



IN THE HIGH COURT OF KENYA

AT MACHAKOS

ELC CASE NO. 105 OF 2010

PETER MAINA NDEGWA PLAINTIFF

VERSUS

ATHI HIGH DEVELOPMENT COMPANY LTD..... DEFENDANT

RULING

1. The Plaintiff seeks the following orders in his Motion dated 24.7.2012 namely;

The orders made on 11.7.2012 requesting him to deposit KShs.25,614,000/- be deposited in court,

And that he be allowed to file replies to application dated 24.2.2012 and same application be heard inter partes.

2. The application is anchored on the provisions of order 51, rules 1, 3 and 15 Civil Procedure Code 2010, Section 1A, 1B, 3A and 63 (e) Civil Procedure Act Cap 21. The same application is supported by the grounds on the face of the motion and the supporting affidavit of Kangeri Wanjohi T/A Kindest Auctioneers and his further affidavit sworn on the 15.4.2013. The application is opposed by way of the affidavit of David Njeru sworn on the 10.8.2012.

APPLICANT'S CASE

3. The applicant's case is that he was not aware of the application 24.2.2012 as the same was served upon his advocates on record who never informed him of the same but learned of the same on 16.7.2012 when he was served with orders issued on 11.7.2012 directing him to deposit KShs.25,614,000/-. He blames his advocates on record for not defending the application and nor attending court to oppose it. He states that if he was aware of the application, he would have responded to and opposed the same.

4. He narrates the event ranging from the notification of sale to the process of execution culminating with the recovery of the purchase price in the affidavit and the attached annexures. He then sets the details of account as to how the sale proceeds was disbursed and avers that the sought KShs.25,614,000/- to be deposited is not available as all the sale proceeds KShs.60,000,000/- was paid out. The accounts for the proceeds recovered is as follows:

- a. **Payments to Kagwima Kangethe & Co. Advocate KShs.15 million**
- b. **Payment to Peter Maina Ndegwa Plaintiff KShs.22 million**
- c. **Payment to Njeru Nyaga & Co. Advocates for Defendant KShs.7 million**

- d. **Refund to Kanyara & Co. KShs.10 million**
- e. **Auctioneers charges KShs.3 million**
- f. **Purchase Commissions KShs.3 million**

Total KShs.60 million.

5. In view of the foregoing accounting of the proceeds of sale, the applicant seeks leave to defend the application which was heard ex parte to enable him give his side of the story.

THE DEFENDANT 'S CASE

6. The Defendant/Respondent case is to the effect that the Applicant was instructed to recover KShs.18,460,040/- in execution of warrants in favour of the Plaintiff/J/C. After recovery of proceeds of sale, the Applicant paid the J/C/Plaintiff in this case KShs.18,460,040 and a further KShs.9 million was paid in HCC No.127/2011, for the Defendant in this case who was a defendant in that case and the same was also marked settled.
7. The Respondents states that the balance of all the other proceeds of sale in the instant case less reasonable auctioneer charges agreed and/or taxed was to be paid to Njeru Nyaga Advocates as per the consent orders. The Respondent avers that the applicant had no authority or even capacity to appropriate the proceeds of sale other than pay the decretal sum or any other amounts with the consent of the judgment debtor or its advocate or with permission of the court.
8. The Respondent submits that Applicant ought to have challenged the consent orders dated 18.1.2012 not file an application in the nature of the one before the court. The Respondent complains of unprofessional, incompetent and irresponsible conduct by the Applicant in handling proceeds of sale as demonstrated herein, in that:
- The decretal amount in the warrants was KShs.18,460,040, yet the Applicant claims to have paid KShs.22 million.
 - Further in HCC No.127/2010 the amount payable was KShs.9 million, but he alleges to have paid KShs.15 million.
 - The Auctioneer charges under the prescribed scales is KShs1,260,000/- yet he charged KShs.6 million.
 - Further the Applicant alleges to have refunded purchaser advocate KShs.10 million whereas sale has not been set aside.
 - The Respondent seeks the application be dismissed with costs.
9. After going through the parties cases set herein and the content of the record and affidavits, I find that the following are the issues:
- Whether the Applicant has made a case for setting aside the orders of 11.7.2012?
 - Whether there is defence by the Applicant for the Application dated 24.2.2012 to warrant him being allowed to defend?
 - What is the direction of the matter in the circumstances?
 - What is the order as to costs?
10. The matter in the instant suit was settled via a consent orders in which a decree was extracted and issued on the 18.3.2011. The same stipulated that:
- **Judgment for plaintiff KShs.18 million**
 - **Orders issued on 11.6.2010 be discharged.**
 - **The Defendant to pay Plaintiff KShs.3 million and the balance KShs.15 million to be paid by reasonable instalments in terms to be agreed between the parties.**
 - **In default execution to issues.**
 - **Costs agreed KShs.356,000/.**

11.The above consent was not honoured and on 8.9.2011 a public auction was held and the Garden Children Ltd was declared the winner of the bids with the highest bid of KShs.60 million being the purchase price. On 15.12.2011 an application dated 15.9.2014 was filed and was allowed by consent on 16.1.2012 between the advocates for the Applicant/Auctioneers, Plaintiff and defendant.

12.The Application had 2 vital limbs namely;

Court authorized the Deputy Registrar to execute the transfer on behalf of the Judgment debtor to effectively vest ownership of LR.No.714/115 (LR/11 4440) to the purchaser. **AND**

The Auctioneers to pay decretal amount/sum to judgment creditor (J/C) AND the balance thereof to be paid to advocate for the Judgment Debtor/Defendant.

13.The aforesaid consent orders stand to date unimpugned and are still in force. However, while the orders above stood, the Applicant proceeded to recover the sale proceeds KShs.60 million and disbursed the amount of KShs.60 million without varying the consent orders or even seeking the consent of the Judgment Debtor or its advocate.

14.It is in the light of the above circumstances, that application dated 24.2.2010 was lodged. The application was served upon the Advocates for the Purchaser and Judgment Creditor on the 29.2.2012 and none of the aforesaid advocates opposed it and on 11.7.2012 the same was allowed. It is in the aforesaid circumstances the Applicant seeks to be heard.

15.The service of the Application dated 24.2.2012 is not denied nor contested. The Applicant advocate has not sworn an affidavit as to why he never sought instructions from the Applicant nor attend court, or even oppose it. Applicant only indicates that if he was aware of the same, he would have opposed it.

16.But the question which comes fore is that, does he have a defence to the same application? His proposed defence is that he disbursed KShs.60 million apparently contrary to the consent orders still in force which only authorized the payment of the decretal amount and the balance to be deposited with the Judgment Debtor advocates.

17.Even if there were no such orders, Rule 18 of the Auctioneers rules 1997 as revised in 2009 stipulates that the sale proceeds should be deposited in court or with the instructing party.

18.On the face of the aforesaid consent orders and the provisions cited in the Auctioneers Rules, it is an exercise in futility to allow the applicant a chance to be heard in the application dated 24.2.2012. The Hon. Judge only acted as per the consent orders by directing the balance of sale proceeds to be deposited with the Judgment Debtor's Advocates.

19.Section 1A, 1B Civil Procedure Act, Cap 21 on overriding objective emphasis on the points of expedition, just and proportionate disposal of the suit. Article 159 (2) (b), (d), emphasizes substantive justice without delay. The situation and circumstances of the case herein demand that the matter be brought to close by rejecting the application dated 24.7.2012.

20.The Applicant can deal with his advocated here on record for failing him if he thinks he could have saved the situation. The wheel of justice cannot be stopped from grinding in a progressive forward trajectory. The Applicant has no justification at all in the way he fragrantly violated the consent orders. The judge was justified in ordering the money to be deposited in court.

21.The court therefore makes the following orders:

1. **The application dated 24.7.2012 be and is hereby dismissed.**
2. **Costs to the Respondents.**

Dated and Delivered at Machakos this 21st day of November, 2014.

CHARLES KARIUKI

JUDGE

