



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 526 OF 2010

KENNEDY RASUGU OROKO.....1ST PLAINTIFF

PHILLISE NYACHAMA RASUGU.....2ND PLAINTIFF

VERSUS

DANIEL KAMAU MUGAMBI.....DEFENDANT

R U L I N G

By an application by Chamber Summons dated 9th August, 2010, the Plaintiffs moved this court under the provisions of Order XXXIX Rules 1, 2, 7, and 9 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act for orders that the Defendant be ordered to give immediate vacant possession of the suit property to the Plaintiffs, and in default the Plaintiffs to be at liberty to evict the Defendant therefrom. The application is supported by the annexed affidavit of Phillise Nyachama Rasugu, the 2nd Defendant, and is based on the grounds that the Plaintiffs purchased the suit property in a public auction and paid valuable consideration for it. Thereafter, they were registered as the proprietors of the said property and a certificate of lease issued to them by the Lands Registry. It is their contention that the Defendant lacks any registrable interest in the property and that if there was any irregularity in the exercise of the statutory power of sale, any remedy lies against the person exercising the power of sale.

To this application the Defendant filed grounds of opposition in which he alleged that the application was bad in law, premature, and that the Respondent has a good defence which raises triable issues. In a replying affidavit filed in court 10 days after the filing of the grounds of opposition, the Respondent avers that the auction sale was illegal as the matter was still pending in court, and that this infringed Section 52 of the Transfer of Property Act, 1882. He also deposes that the matter was under appeal and therefore it was illegal for any sale to be conducted. Finally, he attests that the whole action violated Section (sic) 47 of the Constitution which is to the effect that he has a right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. On the same date that he filed the replying affidavit, he also filed a Notice of Preliminary Objection that the application dated 9th August, 2010, affects Section 47 (1) and (2) of the new Constitution. He therefore prays that the application be dismissed with costs and the matter be allowed to go for full hearing.

With the leave of the court, the parties filed their respective skeleton submissions. Thorough their

counsel, the Plaintiffs highlighted their submissions but counsel for the Defendant did not highlight the Defendant's submissions, preferring instead to rely exclusively on his written submissions. After considering the pleadings and the submissions of the respective parties, I find that the issues for determination in this matter are whether the application before the court offends Article 47 of the Constitution; whether the auction sale was illegal as there was a matter allegedly still pending in court, and whether this infringed Section 52 of the Transfer of Property Act; and finally whether the matter was under appeal.

The 1st issue is whether this application is unconstitutional as offending Article 47 of the Constitution. That Article provides, *inter alia*, as follows –

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

“(2) If a right or fundamental freedom of any person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

It is instructive that Article 47 of the Constitution falls under Part 2 of the Bill of Rights which prescribes rights and fundamental freedoms, and that in particular the Articles in question makes provision for **“fair Administrative Action”**. In my view, **“administrative action”** in the context of that Article relates to such actions by the administration as may positively or adversely affect any person, and further that **“administrative”** in that context refers to actions by the Executive as distinct from those by Legislature or the Judiciary. The application in this matter deals with the Rights of a Purchaser of land at an auction and does not involve any administrative action. It is not certain what administrative action the Respondent seeks to impute in the matter and the attempt to do so is far fetched.

The 2nd issue is whether the auction sale was illegal on the ground that the matter was still pending in court and whether such sale was a contravention of Section 52 of the Transfer of Property Act. The Plaintiffs' case is that they purchased the suit property in a public auction and paid valuable consideration without any notice of any defects in title. The Respondent has not advanced or offered any evidence to contradict this contention and in the absence of any such evidence, his allegation remains an allegation without proof. The onus rests entirely on him to demonstrate that there was a suit pending at the time of the auction sale; who the parties were; and how that suit involved the property in question. In the absence of such particulars, the Respondent has not established any registrable interest capable of being protected by the court, and his pleas must therefore fail. For the same reasons, the Respondent has also invoked Section 52 of the Transfer of Property Act but he has not pleaded what case is pending in court and between which parties. He also alleges that at the time of the auction, there was an appeal pending but he has not given any details of the alleged appeal. In the absence of any such details, the court has no basis for upholding the invocation of Section 52.

After purchasing the suit property at the public auction on 15th September, 2009, at which the Plaintiffs were the highest bidders, the Plaintiffs were registered as the proprietors of the property on the 14th July, 2010. On the same date, they were also issued with a Certificate of Lease. Prima facie, they are the owners of the suit property. In such circumstances, the law does not allow an aggrieved party to claim back such property which has already changed hands pursuant to a lawful exercise of a Statutory Power of Sale. However, the Respondent's remedy lies in Section 77 (3) of the Registered Land Act which states that –

“A transfer by a chargee in exercise of his power of sale shall be made in the prescribed form, and the Registrar may accept it as sufficient evidence that the power has been duly exercised, and any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power.”

On the facts of this case, the Respondent's interest in the suit property became extinguished upon the purchase of the property by the Applicants. His only remedy, therefore, lies in Section 77 (3) of the Registered Land Act as set out above. For these reasons I find that the Applicants are the legal owners of

the suit property and the Respondent is now a trespasser. I accordingly make the following orders –

- (a) That the Defendant be and is hereby ordered to give vacant possession of the suit property to the Plaintiffs within 21 days from the date hereof.**
- (b) In default, the Plaintiffs' shall be at liberty to evict the Defendant from the property using court bailiffs at the Defendant's cost.**
- (c) The Plaintiffs be at liberty to set down the other aspects of the case for hearing.**

Orders accordingly.

DATED and DELIVERED at NAIROBI this 10th day of February, 2011

**L NJAGI
JUDGE**