



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 4 OF 2018

MICHAEL ANGAYA ARUNGA.....1ST PLAINTIFF

PAMELA KAWIRA ARUNGA.....2ND PLAINTIFF

=VERSUS=

NCBA BANK KENYA PLC.....1ST DEFENDANT

ATHINYA MUTHURI HARON.....2ND DEFENDANT

LYDIA WAWERU T/A

PURPLE ROYAL AUCTIONEERS.....3RD DEFENDANT

THE DISTRICT LAND REGISTRAR KIAMBU.....4TH DEFENDANT

RULING

This suit was initially filed against the 1st defendant only. On 9th March 2020, the plaintiffs sought and obtained leave to amend the plaint. The plaintiffs filed an amended plaint on 24th June 2020 through which they added the 2nd to 4th defendants as parties to the suit. In the amended plaint, the plaintiffs averred that without following the laid down procedures for sale of a charged property, the 1st defendant through the 3rd defendant sold to the 2nd defendant all that property known as Kiambaa/Kihara/2861 (hereinafter referred to as “the suit property”) that was registered in the names of the plaintiffs and charged to the 1st defendant to secure a loan facility. The plaintiffs averred that the purported sale was conducted in secrecy and that there was no public auction. The plaintiffs averred that the secret sale was conducted so as to deprive the plaintiffs of their right to redeem the suit property. The plaintiffs averred that the suit property was sold to the 2nd defendant at an undervalue and that the whole process was illegal and fraudulent in that even the necessary statutory notices were not served upon the plaintiffs before the said sale that was conducted through private treaty camouflaged as public auction. The plaintiffs averred that the suit property that was purportedly sold by the 1st defendant to the 2nd defendant at Kshs. 22,400,000/- was last valued in April 2019 at Kshs. 87,500,000/-.

In the said amended plaint, the plaintiffs sought among other reliefs; an order nullifying the auction that was conducted on 20th February 2020 and the subsequent purported sale of the suit property to the 2nd defendant, an order that a fresh valuation of the suit property be conducted by an independent valuer and in the alternative, an order for the defendants to compensate the plaintiffs for the loss incurred as a result of the unprocedural valuation and auction of the suit property.

From the record, the court directed the plaintiffs on 20th July 2020 to serve the amended plaint upon the defendants forthwith. From that date none of the defendants has complained of non-service of the amended plaint. From the record, I have not come across a defence filed by any of the defendants in response to the plaintiffs’ amended plaint.

What is now before the court is the 2nd defendant’s Notice of Motion application dated 6th October 2021. In the application, the 2nd defendant sought the following orders;

1. That the plaintiffs be ordered to pay to the 2nd defendant reasonable market rent in respect of the suit property for the period between March 2020 to October 2021.
2. That the plaintiffs do vacate the suit property on or before 1st November

2021 and peacefully give vacant possession thereof to the 2nd defendant in default of which they be forcefully evicted from the property.

3. That the OCPD Gigiri Police Station does enforce the order for the forceful eviction of the plaintiffs from the suit property.

4. That the costs of the application be in the cause.

The 2nd defendant's application that was supported by the 2nd defendant's affidavit sworn on 6th October 2021 was brought on the following main grounds: The 2nd defendant purchased the suit property at Kshs. 22,400,000/- of which he paid Kshs. 5,600,000/- and obtained a loan of Kshs. 16,800,000/- from Sidian Bank Limited (Sidian Bank) for the balance. The suit property was transferred to his name and charged to Sidian Bank to secure the said loan of Kshs. 16,800,000/-.

The 2nd defendant averred that he was entitled to receive rent from the plaintiffs from the time he purchased the property until vacant possession was delivered by the plaintiffs. The 2nd defendant averred that a restriction that the plaintiffs had registered against the title of the suit property to frustrate the transfer of the property to the 2nd defendant was lifted by this court and the plaintiff's application to the Court of Appeal to stay this court's order was dismissed on 23rd July 2021.

The 2nd defendant averred that he would be prejudiced if the orders sought were not granted as he was paying the loan from Sidian Bank while he was not using the suit property neither was he getting any rent therefrom.

The application was opposed by the plaintiffs. The 1st plaintiff opposed the application through a replying affidavit sworn on 13th October 2021. The 1st plaintiff contended that the application was misconceived and meant to embarrass the court. The 1st plaintiff averred that there was no landlord and tenant relationship between the plaintiffs and the 2nd defendant that would entitle the 2nd defendant to the rent being claimed. The 1st plaintiff averred that the plaintiffs were occupying the suit property by virtue of the fact that they were the registered owners thereof before the same was transferred to the 2nd defendant. The 1st plaintiff averred that there were a number suits pending before this court and the Court of Appeal challenging the legality of the sale of the suit property to the 2nd defendant. The 1st plaintiff averred that it was necessary that the status quo be maintained pending the hearing and determination of the pending cases. The 1st plaintiff averred that any loss that the 2nd defendant could incur could be compensated in damages.

On her part, the 2nd plaintiff who acts in person opposed the application through a preliminary objection dated 13th October 2021 and a replying affidavit of the same date. In her preliminary objection, the 2nd plaintiff averred that she had filed a Constitutional Petition No. 17 of 2020 challenging the sale of the suit property to the 2nd defendant which petition raised weighty constitutional issues. The 2nd plaintiff averred that this court had no jurisdiction to entertain this suit while the said petition was still pending hearing. The 2nd plaintiff reiterated that the sale of the suit property by the 1st defendant to the 2nd defendant was illegal, null and void and as such the 2nd defendant was not a bona fide purchaser of the property. The 2nd plaintiff averred that the 2nd defendant's application was incompetent and not properly before the court.

In her replying affidavit, the 2nd plaintiff contended that the 2nd defendant's application was misconceived and was an attempt to perpetuate an injustice against her. The 2nd plaintiff averred that her Constitutional Petition No. 17 of 2020 that was pending hearing before this court should be heard first on a priority basis and a decision made before the decision in the present application. The 2nd plaintiff averred that this suit should be stayed pending the hearing and determination of her pending constitutional petition. The 2nd plaintiff averred that the 2nd defendant was not a bona fide purchaser of the suit property since there was no public auction. The 2nd plaintiff averred that even if the purported auction took place, the 2nd defendant did not comply with the timelines that were set out in the memorandum of sale.

The application was heard by way of written submissions. The 2nd defendant filed his submissions dated 1st November 2021. The 2nd defendant averred that it was clear from the record that the plaintiffs were guilty of gross abuse of the court process in that they had moved various courts seeking similar reliefs. The 2nd defendant submitted that the plaintiffs must be stopped from engaging in further abuse of the court process so as to save the court from embarrassment by accusations being thrown by the plaintiffs against the court and other parties. The 2nd defendant submitted that by fashioning a land dispute as a constitutional petition does not sanitise the plaintiffs' failure to meet their financial obligations. The 2nd defendant submitted that the 2nd plaintiff's constitutional rights do not override other parties' rights. The 2nd defendant urged the court to declare the plaintiffs as vexatious litigants.

With regard to the 2nd plaintiff's preliminary objection, the 2nd defendant submitted that the same did not meet the threshold for a preliminary objection since it did not raise a pure point of law. The 2nd defendant submitted that section 152E of the Land Act, 2012 gives the court power to give an order for the eviction of unlawful occupiers of private land. The 2nd defendant submitted that as the owner of the suit property, he was entitled to an order for possession.

The 1st plaintiff did not file submissions. The 2nd plaintiff filed submissions dated 9th November 2021. In her submissions, the 2nd plaintiff reiterated that in view of the pendency of her constitutional petition, this court had no jurisdiction to entertain the 2nd defendant's application. The 2nd plaintiff submitted that the application was intended to demean the Constitution of Kenya and was an attempt to sanitise the illegalities and the irregular process through which the 2nd defendant acquired the suit property. The 2nd plaintiff submitted that delivery of a ruling in this matter while her constitutional petition was pending would amount to a further violation of her constitutional rights. The 2nd plaintiff reiterated that the constitutional petition must be heard first before this suit. The 2nd plaintiff submitted that her preliminary objection raised questions that must be answered by correct application of the law and as such validly raised by way of a preliminary

objection. On whether the 2nd defendant was a bona fide purchaser of the suit property, the 2nd plaintiff reiterated that the sale of the suit property was illegal and fraudulent and that the 2nd defendant was part and parcel of what she referred to as a scam. The 2nd plaintiff denied that she was a vexatious litigant and urged the court to find that there was no valid auction sale and as such the 2nd defendant was not entitled to the orders sought in his application.

I have considered the 2nd defendant's application together with the affidavit filed in support thereof. I have also considered the replying affidavits and Notice of Preliminary objection filed by the plaintiffs in opposition to the application. Finally, I have considered the submissions on record. The following is my view on the matter. The 2nd defendant's application was brought under Order 51 Rule 1 and Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules, section 3 and 3A of the Civil Procedure Act and all other enabling provisions of the law. At the beginning of this ruling, I have mentioned that the 2nd defendant among others has not filed a defence to the plaintiffs' claim against him. This court cannot give orders in a vacuum. The court has power to grant the reliefs sought by the 2nd defendant. That power is however exercisable on the basis of pleadings. The 2nd defendant's application is not anchored on any pleading before the court. I am of the view that the orders sought by the 2nd defendant are substantive in nature and cannot be granted by the court without a proper foundation being laid for the same. If the 2nd defendant wants to recover possession and damages for loss of use of the suit property from the plaintiffs, the claims must be properly pleaded and the plaintiffs given opportunity to respond to the same. It is on the basis of such pleading that the current application can be brought. As it stands, the 2nd defendant's application has no leg to hold it. It must fall. Section 152E of the Land Act, 2012 that was cited by the 2nd defendant in his submissions cannot be of assistance to him. That section sets out an elaborate procedure through which the jurisdiction of the court is invoked. The 2nd defendant did not move the court under section 152E of the Land Act, 2012 and as such cannot call it in his aid.

From what I have said above, I do not think that it is necessary to consider the merit of the application. The application is a nonstarter. The same is accordingly struck out with costs to the plaintiffs.

DELIVERED AND DATED AT NAIROBI THIS 15TH DAY OF FEBRUARY 2022

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Nyamolo h/b for Mr. Owaga for the 1st Plaintiff

Mrs. Arunga, the 2nd Plaintiff in person

Mr. Kabaiku for the 1st and 3rd Defendants

Mr. Kurauka for the 2nd Defendant

N/A for the 4th Defendant

Ms. C. Nyokabi-Court Assistant