



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HIGH COURT CIVIL CASE NUMBER 170 OF 2010

IN THE MATTER OF AN APPLICATION BY DYSELEER MIREILLE LESOIPA UNDER SECTION 17 OF THE MARRIED WOMEN PROPERTY ACT 1882 (AS AMENDED)

DYSELEER MIREILLE LESOIPA.....PLAINTIFF/DECREE HOLDER

=VERSUS=

MANUEL LESOIPA alias EMMANUEL LESOIPA.....DEFENDANT/JUDGMENT DEBTOR

AND

NUCLEAR INVESTMENT LIMITED.....PURCHASER/APPLICANT

RULING

1. The application before Court is the Amended Notice of Motion dated 16/5/2018. The prayers sought are;

1. Spent

2. THAT this Honourable Court be pleased to enjoin the Purchaser/Applicant as an Interested Party/Applicant as such in this matter.

3. THAT this Honourable Court do issue an order making the sale carried out on the 30th day of October, 2017 in respect of the property SAMBURU/MARALAL TOWNSHIP/112 to NUCLEAR INVESTMENTS LIMITED absolute.

4. THAT consequently to the order above, this Honourable Court do issue an order vesting the parcel of land SAMBURU/MARALAL TOWNSHIP/112 to NUCLEAR INVESTMENTS LIMITED.

5. THAT the Honourable Court be pleased to dispense with the signature and the production of PIN certificate, passport size photographs and copy of national identity card of MANUEL LESOIPA alias EMMANUEL LESOIPA, the Defendant/Judgment Debtor herein, and in its place the Executive Officer be authorized to sign all documents necessary for effecting the transfer in favour of NUCLEAR INVESTMENTS LIMITED.

6. THAT arising from the above, this Honourable Court be pleased to order and direct that the Chief Land Registrar do dispense with the production of the original Certificate of Lease and therefore issue a Certificate of Lease in respect of SAMBURU/MARALAL TOWNSHIP/112 in favour of NUCLEAR INVESTMENTS LIMITED.

7. THAT cost of this application be provided for.

2. The application is premised on the supporting affidavit of James Mutahi Kariuki (Applicant) and on grounds;

(a) THAT Purchaser/Applicant herein did purchase in a public auction plot No. SAMBURU/MARALAL TOWNSHIP/112.

(b) THAT at the fall of the hammer, the Company and emerged the highest bidder for the aforementioned property with an offer of Kshs. 15,200,000/= (Kenya Shillings Fifteen Million Two Hundred Thousand Only).

(c) THAT by an order of the Court dated 24th July, 2017, it is ordered sale of plot number SAMBURU/MARALAL

TOWNSHIP/112 within ninety (90) days by public auction.

(d) THAT the Purchaser/Applicant has fully paid purchase price to the Plaintiff's advocates as follows;

(i) The mandatory 25% on the fall of the hammer which was equivalent to Kshs. 3,800,000/= (Kenya Shillings Three Million Eight Hundred Thousand Only).

(ii) On 29th January, 2018, the balance of Kshs. 11,400,000/= (Kenya Shillings Eleven Million Four Hundred thousand Only) to the firm of Mugambi Nguthari & Co. Advocates by bank transfer.

(e) THAT no application has been made objecting the said sale as is provided under Order 20 rule 74 and 75 of the Civil Procedure rules.

(f) THAT the interest of the Purchaser/Applicant is yet to be realized as the property is yet to be vested in its favour.

(g) THAT the presence of the Purchaser/Applicant in this matter is necessary to enable protect its interest in the property purchased for value.

(h) THAT for the Purchaser/Applicant to invest and fully utilize the subject property, it is necessary that the sale be made absolute and a vesting order be issued by the Court.

(i) THAT the Purchaser/Applicant invested heavily in the purchase and being an intreprenuering Company, it is necessary that orders herein be issued timeously.

(j) THAT the pending aspect of the matter regards execution of the decree arising from the judgment which aspect by virtue of Order 24 Rule 10 of the Civil Procedure Rules, 2010, neither requires substitution of a deceased party nor does it attract abatement of a suit.

(k) THAT there was no limitation for substitution where the suit had been determined execution proceedings were already in place as in this matter.

(l) THAT arising from the foregoing, it is only mete and just that this Honourable court issue orders enforcing the sale and vesting the property in favour of the Purchaser value.

(m) THAT the orders sought herein are meant to effect the judgment of the court.

3. In a nutshell the Applicant's case as gleaned from the grounds and supporting affidavit is that following an advertisement in the Daily nation on 16/10/2017 by Ms Legacy Auctioneering Services, the Applicant participated in a public auction for the sale of plot number Samburu/Maralal Township 112 and emerged the highest bidder with an offer of Kshs. 15,200,000/=.

4. A sum of Kshs. 3,800,000 being the mandatory 25% of the fall of the hammer was paid. Annexure "JMK 4' is exhibited as acknowledgement by Ms Legacy Auctioneers.

5. The balance of Kshs. 11,400,000 was to be paid directly to Ms Mugambi Nguthari & Company Advocates as per bank details provided. Through a loan from Ms Family Bank, the balance of the purchase price was raised and paid directly via a bank transfer to ms Mugambi Nguthari & Company Advocates. A memorandum and certificate of sale has since been issued to the Applicant by the auctioneer.

6. It is urged that no application whatsoever has been raised in objection to the sale neither has the sale been set aside by court. The sale of the property should thus be made absolute and a vesting order issued to the Applicant.

7. It is the Applicant's position that since the matter regards execution of the decree arising from the judgment of Court, by virtue of **Order 24 Rule 10** of the **Civil Procedure Rules 2010**, the same neither requires substitution of a deceased party nor does it attract abatement of suit.

8. The Application is opposed and a preliminary objection on points of law dated 12/6/2018 is on record as well as grounds of opposition.

9. The gist of the preliminary objection and the grounds of opposition is that the Court has no jurisdiction to grant the substantive reliefs sought as the same ought to be sought in the main suit.

10. It is urged that in accordance with the decision in **MARIGI Vs. MURIUKI & 2 OTHERS CIVIL APPEAL NUMBER 189 OF 1996 [2008] 1KLR 1073**, the **Law of Succession Act** recognises the rights of wives and children over their husband's or father's estate. These rights are inchoate and accrue upon the death of the husband. It is urged that the public auction conducted on 30/10/2017 after the death of the deceased was illegal, irregular, null and void.

11. The amended notice of motion is challenged on grounds that it was amended without leave of Court.

12. The *locus standi* of the Applicant is also challenged as it is not a party to the suit. It is also urged that the process from the "fall of the

hammer” was not completed and there is no evidence of this.

13. The application is impugned for having been framed and filed against Manuel Lesoipa (deceased) as if he is still alive. Manuel is deceased and a personal representative ought to be enjoined.

14. The Applicant filed a supplementary affidavit sworn on 13/6/2018.

15. The application was canvassed by way of oral submissions.

16. I have considered the application, the supporting affidavit, the preliminary objection and the supplementary affidavit.

17. I need to address and get out of the way a preliminary issue that I find straight forward and not requiring elaborate inquiry. This is the propriety of the amended notice of motion dated 16/5/2018 which the Respondent holds was unprocedurally amended. The ready answer is found in the record of Court of 9/5/2018. I reproduce the record here;

“9/5/2018

Before Hon. A. K. Ndung'u J

C/A Betty/Edna

Kimani holding brief for Mugambi for Plaintiff

Ndung'u holding brief for Arusei for Respondent

Kahiga with Otieno for Purchaser/Applicant

Kahiga: The only issue is the vesting of the property. Notice of motion is dated 26/2/2018. We propose to amend the notice of motion and come back when we can dispose off the issue.

Ndung'u: No objection.

Kimani: No objection.

Court: An amended motion be filed and served within the next 7 days. Responses within 7 days.

Hearing 13/6/2018.

A. K. NDUNG'U

JUDGE

9/5/2018”

18. The record speaks for itself. The amendment was sanctioned by all parties. It is not enough for counsel for the Respondent to state that counsel holding brief did not have such instructions. Only a formal setting aside of the orders of Court would suffice.

19. Ultimately, the issues for determination are;

1. Whether the sale by public auction was regular and if so whether the sale to Nuclear Investment Limited should be made absolute.
2. If 1 above is in the affirmative, whether a vesting order in respect of property SAMBURU/MARALAL TOWNSHIP/112 in favour of Nuclear Investment Limited should issue.
3. What other consequential orders (if any) should the Court make.

20. This is a concluded trial. We are at the execution stage. On the 23/8/2017, the Deputy Registrar settled the terms upon which a public auction would be conducted in execution of decree. Ms Legacy Auctioneers were duly appointed to conduct the sale. The sale was to be pegged on a reserve price of Kshs. 15 million and was to be conducted within 90 days. The intended sale was to be advertised in a daily newspaper with nationwide circulation.

21. That sale was pursuant to Order of Court dated 20/7/2017 and issued on 24/7/2017 following an application canvassed on 8/2/2017, I reproduce the said orders;

1. THAT the Applicant/Plaintiff's Application dated 30.08.2016 be and is hereby disallowed, but is compromised as per orders

below.

2. THAT the suit plot, SAMBURU/MARALAL TOWNSHIP/112 be advertised for sale by Public Auction whereby the proposed purchaser and public can participate.
3. THAT the proceeds of the sale be applied as per the judgment of the Court dated 9th February, 2015.
4. THAT the advertisement, sale by Public Auction and enforcement of the Court Judgment of 9th February, 2015, be done within ninety (90) days of this ruling unless otherwise extended by a Court order upon application.
5. THAT there shall be no order as to costs.

22. I have painstakingly considered the affidavit evidence and the annexures thereto. It is crystal clear that the public auction was conducted within the law and all conditions set by Court were adhered to. The Applicant was the highest bidder. The propriety of sale is not challenged.

23. The orders of Court of 24/7/2017 have not been varied, reviewed or otherwise set aside. Without vacation of these orders any public auction carried out within the terms of the orders is valid.

24. It is instructive to note the provisions of **Order 24 Rules 3, 4, 7 & 10** of the **Civil Procedure Rules**.

25. **Order 24** provides;

“Rule (3)

(1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time.

Rule (4)

(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.

Rule (7)

(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.

Rule (10).

Nothing in rules 3, 4 and 7 shall apply to proceedings in execution of a decree or order.”

26. This matter is at the tail end of the execution process. By virtue of **Order 24 Rule 10**, the provisions of **Order 24 Rules 3, 4** and **7** are not applicable in our instant suit.

27. The instant case, therefore, must be distinguished from the decision in M'NYERI M'RIMUNYA Vs. BETH KAARI & 2 OTHERS [2018] eKLR. In the decision, proceedings had been initiated after the death of the deceased to recover costs. In our case the proceedings including the initiation of execution proceedings were done in the lifetime of the deceased. The Court made a finding that the subject

property he sold to satisfy the judgment of Court. The fate of the subject property was already sealed.

28. I agree with the holding of *Obaga J* in **AHMED ALI ISMAEL Vs. ALI SHURIA [2013] eKLR** where he stated;

“...There was an argument by Mr. Gatune for the administrators that this application cannot be sustained as there has been no substitution of the deceased. This argument is misplaced. Order 24 Rule 10 of the Civil Procedure Rules is very clear that rules 3,4 and 7 shall not apply to proceedings in execution of a decree...”

29. The sale was properly sanctioned by Court in proceedings where the judgment debtor actively participated. Resistance to execution was exhaustively litigated on and determined in favour of the decree holder and sale by public auction picked as the mode of execution.

30. The Applicant was invited to the public auction through a legal process. It participated. It was declared the highest bidder. The Applicant is a bona fide purchaser for value through a court sanctioned auction.

31. I am satisfied with the legality of initiation of the execution process, the procedure followed and the conduct of the public auction itself.

32. This is a Court of justice. There is in place a valid decree and orders for execution through sale by public auction. In my considered view, where a judgment debtor has participated in execution proceedings culminating to an order for the sale of a specific property by way of a public auction to satisfy the decree, it would be an injustice of monumental proportions to deny an innocent purchaser for value under a Court sanctioned process the right to full enjoyment of such property.

33. I am persuaded that at this juncture the Court's duty is to confirm that the sale by public auction was in accordance with the terms settled by Court. Any attempt to resurrect the litigation herein must be resisted. There is a successful litigant, the Plaintiff, who must be allowed to enjoy the fruits of the legally obtained judgment and the regular execution process.

34. The challenge on the *locus standi* of the Applicant is founded on sinking sand. Having participated in the auction ordered by the Court, the prayer by the Applicant to be enjoined in these proceedings as per prayer 2 of the amended notice of motion is appropriate to enable it enforce its right. Indeed, the Applicant becomes a necessary party at this stage of the proceedings.

35. On the material before me, I am satisfied that the sale by public auction herein was regular and done in accordance with the terms settled by Court. The Applicant paid all the necessary monies and indeed, the Plaintiff/Decree Holder has not contested the fact that her advocates received the decretal sum.

36. Consequently, I find merit in the application before Court and I grant orders in terms of prayers 2, 3, 4, 6 and 7. Each party to bear its own costs.

Dated and Signed at Nakuru this 31st day of July, 2018.

A. K. NDUNG'U

JUDGE