



Parklane Construction Limited v Fechim Investments Limited (Miscellaneous Civil Application 507 of 2015) [2021] KEHC 354 (KLR) (Commercial and Tax) (17 December 2021) (Ruling)

Neutral citation: [2021] KEHC 354 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION 507 OF 2015**

A MSHILA, J

DECEMBER 17, 2021

BETWEEN

PARKLANE CONSTRUCTION LIMITED PLAINTIFF

AND

FECHIM INVESTMENTS LIMITED DEFENDANT

RULING

1. The application is a Notice of Motion dated 31st May, 2021 and is brought under the provisions of Section 1, 3A, 63(e) of the *Civil Procedure Act* 2010, and all other enabling provisions of the law. it is supported by the grounds on the face of the application and on the Supporting Affidavit of the Eshban Githiaka made on 31/05/2021; the applicant seeks the following orders;
 - a. That there be a stay of further proceedings before the Deputy Registrar as they relate to the disposal of Ruiru/Ruiru East/Block 7/16;
 - b. That there court adopts the valuation by Tysons Limited dated 16/10/2018 for puposes of the sale of the property;
 - c. That there court certifies that the reserve price on the property shall not be less than the forced sale as appears on the valuation dated 16/10/2018, that is, Kshs.155,000,000/-;
 - d. That there be a new settlement of terms of sale of the property in tandem with the above orders.
2. The parties were directed to canvass the application by way of written submissions; hereunder is a summary of the parties respective submissions.



Applicant's Case

3. The applicant submitted that respondent commissioned a valuation on the subject property on 16/10/2018 and the value given at the time was a forced sale value of Kshs.155,000,000/-. It was thus equitable to fix this as the reserve price; there was no new valuation to justify the unilateral price arrived at by the respondent; that the only concession made by the applicants' advocate was that the respondent be allowed to bid for the property on the basis of the terms recorded on 4/04/2019; but that it did not concede to the reduction of the reserve price.
4. When the matter came up for mention before the Deputy Registrar on 11/05/2020 the respondent made an oral application requesting the court for a Certificate of Completion of Sale and also sent a letter to the applicant indicating that the property had been sold to the respondent for Kshs.120,000,000/-; this was a court supervised sale whose supervision was to ensure the property is sold for the best price available.
5. The applicant contends that all the correspondence exhibited indicate that the Sales Agent never copied any correspondence to it; the conduct of the impugned sale was opaque.
6. The agreed bid was based on the original settled terms; case law relied on *Mbuthia vs Jimba Credit Finance Corporation and Another [1988] eKLR* where the Court of Appeal held;

‘A sale made at a fraudulent undervalue will be set aside. But the court will not set aside a sale merely on the ground that it is disadvantageous, unless the price is so low as to be in itself evidence of fraud.’
7. The applicants submitted that the court ought to intervene so as to protect the applicant so that the property gets the market value and is disposed for the highest amount possible; the applicant is legitimately apprehensive that the respondent may move to court for a Certificate of Completion for a sale that is patently defective, illegal and inequitable.
8. Further the applicant submitted that any transaction conducted in contravention of settled terms is not a sale and ought to be set aside ex debito justitiae; and in light of the above there be a new settlement of terms for the sale of the property in tandem with the adoption of the valuation by Tysons Limited dated 16/10/2018.

Respondent's Case

9. The respondent opposed the application and relied on the Replying Affidavit dated 8/06/2021 made by Mukesh Hirani and a Supplementary Affidavit made by Jomo Nyaribo dated 18/08/2021.
10. The respondent stated that judgment was entered in favour of the respondent as against the applicant and a decree issued on 3/03/2015; in execution of the decree parties appeared before the Deputy Registrar on 4/04/2019 for Settlement of Terms and by consent agreed on the appointed Estate Agent and the reserve price of Kshs.155,000,000/-. After unsuccessful attempts to sell the property the parties appeared before the Deputy Registrar on 2/07/2020 and the respondent notified the court that the property had been revalued and the order recorded on 4/04/2019 was varied to adjust the reserve price downwards to Kshs.82,250,000/-; the Order also granted the respondent leave to bid for the purchase of the suit property as provided under Order 22 Rule 61 of the Civil Procedure Rules.
11. The respondent submitted that the consent order issued on 2/07/2021 has never been reviewed, appealed against or set aside.



12. Further the Valuation Report by Tysons Limited of 16/10/2018 had been overtaken by the two subsequent valuation reports that were made available to court; the sale was concluded and the plaintiff/deeree/holder was declared the highest bidder and successful purchaser by the court appointed Sales Agent.
13. On the prayer for staying of an execution process, the respondent submitted that the applicant had not indicated why the stay of proceedings was being sought; whether it was a stay pending appeal or whether a stay pending the hearing of the instant application; provisions of; Order 22 Rule 52 of the Civil Procedure Rules had not also been met as there are no objection proceedings filed in this matter.
14. The respondent submitted that there was no evidence placed before this court to warrant granting of any of the orders sought;

Issues For Determination

15. The Court after reading and considering the application, the affidavits and the respective written submissions has framed the following issues for determination.
 - a. Whether an order for stay of proceedings before the Deputy Registrar relating to the disposal of Ruiru/Ruiru East/Block 7 is merited;
 - b. Whether the Order of 4/4/2019 was varied;
 - c. Whether there should be new settlement of terms of sale of the subject property at the reserve price of Kshs.155, 000,000/-

Analysis

Whether an order for stay of proceedings before the Deputy Registrar relating to the disposal of Ruiru/Ruiru East/Block 7 is merited;

16. The Applicant herein sought for an order of stay of further proceedings before the Deputy Registrar as they relate to the disposal of Ruiru/Ruiru East/Block 7/16. On the face of the Application it is not clear what form of stay the Applicant wants granted. Why should the stay of proceedings be stayed? Pending what? The Applicant did not elaborate on the nature of stay it seeks and this court cannot make an assumption on the same. This prayer is thus dismissed.

Whether the Consent Order of 4/4/2019 was varied;

17. The second issue is whether the Consent Order of 4th April, 2019 was varied? It was the Applicant's contention that the reserve price on the property should not be less than the forced sale as appears on the valuation dated 16th October 2018, that is, Kshs.155, 000, 000.
18. In contravention to the Applicant's argument, the Respondent referred the Court to the court proceedings of 2nd July 2021 where the reserve price was adjusted downwards to Kshs.82, 250, 000 and consent orders issued on 2nd July 2021.
19. This court has had the occasion to peruse the proceedings of the court of 2nd July 2021. The advocates for both parties, Mr. Gitonga and Mr. Nyaribo were present in court. Mr. Nyaribo notified the court that the property had been revalued and the revaluation reports by Kenya Valuers and Estate limited



and J. Musyoka Consultants and been shared between the parties. The Respondent/Plaintiff then asked the court for the following prayers.

- a. That the consent order recorded on 4th April 2019 be varied to adjust the reserve price to Kshs.82, 250, 000
- b. The Decree holder/Plaintiff be granted leave under the provisions of Order 22 Rule 61 of the Civil Procedure Rules to bid for the purchase of the property.

20. Mr. Gitonga Counsel for the Defendant responded as follows;

“We acknowledge receipt of the valuation reports. The reserve price is apparent. We have no objection as to the prayers as set out by the Plaintiff/Decree Holder. They will be allowed to bid like any other interested bidder.”

21. It is based on this that the Deputy Registrar Hon. E. Tanui then went ahead and stated as follows;

“The court hereby and with the consent of the parties, varies the consent recorded on 4th April 2019 by adjusting the reserve price to Kshs.82, 250, 000. The Plaintiff/Decree Holder be and is hereby allowed to bid for the purchase of the subject property.”

22. From the above mentioned court proceedings it is clear that the Applicant consented to adjusting the reserve price to Kshs.82, 250, 000. The Applicant cannot therefore argue that the only concession made by the Applicant’s Advocate was that the Plaintiff be allowed to bid for the property on the basis of the terms recorded on 4th April 2019.

23. This court is a court of record and it is evidently clear in the typed proceedings (marked JN1) as well as the proceedings in the court file on 2nd July 2021 that the Applicant acknowledged receipt of the valuation reports and had no objection to the prayers set out by the Plaintiff/Decree Holder. It is based on these proceedings that a new consent was recorded by the court and the Court Order dated 10th August 2020 was subsequently issued.

24. In light of the above this court is satisfied that the Consent Order of 4/4/2019 was indeed varied on 2/07/2021.

Whether there should be fresh settlement of terms of sale of the subject property at the reserve price of Kshs.155, 000,000/-

25. On whether there should be a new settlement of terms of sale of the property? It was the Applicant’s argument that there be a new settlement of terms of sale of the property in tandem with the orders sought and that it was apprehensive that the Plaintiff may move the court for a certificate of completion for a sale that is patently defective, illegal and inequitable.

26. The Court has already established that the sale of the property was to be conducted pursuant to the consent order dated 2nd July 2021. It is noteworthy that the Applicant has not filed any application seeking to set aside the consent order of 2nd July 2021 and the same stands valid and binding until reviewed, varied, set aside or appealed against. The parties hereto are bound by this consent order.

27. In the case of Flora N. Wasike vs Destimo Wamboko [1988] eKLR Hancox JA cited Setton on Judgments and orders (7th edition) Vol. 1 page 124, and reiterated that;

“Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them... and cannot be varied or



discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement.”

28. There being no Application varying, reviewing or setting aside the Consent Order of 2nd July 2021, the Applicant’s Application dated 31st May 2021 is without merit.

Findings And Determination

29. For the foregoing reasons this court makes the following findings and determinations;
- i. This court finds the application for an order for stay of proceedings before the Deputy Registrar relating to the disposal of Ruiru/Ruiru East/Block 7 to be lacking in merit;
 - ii. This court finds that the order of 4/04/2019 was varied by the order of 2/07/2021;
 - iii. This court finds that a fresh settlement of terms of sale of the subject property cannot take place at this late stage;
 - iv. The application in its entirety is found to be devoid of merit and it is hereby dismissed with costs to the respondent.

Orders Accordingly

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 17th DAY OF DECEMBER, 2021.

HON.LADY JUSTICE A. MSHILA

JUDGE

In the presence of;

Gitonga for the Defendant/Applicant

Cherono holding brief for Nyaribo for the plaintiff/Respondent

Lucy-----Court Assistant

