



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND MISC. CIVIL APP. NO. 78 OF 2008 (JR)**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**MANGA DIVISION LAND DISPUTES TRIBUNAL ..... 1<sup>ST</sup> RESPONDENT**

**RESIDENT MAGISTRATE’S COURT, NYAMIRA ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**SIMION MOKAYA NYABWERA ..... 1<sup>ST</sup> INTERESTED PARTY**

**PIRASE KEMUNTO NYAMBANE ..... 2<sup>ND</sup> INTERESTED PARTY**

**BHAVIN ASHWIN GUDKA ..... 3<sup>RD</sup> INTERESTED PARTY**

**M/S ODONGO INVESTMENT AUCTIONEERS .....4<sup>TH</sup> INTERESTED PARTY**

**EX PARTE**

**JOHN MOSE NYABWERA**

**RULING**

**1. Background:**

At all material times the ex parte applicant, John Mose Nyabwera was the registered proprietor of all that parcel of land known as LR No. East Kitutu/Kebirichi/815 measuring 4.5 acres (hereinafter referred to as “the suit property”). The suit property was registered in the name of the applicant on 8<sup>th</sup> September 1973. The applicant had two (2) brothers namely, Simion Mokaya Nyabwera, the 1<sup>st</sup> interested party and Nyambane Nyabwera, deceased, whose widow, Pirase Kemunto Nyambane is the 2<sup>nd</sup> interested party herein. The applicant, the 1<sup>st</sup> interested party and the husband of the 2<sup>nd</sup> interested party, Nyambane Nyabwera, were the sons of Nyabwera Michira (hereinafter referred to as “Michira”) and Kerubo Nyabwera Michira (hereinafter referred to as “Kerubo”) who were their father and mother respectively. Michira died on a date which is not clear from the record while Kerubo died in the year 1989. Michira predeceased Kerubo. Michira owned a parcel of land the particulars of which has not been provided by the parties. Upon his death, the said parcel of land was inherited by Kerubo. Before her death, Kerubo divided the said parcel of land among her three (3) sons aforesaid.

2. In that regard, the said parcel of land was sub-divided into three portions namely, LR Nos. East Kitutu/Kebirichi/815, 816 and 817. The three parcels of land were registered in the names of the applicant, the 2<sup>nd</sup> interested party's husband, Nyambane Nyabwera and the 1<sup>st</sup> interested party respectively. A dispute arose between the applicant and the 1<sup>st</sup> and 2<sup>nd</sup> interested parties after the death of Kerubo. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties contended that the original parcel of land the particulars of which has not been provided as I have stated above measured 10.5 acres and that each son of Kerubo was supposed to get 3 acres each making a total of 9 acres. They contended that the remaining 1.5 acres was to be held by Kerubo during her lifetime and upon her death to be shared among her three sons equally. A parcel of land held in that manner is known as "*Emonga*" under the Gusii customs. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties contended further that, whereas LR Nos. East Kitutu/Kebirichi/816 and 817 measured 3 acres each, LR No. East Kitutu/Kebirichi/815 ("the suit property") which is registered in the name of the applicant measured 4.5 acres. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties contended that the applicant without their knowledge caused their mother's (Kerubo) share of the original parcel of land, her *Emonga* to be included in the suit property thereby increasing his share of the family land by 1.5 acres. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties contended that they discovered that Kerubo's *Emonga* had been included by the applicant as part of the suit property upon Kerubo's death.

3. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties were aggrieved by the alleged move on the part of the applicant to keep the whole of Kerubo's *Emonga* for himself. Sometimes in the year 2006, the 1<sup>st</sup> and 2<sup>nd</sup> interested parties filed a claim against the applicant at Rigoma Division Land Disputes Tribunal seeking an order that a portion of land measuring 1.5 acres being Kerubo's *Emonga* be hived off from the suit property and shared equally between the applicant and the 1<sup>st</sup> and 2<sup>nd</sup> interested parties. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties also sought an order compelling the applicant to open up an access road that used to pass through the suit property that he was alleged to have blocked. The tribunal after hearing both parties made its award on 3<sup>rd</sup> November 2006 in which, it ordered that Kerubo's *Emonga* that was included as part of the suit property by the applicant be hived off the said property and shared amongst the three sons of Kerubo equally. There was a further order that a path measuring 10 feet be reserved for use by the said sons of Kerubo to access the tarmac road in the area. For reasons which are not clear from the court record, this decision of Rigoma Land Disputes Tribunal seems not to have been adopted as a judgment of the court pursuant to the provisions of section 7 of the Land Disputes Tribunals Act, No.18 of 1990 (now repealed). The dispute between the parties was referred to Manga Division Land Disputes Tribunal, the 1<sup>st</sup> respondent herein, in the year 2007. The 1<sup>st</sup> respondent heard the parties again and made a fresh award on 7<sup>th</sup> September 2008. The 1<sup>st</sup> respondent reached the same decision as Rigoma Land Disputes Tribunal. The 1<sup>st</sup> respondent ordered that a portion of the suit property measuring 1.5 acres that the 1<sup>st</sup> and 2<sup>nd</sup> interested parties had claimed to be Kerubo's *Emonga* be shared equally between the applicant and the 1<sup>st</sup> and 2<sup>nd</sup> interested parties. It made a further order that a common access path with a uniform width of 12 feet be reserved for use by the parties. The decision of 1<sup>st</sup> respondent was adopted as a judgment of the court by the Senior Resident Magistrate's Court at Nyamira, the 2<sup>nd</sup> respondent herein, on 27<sup>th</sup> November 2008 pursuant to the provisions of section 7 of the Land Disputes Tribunals Act, No.18 of 1990 aforesaid.

#### **4. The judicial review application:**

The applicant was aggrieved by the said decision of the 1<sup>st</sup> respondent and moved this court under certificate of urgency on 17<sup>th</sup> December 2008 through the firm of Oruru Gisemba & Co. Advocates for leave to apply for an order of certiorari to quash the same. The applicant also sought leave to apply for an order of certiorari to quash the proceedings of the 2<sup>nd</sup> respondent aforesaid through which the said decision of the 1<sup>st</sup> respondent was adopted as a judgment of the court and an order prohibiting the 2<sup>nd</sup> respondent from issuing any decree pursuant to the said proceedings or executing the same. The applicant also sought an order that the leave sought if granted do operate as a stay. The applicant's application for leave was heard and allowed as prayed by Musinga J. (as he then was) on 4<sup>th</sup> February 2009.

5. The applicant thereafter filed the application for judicial review for the orders of certiorari and prohibition aforesaid on 24<sup>th</sup> February 2009 by way of Notice of Motion of the same date. The application was opposed by the 1<sup>st</sup> and 2<sup>nd</sup> interested parties. When the application came up for hearing, the 1<sup>st</sup> and 2<sup>nd</sup> interested parties raised a preliminary objection that the same was defective in form and substance and urged the court to strike out the same. The objection was taken before Muchelule J. who upheld the same and struck out the applicant's application for judicial review with costs on 16<sup>th</sup> November 2009.

## **6. Subsequent events:**

After the applicant's judicial review application was struck out, the 1<sup>st</sup> and 2<sup>nd</sup> interested parties filed a bill of costs on 12<sup>th</sup> January 2010 for taxation which bill was taxed at Kshs. 118,609/= by G. H Oduor, Deputy Registrar on 22<sup>nd</sup> March 2010. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties thereafter brought an application under Order XXI rule 49 of the repealed Civil Procedure Rules by way of Notice of Motion dated 8<sup>th</sup> November 2010 seeking a prohibitory order prohibiting the applicant and all persons from having any dealing with LR No. East Kitutu/Kebirichi/815 ("the suit property") save where such proceedings are undertaken pursuant to the execution proceedings that the 1<sup>st</sup> and 2<sup>nd</sup> interested parties had initiated. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties application dated 8<sup>th</sup> November 2010 was served upon the applicant's then advocates on record and was heard before Makhandia J. (as he then was) who allowed the same as prayed on 2<sup>nd</sup> March 2011. On 7<sup>th</sup> February 2012, the 1<sup>st</sup> and 2<sup>nd</sup> interested parties filed an application for execution for the recovery of the sum of Kshs. 118,609/= that was awarded to them as costs. In the said application, they sought the attachment and sale of the suit property.

7. Before warrants for the attachment and sale of the suit property were issued, the 1<sup>st</sup> and 2<sup>nd</sup> interested parties took out and served upon the applicant, a notice pursuant to Order XXI rule 18 of the repealed Civil Procedure Rules requiring the applicant to appear in court and show cause why the decree for costs that was issued herein should not be executed against him. Neither the applicant nor his advocates then on record appeared in court on 19<sup>th</sup> September 2011 when the matter came up before G. H Oduor, Deputy Registrar. In the absence of any cause shown by the applicant, the said Deputy Registrar ordered warrants for the attachment and sale of the suit property to issue. Warrants of attachment and sale of the suit property were subsequently issued on 16<sup>th</sup> February 2012 and handed over to Odongo Investment Auctioneers, the 4<sup>th</sup> interested party herein for execution. The 4<sup>th</sup> interested party thereafter set in motion the process of selling the suit property to recover the said sum of kshs. 118,609/= that had been awarded to the 1<sup>st</sup> and 2<sup>nd</sup> interested parties as costs. The suit property was advertised for sale and sold to Bhavin Ashwin Gudka, the 3<sup>rd</sup> interested party herein on 21<sup>st</sup> April 2012 at Kshs. 700,000/=.

8. On 18<sup>th</sup> May 2012, the 4<sup>th</sup> interested party filed an application before this court under rule 17 (5) and (6) of the Auctioneers Rules 1997 in a separate file, namely, Kisii HC. Misc. Civil Application No. 178 of 2012 seeking an order that the suit property be transferred to the 3<sup>rd</sup> interested party who had purchased the same at a public auction and that the executive officer of the court do execute the instrument of transfer in favour of the 3<sup>rd</sup> interested party. This application was heard by L. Kaittany, Deputy Registrar on 7<sup>th</sup> June 2012 who allowed the same in a ruling that was delivered on 2<sup>nd</sup> July 2012. On 11<sup>th</sup> July 2012, the executive officer of this court executed the instrument of transfer of the suit property to the 3<sup>rd</sup> interested party. The interested party was subsequently registered as the proprietor of the suit property and was issued with a title deed on 15<sup>th</sup> October 2013.

## **9. The application before the court:-**

The applicant has now brought an application by way of Notice of Motion dated 3<sup>rd</sup> December 2013 under sections 34 and 63 (e) of the Civil Procedure Act, Cap. 21 Laws of Kenya and Order 1 rule 10 and Order 22 rule 75 and 79 of the Civil Procedure Rules, 2010 seeking the following reliefs:-

1. **THAT this application be certified as urgent and the same be heard ex parte in the first instance.**
2. **THAT Bhavin Ashwin the 3<sup>rd</sup> interested party herein be enjoined herein for purposes of this application.**
3. **THAT pending the determination of this application there be stay of execution of the “Decree” herein.**
4. **THAT Kisii HC. Misc. Application No. 178 of 2012 be consolidated for purposes of this application.**
5. **THAT the “purported” sale of the applicant’s parcel No. East Kitutu/Kebirichi/815 on or about 21<sup>st</sup> April, 2012 be set aside and/or be declared null and void.**
6. **THAT the order of the Deputy Registrar of this court made on 2<sup>nd</sup> July, 2012 permitting the executive officer of the court to execute transfer documents relating to Parcel No. East Kitutu/Kebirichi/ 815 in Kisii Misc. Application No. 178 of 2012 be set aside and/or vacated.**
7. **THAT the costs of and incidental to this application be paid by the interested parties.**

The applicant’s application was brought on the following grounds:-

- i. **The sale of the suit property by the 4<sup>th</sup> interested party to the 3<sup>rd</sup> interested party on 21<sup>st</sup> April 2012 is null and void for want of consent of the Land Control Board.**
- ii. **The orders that were made by L. Kaitany, Deputy Registrar on 2<sup>nd</sup> July 2012 for the suit property to be transferred to the 3<sup>rd</sup> interested party was made without jurisdiction and as such irregular.**
- iii. **The said orders that were made by the Deputy Registrar on 2<sup>nd</sup> July 2012 were made without notice to the applicant.**
- iv. **The applicant was not served with the proclamation or notification of sale.**

10. The application was supported by the applicant’s affidavit sworn on 3<sup>rd</sup> December 2013. In the affidavit, the applicant stated as follows. He resides at Koseta Farm within Trans Nzoia County. He was aware that the judicial review application that he had filed herein was struck out with costs. On 30<sup>th</sup> October 2013, he learnt from his son one, Samwel Mose that the suit property had been sold to the 3<sup>rd</sup> interested party. That information was received by his said son from the 3<sup>rd</sup> interested party’s agents who came to his (the applicant) home at Birongo and notified his son of that development. On receipt of this information, he instructed his advocates on record to obtain more information regarding the alleged sale of the suit property. The said advocates visited the Ministry of Lands office at Nyamira where they obtained copies of; a court order issued in Kisii HC Misc. Application No. 178 of 2012 on 10<sup>th</sup> July 2012, a certificate of sale issued by Odongo Investments Auctioneers, the 4<sup>th</sup> interested party herein and an instrument of transfer of land.

11. After obtaining the said documents, his advocates on record, advised him that no consent of the land control board was obtained in respect of the sale and transfer of the suit property to the 3<sup>rd</sup> interested party. He was advised further that the sale of the suit property to the 3<sup>rd</sup> interested party had not become absolute to warrant the transfer of the suit property to the 3<sup>rd</sup> interested party. The applicant has contended that he was never served with; draft decree for approval, certificate of costs, notice to show cause, proclamation and/or notification of sale, pleadings in Kisii HC Misc. Application No. 178 of 2012 and the application that was filed herein on 8<sup>th</sup> November 2010 by the 1<sup>st</sup> and 2<sup>nd</sup> interested parties. The applicant has contended that the notice to show cause and the proclamation and notification of sale which were purportedly served upon him were for the sale of movable property and not immovable property. The applicant has contended that the proceedings in Kisii HC Misc. Application No. 178 of 2012 were fraudulent in that he was not served with the application. He has contended further that, the Deputy Registrar had no jurisdiction to determine the application. The applicant has contended further that he was not aware of the sale of the suit property until he was notified of the same by his son as aforesaid.

12. The applicant’s application was opposed by the interested parties. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties

filed grounds of opposition dated 6<sup>th</sup> May 2014 in which they termed the applicant's application as incompetent and an abuse of the process of the court. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties contended that the applicant's advocates who have brought the present application are not properly on record and that the application has no basis. The 3<sup>rd</sup> interested party filed statement of grounds of opposition dated 26<sup>th</sup> May 2014 and a replying affidavit sworn on 27<sup>th</sup> May 2014. In his grounds of opposition, the 3<sup>rd</sup> interested party contended that the applicant's application is misconceived and bad in law. The 3<sup>rd</sup> interested party contended further that this court has no jurisdiction to entertain the application which is legally untenable and devoid of any merit.

13. In his replying affidavit, the 3<sup>rd</sup> interested party stated that the suit property was transferred to him lawfully following a court order after he purchased the same through a public auction that was conducted by the 4<sup>th</sup> interested party on 21<sup>st</sup> April 2012. The 3<sup>rd</sup> interested party denied that land control board consent was necessary for the transaction. On his part, the 4<sup>th</sup> interested party denied any wrong doing in relation to the attachment, sale and transfer of suit property to the 3<sup>rd</sup> interested party. In his affidavit sworn on 28<sup>th</sup> May 2014, the 4<sup>th</sup> interested party explained all the steps that he took from the time he was issued with warrants of attachment and sale of the suit property upto the time the property was sold and transferred to the 3<sup>rd</sup> interested party. The 4<sup>th</sup> interested party contended that the applicant was served with all requisite notices but ignored the same having lost interest in the case after his application for judicial review was struck out.

14. When the application came up for hearing on 5<sup>th</sup> June 2014, the parties agreed by consent that Bhavin Ashwin and Oscar Otieno Odongo be joined in these proceedings as 3<sup>rd</sup> and 4<sup>th</sup> interested parties respectively and that this court shall call for and peruse the court file for Kisii HC. Misc. Civil Application No. 178 of 2012 when considering the application herein. The parties agreed further that the application be heard by way of written submissions. The applicant, the 1<sup>st</sup> and 2<sup>nd</sup> interested parties, the 3<sup>rd</sup> interested party and the 4<sup>th</sup> interested party filed their submissions on 7<sup>th</sup> January 2015, 8<sup>th</sup> September 2014, 11<sup>th</sup> August 2014 and 24<sup>th</sup> November 2014 respectively.

15. I have considered the application by the applicant together with the affidavit filed in support thereof. I have also considered the interested parties' grounds of opposition and replying affidavits filed in opposition to the application. Finally, I have considered the parties' respective submissions and the authorities cited in support thereof. From my analysis of the application, the grounds of opposition and replying affidavits filed in opposition thereto and the submissions by counsel, the following in my view are the main issues that arise for determination by the court:-

- i. Whether the applicant has established valid grounds that warrant the setting aside of the sale of the suit property that was conducted on 21<sup>st</sup> April 2012?
- ii. Whether the order made by L. Kaitany, Deputy Registrar on 2<sup>nd</sup> July 2012 in Kisii Misc. Civil Application No. 178 of 2012 was valid and if it was not, whether this court has jurisdiction to set aside and/or vacate the same?
- iii. Whether the applicant is entitled to the orders sought in the application dated 3<sup>rd</sup> December, 2013?

#### **16. The first issue;**

Order 22 rule 75 of the Civil Procedure Rules allows any person whose interest is affected by the sale of an immovable property in execution of a decree to apply to court for the setting aside of the same on the ground of material irregularity or fraud in publishing or conducting such sale. The court has power to set aside the sale if satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud. The applicant has challenged the sale of the suit property that took place on 21<sup>st</sup> April 2012 and the subsequent transfer of the property to the 3<sup>rd</sup> interested party on several grounds. The first line of attack revolves around the procedural errors that the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> interested parties are alleged to have committed before, during and after conducting the sale. The applicant has contended that he was not issued with a notice to show cause before execution was levied against him. The applicant has also

contended that he was not served with the proclamation and notification of sale of the suit property and that in any event, the proclamation that was issued by the 4<sup>th</sup> interested party related to attachment and sale of movable property which had nothing to do with the suit property.

17. On the issue of the notice to show cause, I have noted from the record that the same was taken out in accordance with order 22 rule 18 of the Civil Procedure Rules. According to the said notice, the applicant was supposed to show cause on 19<sup>th</sup> September 2011 why the decree issued herein should not be executed against him. On 19<sup>th</sup> September 2011, the matter came up before G. H Oduor, Deputy Registrar. According to the proceedings of that day, the applicant failed to appear in court and as such did not to show cause why the execution of the said decree should not proceed against him. In his ruling dated 3<sup>rd</sup> February, 2012 in which he ordered warrants of attachment and sale of the applicant's properties to issue, the said Deputy Registrar stated that, he was satisfied from the affidavit of service sworn by Elijah Gekonge Nyangau on 19<sup>th</sup> September 2011 that the applicant was duly served with the notice to show cause. That finding by the Deputy Registrar has not been varied or set aside. The order that he issued has also not been challenged in these proceedings. In the circumstances, the applicant's contention that he was not served with the said notice to show cause has no basis as it is contrary to a finding by a competent court that has not been varied or set aside. On the issue of service of the proclamation and notification of sale, rule 15 of the Auctioneers Rules, 1997 provides that upon receipt of a court warrant for the sale of an immovable property, the auctioneer is supposed to prepare a notification of sale and cause the same to be served upon the registered owner of the property to be sold or an adult member of his family residing or working with him. There is no requirement in that rule for service of a proclamation. A proclamation is only necessary where the property to be sold is movable. See, rule 12 of the Auctioneers rules aforesaid.

18. According to the 4<sup>th</sup> interested party, he served the applicant with the notification of sale through his son one, Evans Mose at his Kiosk in Birongo Market. The applicant did not respond to the 4<sup>th</sup> interested party's affidavit in which this averment was made. In paragraph 6 of his affidavit filed in support of the present application, the applicant has stated that he has a home at Birongo area and that he learnt of the sale of the suit property from one of his son, Samwel Mose. In paragraph 18 of the said affidavit, he has stated that his children reside on the suit property. The applicant did not seek to cross examine the 4<sup>th</sup> interested party on his affidavit on the issue of service of the said notice. I am in agreement with the submission by the advocates for the 3<sup>rd</sup> interested party that there is presumption of service in favour of the process server and that the burden lies on the party contesting service to show that it was indeed not effected.

19. The decision in the Court of Appeal case of, **Dickson Daniel Karaba –vs- John Ngata Kariuki & 2 Others, Court of Appeal, Civil Appeal No. 125 of 2008 (unreported)** that was cited by the said advocates supports that position. The applicant has admitted that he has a home at Birongo and that he has a son by the name Mose. The applicant has not denied that his son has a kiosk at Birongo market near his home where his said son is said to have been served on his behalf with the notification of sale. I am not satisfied that the applicant has discharged the burden of showing that he was not served by the 4<sup>th</sup> interested party with the notification of sale of the suit property. In view of that finding, the application herein has no merit to the extent that it is premised on the alleged want of service of the notice to show cause, proclamation and notification of sale upon the applicant.

20. The other ground on which the sale of the suit property is sought to be set aside is that no consent of the Land Control Board was sought and obtained in respect thereof. It is not in dispute that the suit property is agricultural land and that consent of the land control board was neither sought nor obtained in respect of the sale thereof that took place on 21<sup>st</sup> April 2012. What is in contention is whether or not such consent was necessary. Whereas the applicant has contended that land control board consent was necessary, the interested parties have contended to the contrary. The applicant has argued that the sale of the suit property by public auction on 21<sup>st</sup> April, 2012 was a controlled transaction under the provisions of section 6 of the Land Control Act, Cap 302 Laws of Kenya and as such, required the consent of the land control board to be obtained in respect thereof failure to which the transaction would be void for all

intents and purposes. The applicant has cited the Court of Appeal case of **Kebirigo Parish Consumer Co-operative Society –vs- Diocese of Kisii Kenya, East Africa, Kisumu Court of Appeal, Civil Appeal No. 45 of 2010 [2013]e KLR** in support of his contention.

21. On their part, the interested parties have contended that land control board consent was not required for the sale of the suit property because that sale was conducted pursuant to a court order. I have considered the rival submissions by both parties on this point. Section 6 (1) (a) of the Land Control Act, Cap. 302 Laws of Kenya provides that the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area is void for all purposes unless the land control board has given its consent in respect thereof. The only exceptions to this requirement is provided for in section 6 (3) of the said Act and these includes; transmission of land through a will or intestacy of a deceased person or a transaction in which the government or the settlement fund trustee or a county council is a party.

22. It is clear from the foregoing that sale of agricultural land carried out in execution of a court decree is not among the transactions that are exempted from the requirements of section 6(1) of the Land Control Act, Cap. 302 Laws of Kenya. In the absence of any express provision in the Land Control Act, aforesaid or in the Civil Procedure Act, Cap. 21 Laws of Kenya to that effect, I am unable to accept the interested parties' contention that sale of agricultural land in execution of court decrees does not require land control board consent. Such finding would be contrary to express provisions of the Land Control Act aforesaid. In the case of, **Shakespeare Investments & Another vs. Paul Kipsang Kosgei, Nairobi, HCCC No. 914 of 2012[2006] eKLR**, Waweru J. when faced with a similar question, held that land control board consent is required for sale of agricultural land conducted in execution of a court decree and that if the legislature had intended to the contrary, it would have said so expressly. The judge stated as follows in answer to the argument that was put forward before him that such transactions do not require land control board consent; **“Nothing would have been easier than to include among these exceptions (in section 6(3) of the Land Control Act)(emphasis mine) transactions involving sale of agricultural land in execution of court decrees, had the legislature intended that these should be exempted”**. The court of appeal in the case of **Kebirigo Parish Consumer Co-operative Society –vs- Diocese of Kisii Kenya, E. Africa** (Supra) also seems to have agreed that sale of agricultural land in execution of a court decree would require consent of the land control board. The court stated as follows in the said case:

**“Section 6 of the Land Control Act requires consent of the Land Control Board of the relevant area to be obtained within 6 months without which the transaction becomes void. Consent of the board was not obtained by the respondent at all and the sale could therefore not be sanctioned.”**

I have not been given any reasons by the interested parties as to why I should depart from the above decisions with which I am fully in agreement. Due to the foregoing, I am in agreement with the submission by the applicant's advocates that the sale of the suit property that took place on 21<sup>st</sup> April 2012 required consent of the land control board and since none was obtained, the same became null and void.

23. The sale of the suit property as I have stated above was voided by operation of law. The court has no discretion in the matter. The court has power to extend time within which the said consent can be obtained. However no such application is before me. Under section 20 of the Land Control Act aforesaid, the land registrar was not supposed to accept for registration the instrument of transfer that was executed by the executive officer of the court in favour of the 3<sup>rd</sup> interested party in the absence of the land control board consent. I believe that the land registrar accepted the said instrument of transfer because of the court order that accompanied it which the 4<sup>th</sup> interested party herein obtained from the Deputy Registrar on 2<sup>nd</sup> July 2012. The validity of that order is considered elsewhere in this ruling. Failure by the 3<sup>rd</sup> and 4<sup>th</sup> interested parties to obtain consent of the land control board for the sale transaction that took place on 21<sup>st</sup> April 2012 was not an irregularity but a fundamental defect in the sale of the suit property which rendered the whole transaction null and void and liable to be set aside by this court. It is my finding therefore that the applicant has established a valid ground that warrants the setting aside of the sale of the suit property that was conducted on 21<sup>st</sup> April 2012.

#### **24. The second issue;-**

The 4<sup>th</sup> interested party's application by way of Notice of Motion that was brought in Kisii HC Misc. Civil Application No. 178 of 2012 was purportedly brought under rule 17 (5) and (6) of the Auctioneers Rules 1997 as amended in 2009. That rule provides as follows:-

**“17 (5) The auctioneer shall, after selling the movable property, attaching goods or goods lawfully held under his custody, and for purposes of effecting transfer in favour of the purchaser file an application to the court which issued the decree or to any other competent court which is applicable.**

**(6) An application under this rule shall be by motion by way of Miscellaneous Application, supported by an affidavit and may be heard ex parte.”**

In the application, the 4<sup>th</sup> interested party sought the following prayers:-

- i. That the honourable court be pleased to certify this application urgent and same be heard ex parte.**
- ii. That consequent to prayer 1 herein being granted, the honourable court be pleased to direct and/or order the transfer of LR No. East Kitutu/Kebirichi/815 to Mr. Bhavin Ashwin ID No. 27456944 P.O Box No. 18336 Nairobi from the judgment debtor's (Mr. John Mose Nyabwera) name.**
- iii. The honorable court do direct and/or authorize the executive officer Kisii Law Court to sign the necessary transfer instruments on behalf of the judgment debtor in favour of the purchaser.**
- iv. That the honourable court do order and/or direct the land registrar Nyamira District to lift the prohibitory order lodged by the High Court Kisii vide Misc. Application No. 78 of 2010 (JR).**
- v. That the honourable court do order and/or direct the land registrar Nyamira District to register the transfer instruments and effect the necessary changes in favour of the purchaser and issue a title deed in the names of Mr. Bhavin Ashwin.**
- vi. Such further orders be made as the court may deem fit, just and expedient.”**

25. From my plain reading of rule 17 (5) and (6) of the Auctioneers Rules aforesaid, the orders set out hereinabove were not available to the auctioneer, the 4<sup>th</sup> interested party. The rule refers only to movable properties. It is not applicable to immovable properties such as the suit property herein. The 4<sup>th</sup> interested party could not therefore move the court under that rule for the prayers that he sought in the application that concerned an immovable property. The 4<sup>th</sup> interested party's application was heard by L. Kaitany, Deputy Registrar on 7<sup>th</sup> June 2012. It is clear from the certificate of urgency that was filed together with the application that the said application was not placed before the Deputy Registrar by mistake. That is where the 4<sup>th</sup> interested party wanted the same to be heard. I am of the view that the application could not be heard by the Deputy Registrar. The application was filed in the High Court. Unless the rules provided that the Deputy Registrar could handle the same, the Deputy Registrar had no jurisdiction to entertain the same. It had to be placed before the Judge.

26. The powers of the Deputy Registrar are provided for under Order 49 of the Civil Procedure Rules. That order does not confer upon the Deputy Registrar the power to hear and determine applications brought under rule 17 (5) and (6) of the Auctioneers Rules, 1997. Rule 17 (5) of the Auctioneers Rules provides that the application under that rule should be made “to the court which issued the decree or to any other competent court which is applicable”. In the instant case, the court that issued the decree was the High Court. The application was therefore filed in the right court. However, for reasons only known to the 4<sup>th</sup> interested party, he chose to have the application heard by the Deputy Registrar. It is my finding that the Deputy Registrar had no power to entertain the 4<sup>th</sup> interested party's application and to issue the orders that she purported to issue. It is interesting to note that the Deputy Registrar purported to discharge the prohibitory order that was given by Makhandia J. on 2<sup>nd</sup> March 2011 in these proceedings.

The Deputy Registrar had no power to vary, set aside or discharge orders given by a judge and worse still, in the proceedings in which the order was not given. There is one more problem with the orders that were granted by the Deputy Registrar. The Deputy Registrar purported to order the suit property to be transferred to the 3<sup>rd</sup> interested party before the court had confirmed the sale pursuant to the provisions of Order 77 rule 1 of the Civil Procedure Rules. The sale had therefore not become absolute and as such the purported transfer of the suit property to the 3<sup>rd</sup> interested party was carried out prematurely.

27. In the case of, **Sheik Mohamed Bashir vs. United Africa Co. (Kenya) Limited and others [1959]E.A.706**, it was held that confirmation of the sale by the court is mandatory. I think that I have said enough to show that L. Kaitany, Deputy Registrar had no jurisdiction to make the orders that she purported to make in Kisii HC. Misc. Civil Application No. 178 of 2012. Any order made by a court or tribunal without jurisdiction is void. In the case of **Kabirao Karanja vs. The Attorney General, Court of Appeal at Nyeri, Civil Appeal No. 310 of 1997(unreported)**, the court stated that “**Any order made without jurisdiction is a nullity and no amount of legal ingenuity can turn that into a valid order. What is a nullity remains a nullity.**” It is my finding therefore that the orders that were made by the Deputy Registrar aforesaid are invalid, null and void for want of jurisdiction.

28. The interested parties have argued that this court has no jurisdiction to set the said orders aside. According to the interested parties, the only avenue that was open to the applicant to challenge the said orders was to appeal against the same under order 49 rule 7 (2) of the Civil Procedure Rules. The interested parties have contended that this court has no jurisdiction to entertain any challenge to those orders brought other than by way of an appeal as aforesaid. I am not in agreement with the interested parties’ submission on this issue. As I have stated above, the orders complained of were not made by the Deputy Registrar under the powers conferred upon her under order 49 of the Civil Procedure Rules. The orders were made without jurisdiction and were null and void. Since the orders were not made under order 49 of the Civil Procedure Rules, the applicant had no obligation to challenge the same through the appeal process provided for under that order. In my view, the applicant was within his right to seek the setting aside of those orders under section 34 of the Civil Procedure Act, Cap 21 Laws of Kenya. In view of the foregoing, the applicant’s application seeking among others, the setting aside of those orders is properly before court.

### **29. The third issue;-**

From what I have stated above, the sale of the suit property that took place on 21<sup>st</sup> April 2012 is void for want of the land control board consent. Similarly, the transfer of the suit property to the 3<sup>rd</sup> interested party is also void the same having been carried out unlawfully pursuant to null and void orders that were issued by the Deputy Registrar on 2<sup>nd</sup> July 2012. For the foregoing reasons, it is my finding that the orders sought in the application dated 3<sup>rd</sup> December 2013 are merited.

### **30. Conclusion**

In conclusion, the application dated 3<sup>rd</sup> December, 2013 is allowed in terms of prayers 4, 5 and 6 thereof. Consequently, I hereby make the following further orders:-

- i. The registration of the 3<sup>rd</sup> interested party as the proprietor of LR No. East Kitutu/Kebirichi/815 is cancelled.
- ii. The said parcel of land, namely, LR No. East Kebirichi/815 shall be restored in the name of the applicant, John Mose Nyabwera as the proprietor thereof.
- iii. The sum of Ksh.700, 000/= that was paid by the 3<sup>rd</sup> interested party as the purchase price for LR No. East Kebirichi/815 shall be refunded to him without interest by persons who received the said payment.
- iv. The prohibitory order that was made by Makhandia J. on 2<sup>nd</sup> March 2011 and issued on 18<sup>th</sup> May, 2011 that was lifted on 2<sup>nd</sup> July 2012 by the order of L. Kaitany, Deputy Registrar made in Kisii HC Misc. Civil Application No. 178 of 2012 is reinstated on the title of LR No. East

Kebirichi/815.

- v. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties are at liberty to start the process of sale of LR No. East Kitutu/Kebirichi/815 afresh if the costs that were awarded to them herein remain unpaid.
- vi. Each party shall bear its costs of the application.

**Delivered, Dated and Signed at Kisii this 24<sup>th</sup> day of July, 2015.**

**S.OKONG'O**

**JUDGE**

**In the presence of:**

N/A for the applicant

N/A for the 1<sup>st</sup> and 2<sup>nd</sup> respondents

Miss Moguche h/b for Nyambati for the 1<sup>st</sup> and 2<sup>nd</sup> interested parties

N/A for the 3<sup>rd</sup> interested party

N/A for the 4<sup>th</sup> interested party

Milcent Maore Court Assistant

**S.OKONG'O**

**JUDGE**