



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 1217 OF 2002

GEORGE WASHINGTON OMONDI.....PLAINTIFF

VERSUS

GUILDERS INTERNATIONAL BANK LIMITED.....DEFENDANT

RULING

Two applications: Setting aside and extension of completion of sale

[1] I am confronted by two applications. The first one is by the Plaintiff and is dated 15th May 2015. The other is by the purchaser and is dated 18th May 2015. Both applications shall be determined back to back as they are different sides of the same coin. The first application shall be christened as “the Plaintiff’s application” whereas that by the Purchaser “the purchaser’s application”.

The Plaintiff’s application

[22] The Plaintiff’s application is expressed to be brought pursuant to the Order 22 Rule 75 of the Civil Procedure Rules and Sections 1A, 2, 3A and 34 of the Civil Procedure Act. The Plaintiff seeks for the following orders *inter alia*;

1. **THAT the Defendant be restrained whether by itself, its agents and in particular Keysian Auctioneers, its servants, employees and whosoever from transferring land parcel number LR No 3437/311 Lavington pursuant to the auction conducted on 5th May 2015 by Keysian Auctioneers pending the hearing and determination of this application.**
2. **THAT there be a stay of any further proceedings in respect of the confirmation of the sale by auction held on 5th May 2015 pending the hearing and determination of this application.**
3. **THAT the sale conduct be conducted on 5th May 2015 by Keysian Auctioneers be set aside and cancelled.**
4. **THAT the costs of this application be allowed to the Plaintiff/Applicant.**

[3] The application is predicated upon the grounds that the auctioneer conducted the auction of the suit property fraudulently and irregularly, that the sale was conducted without a proper valuation being carried out and that the auctioneers had failed to furnish the Plaintiff with details in respect of the auction carried out on 5th May 2015. Further, it was contended that the Plaintiff suffered substantial loss from the

sale of the suit property.

[4] The application was supported by three (3) affidavits all sworn on 15th May 2015 and a further affidavit of the Plaintiff sworn on 26th May 2015. In the affidavit of George Washington Omondi, the Plaintiff herein, it was deposed to that the sale of the suit property was tainted with fraud and numerous irregularities. Further, it was deposed to that the auctioneer proceeded with the sale in breach of Rules 15(c) and (d) of the Auctioneers Rules, by failing to give Notification of Sale and 45 days redemption notice respectively, and further that no valuation had been carried out on the suit property as directed by the Court on 13th March 2015. It was deposed that the auctioneer was in breach of the terms and conditions of sale orders of the Court on 17th March 2015 in terms of (1) failing to affix the notification of sale on the suit property, (2) waiving the condition for payment of Kshs 10,000,000/- refundable deposit by potential bidders without the consent of the Court, (3) breach of the condition for the payment of 25% of the purchase price at the fall of the hammer and (4) completing the auction without proof that the balance of the purchase price was paid within fifteen (15) days as provided in the conditions of sale.

[5] Francis Wasuna, an advocate in the firm of Wasuna & Co Advocates, the advocate on record for the Plaintiff, deposed that he had received two (2) offers for the purchase of the suit property on 30th April 2015 and 4th May 2015 from Nyando Investment Ltd and Inca Consult Ltd respectively. He further averred that the said offers were made available to the auctioneer appointed to carry out the auction, Keysian Auctioneers, and that they had intimated that they would suspend the auction that had been scheduled for 5th May 2015 in consideration of the offers. It was contended that the auction was neither suspended nor were they furnished with details of the auction as requested in their letter dated 8th May 2015. Benin Makori, a secretary in the firm of Wasuna & Co Advocates averred that she had received the two (2) letters of offer from Nyando Investment Ltd and Inca Consult Ltd on 30th April 2015 and 4th May 2015 respectively, and that the same had been forwarded to Keysian Auctioneers.

[6] The application was opposed through the affidavits of Francis Ng'ang'aMundia and MugandaWasulwa sworn on 22nd May 2015 and the affidavit of Mary Omullo sworn on 26th May 2015. It was deposed to that the auction conducted on 5th May 2015 was properly conducted and in accordance with the conditions of sale as issued by the Court on 17th March 2015. Further, it was deposed to that the provisions of the Auctioneers Act were complied with and that there was a valuation report provided before the sale was conducted. It was also deposed to that the letters of offer dated 30th April 2015 and 4th May 2015 were never received by the said firm of auctioneers, and further, that no individual, or representative of the Plaintiff, was turned away from witnessing the auction by reason of failing to pay the Kshs 10,000,000/- refundable deposit. Mary Omullo averred that the auction was properly conducted as enunciated by the auctioneers and that as at 18th May 2015, had received Kshs 26,250,000/- being the 25% deposit on the highest bid. It was further contended that the rest of the purchase price was to be paid by 20th May 2015.

ANALYSIS AND DETERMINATION BY COURT

Points of emphasis by plaintiff

[7] Parties filed elaborate submissions in this matter. I have considered them. They also filed judicial authorities which I have also considered meticulously. I wish, however, to appreciate that Mr. Issa highlighted submissions filed on behalf of the Plaintiff and he emphasized the following points:

- (a) That condition 5 on a refundable deposit of Kshs. 10,000,000 by bidders before auction was not complied with; and the auctioneer cannot waive this condition;**
- (b) That 25% was not paid at the fall of hammer and availability of funds to pay balance was not established as required;**
- (c) That the balance was not even paid within 15 days as required;**

(d) That the auctioneer issued a memorandum of sale before deposit was paid which was in contravention of rule 18(3) of the Auctioneers Rules;

(e) That a valuation was not undertaken as ordered by court; and

(f) That there being no provision in law for enlargement of time to pay balance as requested for by the purchaser, the only feasible option in law is for the auctioneer to declare the auction unsuccessful. Therefore, on that basis, the court should declare the sale null and void and have another one carried through in accordance with the law.

[8] From the record and arguments presented, in alluding to irregularity and fraud perpetrated by the Defendant, the Plaintiff alleged that the Defendant, and/or its agents, the firm of auctioneers, proceeded with the sale of the suit property in settlement of the decree contrary to the provisions of the conditions of sale issued by the Court on 17th March 2015. The plaintiff made depositions on the alleged fraud and irregularity, more specifically that the sale did not comply with the provisions of the Auctioneers Act, more particularly Rules 15(c) & (d), 17(4) and 18(2) thereof. To him, the sale was therefore irregular and should be set aside.

[9] Further, the Plaintiff alleged that the Defendant was in breach of the conditions of sale imposed by the Court issued on 17th March 2015, and more specifically conditions 3, 5, 7 & 8 of the conditions as set out in the advertisement for sale dated 18th April 2015, and as settled by the Court on 17th March 2015. As I have stated, emphasis was laid on the deposit of a refundable amount of Kshs 10,000,000/- to secure a bidding catalogue and/or bidding reference and the time limitation as to payment of the balance of the purchase price.

[10] The Plaintiff did not end there. Counsel stressed that the fraud herein was perpetrated in that (1) there was no evidence of the payment of the 25% deposit at the fall of the hammer, and (2) the Memorandum of Sale was issued yet the payment of the deposit had not been made. According to the counsel for the Plaintiff, these happenings are in direct violation of the conditions of sale thus a breach of rule 17(4) of the Auctioneers Rules. Therefore, the sale was not properly conducted. Counsel for the Plaintiff also emphasized that the auctioneer purported to waive the condition for the payment of the refundable deposit of Kshs 10,000,000/- for all prospective bidders, without the consent of the Court. They cited cases of **George Washington Omondi v Guilder International Bank & 4 Others (2015) eKLR** and **Florence W Kiratu v Barclays Bank of Kenya & 2 Others (2007) eKLR** in support of these arguments by the Plaintiff.

Order of Court made on 5th May 2015

[11] Under the terms and conditions of sale issued by the Court on 5th March 2015, the terms and conditions of 25th September 2014 were deemed as settled, save that the sale was to be conducted on 5th May 2015. Further, the Court issued directions that;

“The auctioneer appointed is ordered to comply with the Auctioneers Act and to obtain a valuation of the property as required by law. The JD has liberty to apply to Court to seek orders to sale by private treaty if they so wish. Those are my orders.”

In the said terms and conditions of settlement, Keysian Auctioneers was appointed as the auctioneers to conduct the sale of the suit property by public auction on 5th May 2015. From the order made on 5th March 2015, the appointed auctioneer was to comply with the provisions of the Auctioneers Act and obtain the valuation of the property to be carried out.

Notification of sale

[12] Under Rule 15(c) & (d) of the Auctioneers Act, it is provided that;

Upon receipt of a court warrant or letter of instruction, the auctioneer shall in the case of immovable property-

- a. **locate the property and serve the notification of sale of the property on the registered owner or on an adult member of his family residing and working with him or where a person refused to sign such notification, the auctioneer shall sign a certificate to that effect.**
- b. **give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction.**

[13] The Plaintiff stated that he was neither served with the Notification of Sale in accordance with Rule 15(c) of the Auctioneers Rules, nor the redemption notice in accordance to Rule 15(d) thereof. The auctioneer has deposed in his affidavit sworn on 19th May 2015 on service of the notification of sale upon the Plaintiff. Again, on 19th March 2015, the auctioneer issued a redemption notice to the Plaintiff, which was also served upon the Plaintiff's advocate. The only response by the Plaintiff is that during the date and time of the alleged service of notices herein, he was away on official parliamentary matters at the National Assembly. There is absolutely nothing to confirm he was away at the time of service of the notification of sale. From the evidence available, on 17th March 2015, the auctioneer issued a Notification of Sale and served it upon the Plaintiff at his residence on the suit property in the presence of one Stephen Juma Onyango. For further sanctification, the auctioneer served the Notification of Sale upon the Plaintiff's advocates on 19th March 2015. That action does not necessarily mean that the Notification of Sale was not served on the Plaintiff as it has been wrongly argued by counsel for the Plaintiff. From the material before the court, on 18th April 2015, the auctioneer placed an advertisement in the Standard Newspaper, stating the time, place and date of the sale of the suit property. The terms and conditions of the sale were also set out in the said advertisement. Therefore, the auctioneer complied with the requirements of law under Rules 15(c) & (d) of the Auctioneers Rules as was ordered by the court. Indeed, as such auctioneer, he had no choice but to comply with the law.

[14] Contrary to the assertions by the Plaintiff, the record show that, on 5th May 2015, three (3) bidders attended at the auctioneer's offices, whereby a bid of Kshs 105,000,000/- was placed and was deemed to be the highest bid. Subsequently, a Memorandum of Sale was issued in favour of the highest bidder. The deposit of Kshs 26,250,000/- was received by the Defendant on 18th May 2015, with the balance of the purchase price due on 20th May 2015. The acknowledgement of the deposit by the Defendant and the auctioneer satisfies the law and nothing much may be gained by conjecture arguments being put forth by the Plaintiff. I reject the arguments thereto.

Sale by private treaty

[15] On the sale by private treaty, the court ordered that:-

The JD has liberty to apply to Court to seek orders to sale by private treaty if they so wish. Those are my orders.

The Plaintiff contended that it wrote two (2) letters of offer made for the purchase of the suit property by a third party dated 30th April 2015 and 4th May 2015. According to the order of the Court on 5th March 2015, the JD, the Plaintiff was at liberty to apply for orders to sell the mortgaged property by private treaty if he so wished. Therefore, any agreement for or sale of the property by private treaty was to be sanctioned by the court upon application by the Plaintiff. There is no application that was made to the Court in that behalf, and therefore, the Plaintiff cannot rely on any offers or arrangement it made unilaterally with third parties to purchase the property without an order of the court to that effect. In a private treaty arrangement. Nothing also prevented the prospective purchaser from placing its bids during the auction. Nothing also prevented any representatives of the Plaintiff or the Plaintiff from placing their bids in the auction. Accordingly, the auctioneer could not have considered any private treaty arrangement between the Plaintiff and the third party without the sanction of the court on sale by private treaty, and

therefore, the Defendant, or the auctioneer, were not in breach of conditions of sale as alleged by the Plaintiff.

Valuation

[16] Valuation was also a major issue which was relied upon by the Plaintiff in his application to set aside the sale herein. Under Rule 11(a)(b)(x) it is provided that;

The reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale.

A valuation report on the suit property annexed to the Defendant's affidavit show that valuation was conducted on 30th October 2014. The sale of the property was fixed for and was conducted on 5th May 2015. That being the reference point, the said valuation was within the twelve months stipulated under the Rules. In fact it was done below seven (7) months prior to the auction. I reckon that, under Section 97(2) as read together with Section 97(1) of the Land Registration Act, the purpose of a valuation is to get the best reasonable price obtainable for the suit property. The valuation dated 30th October 2014 is sufficient for purposes of a sale by public auction. I do not think the said valuation violates any law, or is invalid or outdated for purposes of the auction in question - at least no such arguments were advanced at all. It is, therefore, not correct to state that there was no valuation report as at 13th March 2015. Thus, I do not think it is right to say that the Defendant or the auctioneer was in breach of terms and conditions of sale.

Variation of condition 5

[17] The Plaintiff laid a lot of emphasis on the fact that the auctioneer varied and or waived conditions of the auction, and more particularly condition (5) as advertised on 18th April 2015. The specific condition provided that;

All those interested in bidding shall pay through RTGS a refundable deposit of at least Kenya Shillings Ten Million (Kshs 10,000,000/-) to the auctioneer not later than ten (10) days before the auction in order to secure catalogue and/or bidding reference. The said deposit shall be refunded by the auctioneer to the non-successful bidders immediately the auction in the similar manner as may be deemed convenient.

I wish to state that the case of **Florence W Kiratu v Barclays Bank of Kenya** (supra), is quite dissimilar to the current one. There was breach of statutory provision in that case and Section 21 of the Auctioneers Act was in direct focus. The allegation here is that the auctioneer waived condition 5 such that none of the bidders were to pay a refundable sum of Kshs. 10,000,000 as stipulated in the conditions and terms of sale. The waiver was explained by the auctioneer and it was to all prospective buyers. The waiver did not result into any or any fundamental prejudice to the judgment debtor or the law. Indeed, the Plaintiff has not demonstrated any adverse effects on the auction or the law or to any of the parties including himself. None of the bidders or parties including the plaintiff was put to any disadvantage or prejudice or advantage. Similarly, there was no breach of the law particularly section 21 of the Auctioneers Act or the order of the court herein. I appreciate the arguments that the waiver was restrictive; to only a certain category or section of prospective buyers. The Plaintiff ought to have shown but did not show that, by the waiver of this condition, the auctioneer acted in a manner that was contrary to the law, illegal and prejudicial to him, thereby making the sale illegal and irregular. Further, his representative in attendance at the auction has not stated or averred that there was any impropriety of the personal conduct of the auctioneer, or that there was irregularity in how the auction process was carried out. As enunciated in the case of **Fubeco China Fushun v Naiposha Co Ltd & 11 Others [2014] eKLR**, allegations of fraud are serious matters which impute a charge on the individual or party accused of such deplorable acts. Thus, it is the onus of the party alleging such impropriety to adduce before the Court cogent evidence to prove the allegation. See what was stated that;

“First the allegations of collusion and fraud are serious matters and impute a charge on the

Plaintiff and the 1st Interested Party. Such matters require cogent evidence to prove.”

See also the statement by court in the case of **Anthony Malilu Lubulella T/A Lubulella & Associates v Pasteur Dukuzureymi & Another [2013] eKLR** that;

“Fraud is a very serious charge as it denotes criminality. Where fraud is alleged, particulars of the same must be given clearly and without ambiguity.”

[18] The application by the Plaintiff is premised upon Order 22 Rule 75 of the Civil Procedure Act which provides that;

Where any immovable property has been sold in execution of a decree, the decree- holder, or any person whose interests are affected by the sale, may apply to the court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the court is satisfied that the applicant has sustained injury by reason of such irregularity or fraud.

The Plaintiff has alleged irregularity and fraud, but has not presented evidence in support of these allegations. The evidence placed before the Court by the Plaintiff is insufficient to sustain a claim of fraud and or collusion on the part of the auctioneer. The plaintiff has not shown by way of evidence that the auction was irregular. There is also an important element in the proviso to under rule 75 that the court must consider, that is to say, that, ***upon the facts proved the court is satisfied that the applicant has sustained injury by reason of such irregularity or fraud.*** Other than claiming that the auction was irregular and fraudulent, the Plaintiff has not shown that he has suffered any injury as a result of the alleged irregularities and fraud. See **Timothy Ogocha Omatu v National Bank of Kenya Ltd (2005) eKLR** where it was held that;

“The said rule provides that a sale of immovable property shall be set aside if it is proved to the satisfaction of the Court that that the aggrieved party sustained substantial injury as a result of the material irregularity or fraud in the publishing or the conducting of the sale.”

[19] The upshot is that the Plaintiff has not shown that the sale by public auction of the suit property was irregular or fraudulent. He has not even shown that he has suffered any injury as a result of the sale herein. There was no breach of the law in publishing or conducting the sale herein. Therefore, I do not see any injury in law. Accordingly, I dismiss the Plaintiff’s application dated 15th May 2015 with costs to the Defendant.

Of application dated 18th May 2015

[20] The record shows that the deposit of the 25% was paid as required. Mr. Issa, counsel for the Plaintiff briefly addressed this application in his submissions before court that there is no provision in law for extension of time to pay balance of sale of property in a public auction. My understanding of the law is that, a person who is declared a purchaser in an auction and has paid the deposit of 25% as stipulated in the sale is required to pay the balance of the purchase price upon delivery to the purchaser of an executed conveyance or transfer of the property. In any event, a default to pay in accordance with rule 70 is to be declared by the court which will then order a re-selling of the property and give directions on the deposit or any other purchase price that had been paid. To me, substantive justice will not constrict exercise of court’s discretion to extend time for payment of the balance especially where the purchaser has paid the required deposit and in the meantime, there is already an application to set aside the sale being considered by the court. I note that the extension sought was for 90 days from 20th May 2015. That time has lapsed as at the time of this ruling. However, in the circumstances and given my decision, I will allow the purchaser to pay the balance of Kshs. 78,750,000 within the next 30 days. It is so ordered.

Dated, signed and delivered in court at Nairobi this 26th day of August 2015.

F. GIKONYO

JUDGE