



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
MISC APPLICATION NO 949 OF 2007

ANTHONY MILILU LUBULELLA

(t/a LUBULELLA & ASSOCIATES).....ADVOCATE/DECREE-HOLDER

VERSUS

PASTEUR DUKUZUMUREMYI.....CLIENT/JUDGEMENT-DEBTOR

AND

KIWAKA GENERAL MERCHANTS.....PURCHASER

R U L I N G

1. The Advocate acted for the Client in **Nairobi HCCC No. 230 of 2005**. The Advocate subsequently applied for taxation of his bill of costs against the Client vide the present proceedings. The Advocate's costs were eventually taxed at KShs 225,596/00 and a certificate of taxation issued. Later the Advocate obtained a decree upon that certificate of taxation.

2. Eventually the Advocate applied for execution of the decree by attachment and sale of the Client's immovable property, **L. R. No. 1/1151 (Original No. 1/58/2/7)**. The property was sold to **Kiwaka General Merchants Ltd** in a public auction for KShs 10 million.

3. The Client has applied by **notice of motion dated 14th December 2011** for the main order that **the sale of the property to the Purchaser be set aside**. He has also applied for two other orders –

(i) That the orders of 21st October 2009 and 9th February 2010 “and all other consequential orders” be set aside.

(ii) That the orders made on 24th November 2010 “and all consequential orders” be set aside or vacated.

In the alternative the Client has applied that the orders of 17th September 2010 be set aside, vacated or varied.

4. It is useful to have a look at the very beginning of these various orders that the Client wants set aside, vacated or varied.

5. **Order of 21st October 2009:** By this order the court allowed the Advocate's application by notice of motion dated 10th June 2009 and granted an order prohibiting the Client from transferring or charging the property.

Order of 9th February 2010: By this order the Deputy Registrar settled the terms of sale of the attached property.

Order made on 24th November 2010: By this order of the Deputy Registrar the sale of the property to the Purchaser was confirmed and made absolute.

Order of 17th September 2010: By this order the court the Client's application by notice of motion dated 12th April 2010 for an order to set aside the order of 9th February 2010 was dismissed with costs.

6. It is quite apparent that all the orders that are challenged in this application were orders antecedent and necessary to the attachment and sale of the Client's property in execution of decree. The challenge to those orders therefore is ancillary to the main prayer in this application which seeks to set aside the sale. That main prayer is sought under **Order 22, Rule 75 of the Civil Procedure Rules, 2010 (the Rules)** which provides as follows –

“75. Where any immovable property has been sold in execution of a decree, the judgment-debtor, 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 substantial injury by reason of such irregularity or fraud.”

7. Under the law therefore a sale of immovable property in execution of a decree will be set aside only on the ground of a **material irregularity or fraud in publishing or conducting the sale**, and then only if, **upon the facts proved**, the court is satisfied that the **applicant has sustained substantial injury** by reason of such irregularity or fraud.

8. The following therefore are the issues to be decided in this application.

(i) Was there material irregularity in publishing the sale?

(ii) Was there fraud in publishing the sale?

(iii) Was there material irregularity in conducting the sale?

(iv) Was there fraud in conducting the sale?

If the answer to any of these four issues will be in the affirmative, there will be a fifth issue as follows -

(v) Upon the facts proved, is the court satisfied that the Client has sustained substantial injury by reason of such irregularity or fraud?

9. Both the Advocate and the Purchaser have opposed the Client's application. I have read all the affidavits sworn in support of and in opposition to the application. I have also considered the submissions, oral and written, made on behalf of the parties, including the authorities cited.

Issue No. 1: Was there material irregularity in publishing the sale?

10. Publishing the sale can only mean the advertisement preceding the public auction. Advertisement is provided for in **Rule 16** of **The Auctioneers Rules, 1997** as follows –

“16. (1) An advertisement by an auctioneer shall, in addition to any other matter required by the court, contain –

- a. **the date, time and place of the proposed sale;**
- b. **the conditions of sale or where they may be obtained;**
- c. **the time for viewing the property to be sold;**
- d. **in respect of movable property other than perishable goods and livestock, an accurate description of the goods to be sold and a statement as to whether or not they are to be sold subject to a reserve price;**
- e. **in respect of goods of a perishable nature or livestock in accurate description of the goods to be sold and of their condition and a statement as to whether or not they are to be sole subject to a reserve price;**
- f. **in case of immovable property all the information required to be contained in the court warrant or letter of instruction except the amount to be recovered and the exact amount of any reserve price.**

(2) Except as may be ordered by a court, advertisement by an auctioneer of a sale by auction of any property, movable or immovable, shall be by way of an advertisement in a newspaper, provided that in the case of perishable goods and livestock advertisement in a newspaper may be dispensed with if adequate notice to prospective bidders in all the circumstances can be achieved by radio or television announcement, or handbills or posters, or other means of communication.”

11. I have carefully read the grounds for the application appearing on the face thereof as well as the supporting affidavits. There is no specific complaint by the Client regarding advertisement of the property for sale or publication of such advertisement. The only complaint that comes close is that there was no **reserve price**. Indeed the terms of sale set by the Deputy Registrar did not set any reserve price. No law has been pointed out to Court requiring that a reserve price be set in all cases of sale of immovable property in execution of decree. As for such reserve price appearing in the advertisement of such sale, that is expressly prohibited by the aforesaid **Rule 16(1)(f)** of the Auctioneers Rules. And it is for good reason that no reserve price should be known to the bidders because in that case they would bid only slightly higher than the reserve price, no doubt to the eventual detriment of the judgment-debtor whose property is being sold.

12. The Client has also complained that the property was advertised for sale on 8th September 2010 during subsistence of an **order of stay of attachment and sale made on 29th April 2010**. Indeed that order of stay was extended from time to time until it was **finally vacated by the order of 17th September 2010** that dismissed the Client’s application dated 12th April 2010. But it is to be noted that the sale took place on 29th September 2010 after the stay order had been vacated on 17th September 2010.

Issue No. 2: Was there fraud in publishing the sale?

13. 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. Although some allusion to fraud in regard to the sale is contained among the Client’s many complaints, there is no charge of fraud in relation to publication or advertisement of the public auction that resulted in the sale.

Issue No. 3: Was there material irregularity in conducting the sale?

14. With regard to immovable property, **Rule 15** of The Auctioneers Rules provides as follows –

“15. Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property –

- a. **record the court warrant or letter of instruction on the registrar;**
- b. **prepare a notification of sale in the form prescribed in the Sale Form 4, set out in the Second Schedule indicating the value of each property to be sold;**
- c. **locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refused to sign such notification, the auctioneer shall sign a certificate to that effect;**
- d. **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;**
- e. **on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.”**

15. I can find no complaint by the Client that he was not given by the auctioneer the **notice** required by Rule 15(d). There is also no allegation by the Client that he informed the auctioneer that he had already deposited in court the decretal sum. There is a recurring complaint by him that the property was advertised for sale and subsequently sold after the substantial portion of the decretal sum (excluding only KShs 10,000/00) had been deposited in court. But he has not alleged that he brought this to the attention of the auctioneer. It is worth remembering here that we are dealing with irregularities regarding the conduct of the sale, that is, the public auction itself. We are not dealing here with any irregularities that may have taken place in the course of proceedings in court, either before a Judge or Deputy Registrar. There are many complaints by the Client regarding proceedings that resulted in the orders preparatory to and adjunct to the advertisement and sale of the property. But those complaints are outside the ambit of the present application. The application cannot be permitted to go outside the ambit of Order 22, Rule 75 of the Rules. Outside that rule, the Client must seek redress elsewhere.

16. The Client has also complained that his property was sold way below the market price, which market price he placed at KShs 30 million. But he has himself presented evidence that in the same year of sale he had agreed to sell the property for KShs 13.5 million in a negotiated sale. By its very nature a sale by public auction is a forced sale. It will unlikely realize the best price. In the present case the property was sold at KShs 10 million. There is no evidence of collusion between the Purchaser and the auctioneer, or between the auctioneer and the Advocate or between all three. The property appears to have realized the best price in the circumstances.

Issue No. 4: Was there fraud in conducting the sale?

17. There are no particulars of fraud given in conduct of the public auction or sale by the auctioneer. The Client has complained that the Advocate has never given an account of the proceeds of the sale. There does not appear to be a similar complaint against the auctioneer.

18. **Rule 18** of the **Auctioneers Rules** provides as follows –

“18.(1) Payment by purchaser at a sale of seized goods shall be in form of cash, banker’s cheques or electronic funds transfer.

(2) Payment by a purchaser in all other cases shall be in such form as the auctioneer shall think fit.

(3) On receipt of the proceeds of sale the auctioneer shall issue a receipt for it and

in the case of immovable property sign a memorandum of sale.

(4) The auctioneer shall remit the proceeds of sale less his charges to the court or the instructing party, as the case may be, accompanied by an itemized account in the case of movable property within fifteen days of the sale and in the case of immovable property as provided under Order 21, Rule 74 of Civil Procedure Rules.”

19. There is evidence that the auctioneer remitted the proceeds of the sale less his charges to the Advocate (the instructing party). The Advocate’s replying affidavit shows that the Advocate in his turn forwarded to Court on 9th November 2010 KShs 8,304,120/40 by electronic transfer, and the Court issued a receipt for the same on 19th November 2010. This was less than two months after the sale. There was no delay in accounting as alleged by the Client, either on the part of the auctioneer or the Advocate.

Issue No. 5: Is the court satisfied that the Client has sustained substantial injury by reason of any proved irregularity or fraud?

20. I found elsewhere above one irregularity, to wit, advertising the property for sale during subsistence of an order of stay of attachment and sale. But I also pointed out that the sale itself took place after the order of stay had been lifted. This being the case, I am not satisfied that the Client sustained substantial injury by that single irregularity.

21. As already stated, the Client has made many complaints in this application that are outside the ambit of Order 22, Rule 75 of the Rules. This is particularly in regard to proceedings in court leading to various orders, either made by a Judge or a Deputy Registrar. In regard to the orders made by Deputy Registrars, there is no appeal to a Judge in chambers against any of those orders as provided for in the Rules. In regard to orders made by Judges, the same were never appealed to the ***Court of Appeal***. Nor were there any dedicated applications for review or setting aside of those orders. The orders have been challenged in this application only as necessary adjutants to the main application to set aside the sale.

22. As regards the Advocates reply to the application, it will be noted that I have chosen not to deal with the various technical issues raised, preferring rather to deal with the merits of the application within the ambit of Order 22, Rule 75 of the Rules.

23. Having dealt with the application within the ambit of the said rule, I find no merit in it. The same is dismissed with costs to the Advocate and the Purchaser. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF OCTOBER 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER 2013