPERS LTD & ANOR [2012] eKLR** where the court stated that:

*“A person may be enjoined not because there is a cause of action against him, but because that person's presence is necessary to enable the court to effectually and completely adjudicate upon, and settle all questions involved in the matter.”*

**4.** The basis of this prayer is anchored on Order 1 Rule 10 of the Civil Procedure, which empowers Courts at any stage of proceedings, either on an application by parties or suo moto, order the addition of the name of any person who ought to have been joined, whether as Plaintiff or Defendant or whose presence before Court is necessary to enable the effective and complete adjudication and settlement of all questions involved in the suit.

**5.** In response the 1<sup>st</sup> respondent (i.e. NIC Bank) points out that with regard to the **Enjoinder of Peter Kipsigei as the 3<sup>rd</sup> Respondent to the suit** which is anchored on Order 1 Rule 10 of the Civil Procedure, it must be borne in mind that in the present scenario, the Applicant alleges that the proposed Interested Party instituted suit **Eldoret HCC E002 of 2020** against the 1<sup>st</sup> and 2<sup>nd</sup> Respondent relating to the sale of the suit property on grounds of illegality in the conduct of the auction sale.

**6.** The 1<sup>st</sup> respondent contends that this Application is conceived in malice with the intent to continually frustrate the Bank's right to statutory power of sale which has since crystallized. Further, the instant application consists of a series of actions by the Applicants to frustrate the Bank's statutory power

**7.** The basis of this prayer is anchored on **Order 1 Rule 10 of the Civil Procedure** which empowers Courts at any stage of proceedings, either on an application by parties or suo moto, order the addition of the name of any person who ought to have been joined, whether as Plaintiff or Defendant or whose presence before Court is necessary to enable the effective and complete adjudication and settlement of all questions involved in the suit.

**8.** Drawing from the case of **Temple Point Resort Limited v Accredo A G&5 others [20 I BJ eKLR** which emphasized that an applicant must justify why the application for joinder is being made at a particular stage so as to help the court in making a determination whether the application is being made in good faith, the 1<sup>st</sup> respondent argues that the joinder of the 3<sup>rd</sup> Respondent as the proposed Interested Party is unnecessary on grounds that, the issues being contemplated in the present suit and the suit introduced by the 3<sup>rd</sup> Respondent (**Eldoret HCC E002 of 2020**) are different and remote. It is explained that the dispute at hand in this suit revolves around the validity or legality of the Bank's right to exercise its statutory power of sale which has been the subject of litigation for close to 4 years, where the proposed Interested Party is a stranger to such proceedings.

**9.** To this the Interested party in a supplementary has sought to distinguish between joining a party who ought to have been joined as a defendant, and one whose presence is necessary so as to enable the court effectively adjudicate upon and settle questions involved in a matter drawing from the case of **DEPARTED ASIANS PROPERTY CUSTODIAN BOARD V JAFFER BROTHERS LTD [1999] 1 EA,55 (SCU)**

**10.** The respondents further contend that the particulars of malice outlined relate and refer to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The amended plaint does not contain any allegation of illegality regarding the auction sale attributed to the Interested Party. That there is no private of contract binding the Plaintiffs and the Interested Party sufficient to warrant apportionment of liability to the proposed Interested Party.

## **REVOKING/SETTING ASIDE SALE**

11. It is argued that the sale by auction which was conducted on 26<sup>th</sup> June 2020 was unprocedural as the bank had no locus standi to register the charge in their favour without spousal consent from the Interested Party, and reference is made to the provisions of section 93 (3) (b) of the Land Registration Act No 3 of 2012. Further, right section 12 (1) of the Matrimonial Property Act. The 2<sup>nd</sup> applicant is faulted as having failed to notify the Interested Party about the charge, yet her interest in the property overrides any other interest.

It is also contended that the Bank did not serve the **Interested Party with the statutory notices under section 90, 96 (2) of the Land Act and Rule 15 of the Auctioneers Rules.**

It is also argued that the residual term was not adequate to accommodate a charge as specified in the Land Act for a period not less than 45 years remaining on the lease. That in any event, by the time the auction was conducted, the lease had already expired.

12. The property is described as the place where the Interested party and the children of the marriage draw their livelihoods, and the children are being educated on the rent realized from the said property. It is further submitted that the bank misled this court into making orders for maintenance of status quo since there was conflicting information failed to disclose the auction process

13. The 1<sup>st</sup> Defendant/respondent (**NCBA BANK**) confirms that it holds a legal charge over the suit properties on whose basis it advanced loan facilities to **PRAYOSHA VENTURES LTD**. The Plaintiffs defaulted on repayment of the facilities which prompted the Bank to commence the realization process. That in addition, the 1<sup>st</sup> Defendant/Applicant indicated to the Court that the facilities were still in arrears culminating in Kshs 470, 105,380.86 as at the date this Application was filed. It is submitted that in an attempt to frustrate the 1<sup>st</sup> Defendant's efforts of realization, the Plaintiff and the Interested Party moved to Court by way of a Notice of Motion Application dated 4<sup>th</sup> December, 2017 seeking injunctive reliefs against the Applicant.

14. As for the sale, the respondent contends that once the plaintiffs failed to honour the loan repayments, the Bank begun the process of realizing the security and upon instructing an Auctioneer, and an advertisement regarding the sale was published in a newspaper of nationwide circulation on 15<sup>th</sup> June, 2020. Subsequently, the sale was conducted on 26<sup>th</sup> June, 2020 at 12.00 noon in the presence of seven (7) participants (including the Bank's representative) who were given an equal opportunity of placing their bids and countering them. The sale was concluded when the 3<sup>rd</sup> Respondent was declared the highest bidder at Kshs 60,500,000.00 above the reserve price.

## **ANALYSIS AND DETERMINATION**

15. The following issues arise for determination;

- a) **Joinder of Peter Kipsigei 3rd respondent**
- b) **Revocation of the sale**
- c) **Preservation of status quo**

16. This matter arises from the advancement of a loan facility by the Bank to the Applicants where the bank registered a Charge over property **LR Number Eldoret Municipality Block 4/335**. The Applicants defaulted on repayments resulting in the respondents initiating the process of realizing the security. This realization of security through a public auction on 26<sup>th</sup> June 2020 where Peter Kipsigei was declared the highest bidder has resulted in the applicant being aggrieved. Ultimately, the Applicants and the Interested Party instituted separate suits which were consolidated to the instant suit. As summarized by the respondent's counsel, the said suits, sought orders of injunctive reliefs which were denied vide two rulings dated 15<sup>th</sup> March, 2019 and 21<sup>st</sup> February, 2020.

## **JOINDER OF PETER KIPSIGEI SANG:**

With regard to the issue of joinder I acknowledge **that Order 1 Rule 10** the Civil Procedure rules provides that a party may apply for joinder at any stage of the suit to this effect:

**The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.**

17. I am at the same time alive to the views expressed in **ANDY FORWARDERS SERVICE LTD & ANOR V PRICE WATERHOUSE COOPERS LTD & ANOR [2012] eKLR** where the court stated that:

***“A person may be enjoined not because there is a cause of action against him, but because that person's presence is necessary to enable the court to effectually and completely adjudicate upon, and settle all questions involved in the matter.”***

18. This must be balanced with a justification, particularly in a matter where certain processes have been concluded, and where the principal party has maintained a muted refrain taking refuge in the shadow of the interested party. I am guided in this, by the decision in the case of **Temple Point Resort Limited v Accredo a G&5 others [2018] eKLR** in which the Court underscored that **“... a party who desires to join**

*proceedings must lay the basis for such an application. An applicant must also justify why the application for joinder is being made at that particular point in time. This will help the court in determining whether the application is being made in good faith."*

19. The Court of Appeal of Tanzania, while considering the equivalent of **Order 1 Rule 10 (2)** of our Civil Procedure Rules, in **Tang Gas Distributors Ltd Vs Said & Others [2014] EA 448**, stated that:

*"the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage".*

20. In the present situation I think the horse has bolted, as the auction took place, and there is already in existence a separate suit involving the bank and the purchaser. The participation of the interested party in the proceedings will not assist the court in determining the matters herein completely and hence avoid future litigation and re-litigation.

21. I echo the sentiments expressed in **Justin Kithinji Nderi & 2 others v Director of Public Prosecutions & Another; Njiiru Micheni Nthiga (Interested Party) [2020] eKLR** where the court relied on the case of **SKOV Estate Limited & 5 Others v Agricultural Development Corporation & Another** held that;

*"In my view, for one to convince the court that he/she needs to be enjoined to the suit as interested party, such person must demonstrate that it is necessary that he/she be enjoined in the suit, so that the court may settle all questions involved in the matter. It is not enough for one to merely show that he/she has a cursory interest in the subject matter of litigation. Litigation invariably affects many people. A judgment or order in most cases does not only affect the litigants in the matter. It does have ramifications for others as well and one may very well argue that these others have an interest in the litigation. That is a fair argument, but a mere interest, without a demonstration that the presence of such party will assist in the settlement of the questions involved in the suit, is not enough to entitle one be enjoined in a suit as interested party. In other words, there needs to be a demonstration that the interest of the person goes further than "merely being affected" by the judgment or order. It must be shown that the presence of that person is necessary, so that the issues in the suit may be settled, and that if the person is not enjoined, the court may not be fully equipped to settle the questions in the suit or may be handicapped in one way or another. A joinder may also be allowed if the intended interested party has a claim of his own, which in the circumstances of the matter, needs to be tried, or is convenient to be tried alongside the claims of the incumbent plaintiff and defendant..."*

Consequently, I detect no handicap in the matter proceeding without the proposed 3<sup>rd</sup> respondent. I hold and find that this limb of the application on joinder lacks merit and is disallowed.

### **REVOCATION OF SALE BY AUCTION**

22. The Bank begun the process of realizing the security by instructing an Auctioneer, and an advertisement regarding the sale was published in a newspaper of nationwide circulation on 15th June, 2020. Subsequently, the sale was conducted on 26<sup>th</sup> June, 2020 at 12.00 noon and the sale was concluded when the 3<sup>rd</sup> Respondent was declared the highest bidder.

23. The Interested Party herein filed the suit herein challenging the validity of the public auction sale. In response and opposition to the same, the Bank filed its Replying Affidavit.

24. The issue of the June sale has seen this matter go on a spinning whirlwind, to the extent that some of the applications almost mirror the earlier ones, but always crafted with an additional whiff so as to breathe new life. I agree as already pointed out by the 1<sup>st</sup> defendant that the suit property has long been disposed of through auction sale. The Interested Party has put up a spirited fight to salvage the property through a multiplicity of applications. However, it is not misplaced to draw an inference that the Interested Party in a bid to undo the auction process which has long been ruled on by this court, now introduces a new angle [see **Abdulbasit Mohamed Ahmed Dahman & another v Fidelity Commercial Bank Limited [2016] eKLR**]. Without appearing to pre-empt the applicant's main suit, in my view the Interested Party has the option of mitigating the irreparable loss she laments about by considering and pursuing a probable remedy in seeking damages pursuant to **Section 99 (3) and (4) of the Land Act, 2012** achievable by instituting a fresh suit.

Section 99 relevant portions provide that:

**(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.**

**(4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power**

### **Status Quo and validity of auction**

25. The Applicant alleges that there are two subsisting court orders granted by myself (H. A. Omondi) and (S. M. Githinji). The Order issued on the 22nd May, 2020, maintaining status quo, expired on 4th June, 2020, and a subsequent order was issued on 2nd July, 2020 maintaining status quo. It is argued that from the periods of subsistence of the status quo that the public auction sale was conducted on 26th

June, 2020 upon lapse of the interim orders. That there was nothing stopping the Bank from exercising its statutory power of sale as at the aforementioned date. That as at 2nd July, 2020, when a subsequent order was entered in respect to the property, sale had already been effected and property duly transferred to the 3rd Respondent.

26. What is clear to me is that the property was sold at an auction (whether the same was valid or not) and at this point I share the sentiments expressed in **Kenlink Global Ltd and Others v Paramount Universal Bank [unreported Milimani Comm.HCCC E260 of 2020]** that where a property has been transferred to a third party who is not a party in the suit, the court cannot even issue an injunction without hearing that party.

27. As to whether the court ought to declare that the auction was valid or not, I think that is a conclusive order that cannot be made at this interlocutory stage, so I decline to make such declaration or delve into the merits or demerits of the auction.

Can the Interested Party also has the option to seek to be enjoined in the suit filed by **PETER KIPSIGEI** who is apparently contesting the sale and termination thereof on grounds which seem to echo part of what the Interested Party is aggrieved about? On this suggestion it is argued that the prayers sought by the Interested Party are different from those sought by the plaintiff in **ELDORET E002 of 2020**.

28. Of course one would expect that logically if Peter Kipsigei is seeking the court to determine the validity of the auction conducted on 26<sup>th</sup> June 2020 and in fact demanding a refund of the purchase price, this would be a window of opportunity for the applicant to join, but then that is not an option she wants to consider, and certainly this court as an umpire cannot direct a player in the field on where to kick the ball of litigation.

I do not think I can say any more in this spiral web, this matter must be put to rest one way or the other. I have rendered myself twice on this matter and perhaps the applicant ought to consider taking up the matter to a court of superior jurisdiction

29. I acknowledge the applicants great desire to save her matrimonial home at all costs but really it is well settled in law that an Applicant who is aware of the consequences of offering their matrimonial property to be registered as Charge in favour of the Bank is estopped from using the same as an excuse in denying the Bank its right to statutory power of sale. This was expressed succinctly in **Julius Mainye Anyega v Ecobank Kenya Limited [2014] eKLR** where the Court stated as follows:

*'The fact that the Mortgaged property is a matrimonial property will only become relevant if the Applicant is alleging lack of consent of the spouse in the creation of the Mortgage herein or notice on the spouse or spouses has not been accordingly issued as by law required. But where the right of Mortgagee's statutory power of sale has lawfully accrued, it will not be stopped or postponed because the Mortgaged property is a matrimonial'*

The upshot is that the application lacks merit and is dismissed with costs to the 1<sup>st</sup> respondent

Virtually delivered and dated this 27<sup>th</sup> day of May 2021

**H. A. OMONDI**

**JUDGE**