



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

PETITION NO. 11 OF 2015

**IN THE MATTER OF APPLICATION TO SET ASIDE THE SALE OF LR. NO. KISII TOWN
BLOCK III/244**

AND

**IN THE MATTER OF THE CONTEMPT OF THE ORDERS OF THE COURT MADE ON 5TH
APRIL, 2016**

BETWEEN

KEBIRIGO GENERAL STORES.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE INSURANCE REGULATORY AUTHORITY.....2ND RESPONDENT

THE LIQUIDATOR, KENYA NATIONAL ASSURANCE CO. LTD.....3RD RESPONDENT

MOHABE CHACHE.....4TH RESPONDENT

MOTABO CHACHE.....5TH RESPONDENT

NEHEMIAH MANOTI.....6TH RESPONDENT

THE LAND REGISTRAR, KISII COUNTY LAND REGISTRY.....7TH RESPONDENT

DENNIS MANONO NYATUNDO.....8TH RESPONDENT

JAPHET ASIMBA ABABU.....9TH RESPONDENT

ALFRED MDEIZI PAVE AUCTIONEERS.....10TH RESPONDENT

RULING

1. This ruling relates to the application dated 13th July 2016, brought under **Order 22 Rule 75, order 40 Rules 2, 3, 4 and 5 and order 51 Rule 15 of the Civil Procedure Rules and Articles 23, 27 and 40 of the Constitution of Kenya (2010).**

2. The prayers sought are as follows:

1. Spent.

2. That this Honourable Court be pleased to issue an order of temporary injunction to restrain the 9th and 9th Respondents by themselves or any other of their agents, employees, nominees and/or servants from selling, charging, occupying, transferring or otherwise dealing with the proprietorship/registration of L. R. No. KISII TOWN/BLOCK III/244 pending the hearing and determination of this Application.

3. That the 7th – 10th Respondents be restrained by themselves, their agents, employees, nominees and/or servants from interfering with the Applicant's quiet occupation and/or enjoyment of all that Parcel of Land known as KISII TOWN BLOCK III/244 pending hearing and determination of this Application.

4. That this Honourable Court be pleased to nullify and set aside the purported Sale of the subject property known as KISII TOWN BLOCK III/244 conducted by PAVE Auctioneers on 6th April, 2016 where the property was sold to Dennis Manono Nyatundo and Japheth Asimba Ababu.

5. That the Honourable Court be pleased to commit the 8th, 9th and 10th Respondents to jail for six months or such other sufficient period for their wilful violation of the Order made on 5th April, 2016.

6. That costs for this Application be provided for.

3. The application is supported by the affidavit of Samson D. Nyandigisi, the applicant's managing director sworn on 13th July 2016 in which he states that a Notification of Sale dated 31st December 2015 was issued by the Chief Magistrate Kisii for the sale of LR. No. Kisii Town Block III/244 (hereinafter "the suit property") in satisfaction of a decree for Kshs. 702, 427 issued in Kisii CMCC 854 of 1994 and that pursuant to the said Notification of Sale, the 10th respondent issued a Public Notice setting down the auction for Wednesday 6th April 2016 as shown in Annexure "SDN2".

4. He avers that vide a letter dated 18th March 2016 addressed to the Applicant's manager (annexture "SDN3"), the 10th respondent informed the applicant that the forced value of the suit property was Kshs. 7,500,000/= whereupon advised the applicant to avail bidders. It is the applicant's case that on 5th April 2016, this court issued injunctive orders and orders staying execution of the ruling delivered on 11th December 2015 pending the hearing and determination of the application dated 21st March 2016.

5. The applicant's deponent avers that he is aware that because of the said injunctive and stay orders of 5th April 2016, the public auction scheduled for 6th April 2016 did not take place and that the said orders were properly served upon the 10th respondent and its advocate on record as shown in annexure "SDN5". He further avers that the 10th respondents purported sale of the suit property and the subsequent application by the 8th and 9th respondent to be issued with Certificate of Sale together with the subsequent transfer of the suit property were fraudulent as they were obtained by means of concealment of facts.

6. The applicant insists that no public auction of the suit property was conducted and therefore, the subsequent registration of the 8th and 9th respondents as the owners of the suit property places the applicant at the risk of permanently being deprived of the use and ownership of its property. He also avers that the purported sale was null and void having been conducted in contempt of a valid court order issued on 5th April 2016 for which the 8th, 9th and 10th respondents should be committed to jail.

7. The applicant refers to the existence of an appeal at Kisumu being Kisumu Appeal No. 34 of 2016

which he states, shall be rendered nugatory if the orders sought herein are not granted.

8. The 10th respondent opposed the application through his replying affidavit sworn on 9th August 2016 in which he states that he is not a party to the original petition and that no leave had been obtained to enjoin him to the case/petition. He avers that he was issued with warrants of execution of decrees in Kisii CMCC 354 of 1994, 37 of 1997 and Migori CMCC 2 of 1996 and 1355 of 1995. He states that following the dismissal of the application made by the applicant to stay the execution of the said decrees, he proceeded to execute the decrees by advertising the suit property for sale by public auction and that on 6th April 2016 at 10 a.m., the 8th and 9th respondent purchased the suit property thereby finalizing the sale. He denies that he the applicant's directors were present at the venue of the auction during the sale of the suit property and further states that he had not been served with any court order stopping the sale at the time the 8th and 9th respondents purchased the suit property. He reiterates that eh complied with all the rules in executing the warrants and therefore, the sale was valid and cannot be set aside. He further states that eh cannot be cited for contempt of court in the absence of proof of service of an order and penal notice.

9. The 4th, 5th and 6th respondents opposed the application through their grounds of opposition dated 9th August 2016 in which they state that the instant application is incurably defective, bad in law, does not disclose any sufficient grounds and is an afterthought. They contend that the application has been made in bad faith with the intention of delaying the course of justice and denying them their right to enjoy the fruits of their judgment. They contend that the affidavit in support of the application is incompetent in so far as the same is sworn by a person not authorised in law to swear an affidavit.

10. It is the 4th, 5th and 6th respondents' case that the application offends the mandatory provisions of the Civil Procedure Rules. They contend that the application does not meet the threshold et for grant of stay of sale and has been overtaken by events.

11. The 8th respondent, DENNIS MANONO NYATUNDO, also opposed the application through his replying affidavit dated 16th August 2016 wherein he states that he has never been a party to the instant proceedings and neither has he been formally enjoined in the case.

12. He avers that he participated in the public auction that took place on 6th April 2016 at 10 a.m. in which he was one of the successful bidders who purchased the suit property in execution of the decree in Kisii CMCC 854 of 1994 and that he was not aware of the existence of any court order staying the said sale prior to the said purchase.

13. He contends that he was not personally served with any court order staying the said sale and that he only became aware of the same through the 10th respondent who informed him that he received the order on 6th April 2016 at 11 a.m. after the auction had already taken place. It is the 8th respondent's case that the said stay order had therefore, already been overtaken by events and therefore the instant application lacks merit and ought to be dismissed with costs.

14. When the matter came up for hearing before me on 31st August 2016, parties agreed to canvass the instant application by way of written submissions and on 14th February 2017, Miss Ochwal for the state informed the court that the 1st to 7th respondents did not intend to file any submission in view of the fact that they had not been cited for contempt of court.

15. I note that the 8th, 9th and 10th respondents have filed their respective submissions which I have perused.

Analysis and determination

16. Upon considering the application dated 13th July 2016, the response by the 8th, 9th and 10th

respondents and the parties respective written submissions, I discern the issues for determination to be as follows:

- a) Whether the 9th, 9th and 10th respondents have been properly enjoined in this suit.**
- b) Whether the 8th, 9th and 10th respondents should be held liable for contempt of court.**
- c) Whether the sale of the suit property by public auction, slated for 6th April 2016, was conducted, and if so, whether the said sale should be set aside.**
- d) Whether the applicant is entitled to the orders sought.**

17. With regard to the first issue of determination, I note that joinder of parties is governed by Order 1 of the Civil Procedure Rules. In law, joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the same act or transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate suits, any common questions of law of facts would arise. The court may even on its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute or whose presence is necessary in order to enable the suit to be effectively and completely adjudicated upon and to settle all questions involved in the suit. Therefore, joinder of parties is permitted by law and it can be done at any stage of the proceedings.

18. In the instant case, I find that the applicant joined the 8th, 9th and 10th respondents to this petition because these parties will directly be affected by the decision of this application. It was therefore necessary for the 8th, 9th and 10th respondents to be joined in these proceedings as this court will want to hear their side of the case before it makes a ruling. On the applicant's application this court were to proceed with the instant application without hearing the case of the 8th, 9th and 10th respondents, the same would go against the principle of natural justice as these respondents will adversely be affected by the decision of this court in its ruling.

19. On whether the sale of the suit property not placed by way of public slated for 6th April 2016 took place, I note that it is an undisputed fact that judgment was entered against the applicant in Kisii CMCC 854 of 1994 and it is in execution of the said judgment, the suit property herein LR. No. Kisii Town Blok III/224 was attached for auction. The applicant, on his part, to prevent the sale of its property filed a Notice of Motion application dated 15th February 2016 simultaneously with a petition seeking conservatory orders including orders for stay of execution of the judgment in Kisii CMCC 854 of 1994.

20. Pursuant to the ruling of 11th December 2015 a notification of sale dated 31st December 2015 was issued for the sale of the suit property in satisfaction of the decree and the 10th respondent was instructed to auction the sale, the 10th respondent in turn issued a public notice setting down the auction for Wednesday 6th April 2016.

21. The applicant was dissatisfied with the said ruling and intending to appeal the same at the Court of Appeal filed an application dated 23rd March 2016 under certificate of urgency seeking stay of execution of the ruling and orders of 11th December 2015 pending the hearing and determination of the application and the intended appeal.

22. On 5th April 2016 Nagilla J. issued an order of temporary injunction restraining the respondents by themselves, or through PAVE auctioneers or any other of their agents, employees, nominees and/or servants from selling by public auction or selling in any other manner the applicant's suit property on 6th April 2016 or any other date pending the hearing and determination of this application.

23. Annexure DM2 (b) on the 8th respondent's replying affidavit is a return of service sworn by one Juma William giving a detailed report of how he effected service upon the 10th respondent herein on the

morning of 6th April 2016 the day on which the public auction was scheduled to take place. I will reproduce and extract of the said affidavit wherein Mr. Juma states:-

“2...while in the company of Mr. Bernard at 8.05 a.m. we proceeded to Golf House within Kisii town, where the said firm of PAVE Auctioneers is situated for purpose of serving the said order, however we found the said office still locked.

3...we proceeded to the post office Kisii Huduma Centre at the parking ground awaiting for the said Auctioneer with a view to effect service of the said order upon him at the ground where the auction was to take place and proceeded to mount a copy of the said order on a tree trunk thereto as we were waiting for the Auctioneer.

4...I know of my own knowledge at around 11.13 a.m. or thereabout the said Auctioneer Mr. Alfred Mdeizi arrived at the place of Auction (Huduma Centre ground parking) whereupon at 11.18 a.m. or thereabout, I served copies of the said order upon Mr. Wilfred Mdeizi (PAVE Auctioneer) by personally tendering the said copies of the order to him and requiring his signature.

5...While in the company of the said Auctioneer, we proceeded to the Auctioneer’s office at Golf House wherein he accepted service by signing and dating on the face body of the principal copy which I now return herewith duly served. However the replying affidavit of the 10th respondent herein PAVE Auctioneers states:

10....that on the 6th April 2016 at 10.00 O’clock in the forenoon, I duly conducted the sale by public Auction and the 8th and 9th respondents herein were declared the purchasers being the highest bidders.

11...that upto and including the time of sale by public action I was never served with any subsequent orders of stay as alleged.

24. From my own observation, the copy of the order returned by the process server as having been duly served by the auctioneer proves that the auctioneer was served on the 6th April 2016 at 11.10 a.m. The auctioneer alleges that by this time he had already sold the property to the 8th and 9th respondents. However, it is not clear from his replying affidavit where the alleged sale, if at all, took place and the time at which he arrived at the venue if at all.

25. In the affidavit of Samson D. Nyandigisi he averred at paragraph 9 that he arrived at the venue at 11.00 a.m. and remained there until 5.00 p.m. and during that time no public auction took place. A similar averment was also made by the process server who clearly stated that he left the auctioneers office after 8.00 a.m. for the venue of the intended sale in search of the 10th respondent so as to effect service upon him, he went straight to the venue and remained there until 11.17a.m at which time the auctioneer arrived whereupon he tendered copy of the order upon him after there the two left together to the auctioneer’s office where he proceeded to sign and stamp the order.

26. In as much as the 10th respondent alleges that he received the order after the auction had taken place, this court is not convinced that any sale actually took place. I hasten to add that nothing has been filed to show how the said auction was conducted, who the bidders were, who the highest bidder was, how much deposit was paid by the highest bidder including how the supposed highest bidder paid for the bid whether by cash or banker’s cheque and what the reserve price was if any. There are also no details on whether or not a representative of the applicant attended the public auction. I find that the circumstances under which the alleged auction took place raise more questions than answers.

27. Furthermore, I note the 9th respondent’s advocate one Sam Onyango & Co. Advocates was served with the stay order on the 6th April 2016 at 8.50 a.m. In my humble view the advocate was under a duty

to inform the auctioneer about the order made by Nagillah J on 5th April 2016 but apparently this appears to have been deliberately ignored.

28. I find the purported sale, if indeed it ever happened, was tainted with illegality. It is not in order that property whose priced value was Kshs. 7,500,000 was sold at Kshs. 2,357,000 while its initial valuation was Kshs. 25,100,000.

29. There was also lack of material disclosure on the part of the 8th and 9th respondents who moved hastily before the lower court on 7th April 2016 seeking the executive officer of the court to sign the transfer forms vesting the property to them.

30. Therefore, in view of the foregoing this court finds that no public auction took place on 6th April 2016 at Huduma Centre parking at 10.00 a.m. or at all as was alleged by the 10th respondent and if the sale took place, the same was tainted with illegality.

31. Lastly, on the issue of contempt of court, only the 9th and 10th respondents were actually served with the court order dated 5th April 2016 and having found that no sale can be said to have taken place, it would not be in order to hold, in the same breath, that they disobeyed the court order and are liable for contempt. In any case, contempt proceedings are special proceedings which should be filed separately in their own substantive motion under the Judicature Act citing the 9th and 10th respondents for contempt. The present application is not anchored on the Judicature Act and the prayers for declaration of contempt of court cannot be granted.

32. For the above reasons, I will allow the applicant's Notice of Motion application dated 13th July 2016 in the following terms:

1. I hereby nullify and set aside the purported sale of the subject property known as Kisii Town Block III/244 conducted by PAVE Auctioneers on 6th April 2016 where the property was sold to Dennis Manono Nyatundo and Japhet Asimba Ababu.

2. That the applicant shall have the costs of this application.

Dated, signed and delivered in open court this 27th day of June, 2017

HON. W. OKWANY

JUDGE

In the presence of:

- Mr. Nyachiro for the petitioner/Applicant
- Miss Sagwa for the 8th and 9th Respondents
- Omwoyo: court clerk