



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 493 OF 2004

HASSAN A.A. ZUBEIDI.....PLAINTIFF

VERSUS

THIKA MUSLIM HOUSING CO-OPERATIVE SOCIETY LIMITED.....DEFENDANT

RULING NO. 3

1. The application dated 18th September 2015 has been made by the purchaser, **SCREEN CHECK AFRICA LIMITED**. It is an application through which the purchaser is seeking a declaration that the sale by public auction, which was conducted on 3rd August 2015, was absolute.
2. The applicant requested the court to issue a certificate confirming that Screen Check Africa Limited was the purchaser of the property **L.R. No. 10821/53 THIKA MUNICIPALITY**.
3. It is the applicant's further request that the court should raise the Prohibitory Order dated 20th March 2014.
4. In order to facilitate the transfer of the property to itself, the applicant asked the court to nominate the Deputy Registrar of this court to execute the Transfer instrument on behalf of the registered owner, **THIKA MUSLIM HOUSING CO-OPERATIVE SOCIETY LIMITED**.
5. And as the original title documents were in the hands of the registered owner, the applicant asked the court to direct the Registrar of Titles to dispense with the production of the original Certificate of Title.
6. After the transfer is given effect, the applicant asks the court to order the Registrar of Titles to issue a Provisional Certificate of Title in the applicant's name.
7. Another order which the applicant sought was that the Judgement – Debtor be ordered to forthwith hand over vacant possession of the land which is the subject matter of this application. If the Judgement – Debtor should fail to hand over vacant possession of the property, the applicant asks that the court should order that they be evicted.
8. It is the applicant's request that the court should issue a Vesting Order of a good and valid title of the No. 10821/53 to the applicant, free from any encumbrances.
9. When canvassing the application, Mr. Kipng'eno, the learned advocate for the plaintiff, pointed out that there was absolutely no dispute about the fact that the purchaser purchased the suit property at the

auction held on 3rd August 2015.

10. He also added that the said sale had not been set aside to date. Indeed, the defendants had not made any application to set aside the sale, as provided for by Order 22 Rule 74 or by Order 22 Rules 75 or 76 of the Civil Procedure Rules.

11. Given those circumstances, the plaintiff pointed out that, pursuant to Order 22 Rule 77 (1) of the Civil Procedure Rules, the court was now obliged to certify the sale as complete.

12. In answer to the application, Mr. Njoroge, the learned advocate for the defendant submitted that Order 70 rule 2 of the Civil Procedure Rules requires a purchaser at an auction to pay the purchase price before he could seek to have the property transferred to him.

13. In this case, the purchaser is said to have paid Kshs. 14 million only, by the time it filed the application for the transfer of the property.

14. It was the defendants submission that the legislature intended that the court be given proof of full payment. However, the defendants say that the purchaser in this case had not made available proof of payment.

15. If the payments had been made to the auctioneers, the defendants say that the purchaser ought to have provided receipts as proof of the payments.

16. Meanwhile, as the purchaser deponed that it had already taken possession of the suit property, the defendants said that there would then be no need for the purchaser to ask the court to grant orders which would enable it to achieve something which had already been done.

17. The defendants reminded the court that its position has always been that the suit property was not charged. The plaintiff is said to have admitted that fact, because it is only in that scenario that the original documents of title would still have remained in the hands of the defendant.

18. If the title had been charged, the defendant insists that the original title documents would not have remained in their hands.

19. In the understanding of the defendant, Order 22 rule 2 requires the purchaser to bring the title to court, so that the purchaser can prove that he had bought the land.

20. Finally, Mr. Njoroge informed this court that the defendant had filed Application **No. NAI 41 of 2016**, before the Court of Appeal. The said application was for stay of execution, and the defendant said that the Court of Appeal had already granted the orders on 27th January 2016.

21. On his part, the purchaser's advocate Mr. Kimondo, supported the application. He pointed out that his client paid 25% of the purchaser price at the venue of the auction.

22. The purchaser demonstrated that it did sign the Agreement for sale, which stipulated that the balance of the purchase price was payable within 30 days of the auction.

23. In respect to the balance of the purchase price, the purchaser did provide a copy of a receipt dated 3rd September 2015, which had been issued by **PYRAMID AUCTIONEERS**. The said receipt was for Kshs. 44,250,000/-.

24. As this application is dated 18th September 2015, it was clearly made after the purchaser price had been paid in full. Secondly, as the said balance was paid in accordance with the terms of the Agreement for sale, the purchaser did meet its obligations.

25. The purchaser told the court that it took possession of the suit property after paying the full purchase price. However, there was one plot, within the suit property which was under occupation.

26. It was the evidence of the purchaser that the person who had been living on that one plot moved out after the purchaser paid her. Therefore, according to the purchaser, none of the defendants was on the suit land currently.

27. In effect, the purchaser and the decree-holder did not require any orders for the eviction of the defendants.

28. Mr. Kimondo told the court that the defendant's appeal at the Court of Appeal had been struck out.

29. However, as he was not able to provide evidence before this court to satisfy me that the appeal had been struck out, I did direct that there would be a stay of further execution until this court was provided proof that the Court of Appeal had rejected the defendant's application.

30. It later transpired that the application which had been lodged at the Court of Appeal had been withdrawn on 19th February 2016. The import of the said withdrawal was that there was no order for stay of execution which had been issued by the Court of Appeal; or if one had been issued earlier, it was no longer in place.

31. I will now revert to the steps taken in regards to the sale of the land, and how the said steps stand in relation to the law.

32. Order 22 rule 69 (1) of the Civil Procedure Rules provides that the purchaser shall pay 25% of the purchase price immediately after he is declared the purchaser.

33. In this case the purchaser complied by pay the 25% deposit.

34. Pursuant to Order 22 rule 70 (1), the full amount would become payable upon delivery to the purchaser, of the executed conveyance or transfer.

35. In this instance the balance was paid in accordance with both the law and the Agreement for sale. It was paid within 30 days of the sale.

36. Order 22 rule 70 (2) of the Civil Procedure Rules stipulates that the Purchase Price should be paid into court unless the court otherwise directs.

37. The balance of the purchase price was not paid into court. In my considered opinion the fact that the balance was paid to the auctioneer rather than to the court, could not, and did not prejudice the defendant or any other person.

38. If the defendant wished to do so, they could have applied to the court to set aside the sale, for any of the reasons specified in Order 22 rule 75.

39. If the defendant satisfied the court that there was irregularity or fraud, and if the applicant suffered substantial injury by reason for the material irregularity or fraud, the court would set aside the sale.

40. Pursuant to Order 22 rule 77 (1) of the Civil Procedure Rules;

“Where no application is made under rule 74, rule 75 or rule 76, or where such application is made and disallowed, the court shall make an order confirming the sale, and thereupon there shall become absolute in so far as the interest of the Judgement-Debtor in the property sold was concerned?.

41. That is the stage that this case has reached. Therefore, I now confirm the sale of the suit property to

SCREEN CHECK AFRICA LIMITED. This declaration renders the sale absolute.

42. And pursuant to Section 48 of the Civil Procedure Act;

“Where immovable property is sold in execution of a decree and such sale has become absolute, the property is deemed to have vested in the purchaser from the time when the property was sold and not from the time the sale becomes absolute”.

43. At this stage of the proceedings, the court is not called upon to re-open the issues of liability. Therefore, whether or not the decree-holder had originally pleaded in the plaint that the property had been charged to him, is not material currently.

44. Having confirmed the sale, the same is now rendered absolute. It therefore follows that the land should be available for transfer to the purchaser. In order to enable that happen, I do now order that the prohibitory order which the plaintiff had earlier caused to be registered against the title, should be raised.

45. Meanwhile, because the defendant does not have any reason to want to help the plaintiff or the purchaser to finalise the execution process, I direct that the learned Deputy Registrar of this Court will execute the relevant Transfer Instrument for and on behalf of the registered owner.

46. The defendant is directed to hand over the original title documents to the Registrar of Lands, within 7 days of service of an order requiring it to do so.

47. If the defendants should fail, neglect or refuse to hand over the original title documents, the Registrar of Lands is directed to dispense with the requirement that the original document of title be made available before the property could be transferred.

48. And upon the registration of the Transfer of title to the purchaser, I direct the Registrar of Lands to issue to the purchaser a Provisional Certificate of Title for **L.R No. 10821/53 THIKA MUNICIPALITY.**

49. Finally, I do direct that a Vesting Order of a good and valid title do issue in favour of the purchaser, upon completion of the process of the transfer of the title.

50. The defendant will pay the costs of the application to the plaintiff and the Interested Party.

DATED, SIGNED and DELIVERED at NAIROBI this 20th day of June 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Kipnge'no for the Plaintiff

Kugua for the Defendant

Kimondo for Interested party

Collins Odhiambo – Court clerk.