



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 292 OF 2007 (OS)

**IN THE MATTER OF: AN APPLICATION FOR A VESTING ORDER FOR PLOT NO.
1109/VI/MN**

AND

IN THE MATTER OF: KITUI RMCC 171/1997 MBULI MUTONGOI

-VS-

MATIKU KYENGO KAVINGO

BETWEEN

ROMAD ENTERPRISES

LTD.....PLAINTIFF

-VS-

**MATIKU KYENGO KAVINGO through NZELI MATIKU the legal
Representative.....DEFENDANT**

J U D G M E N T

The Plaintiff through an Originating Summons dated 13th November 2007 and filed on 23rd November,

2007 sought the following Orders against the Defendant, the Estate of the Late Matiku Kyengo Kavingo as represented by the Legal Representative, Nzeli Matiku:-

1) *That the Court do issue a Vesting Order resting the property known as Plot No. 1109/VI/M.N. to the Plaintiff.*

2) *That the Plaintiff be put into possession.*

3) *That the costs of this summons be provided for.*

The Summons is supported by an affidavit sworn by Omar Faki on 22nd November 2007. The Plaintiff in the said affidavit depones as follows:-

- That he is a director of Rumad Enterprises the Plaintiff herein.
- That on 18th September 2007 he attended a Public Auction at the offices of M/s Trophy Auctioneers where the plaintiff purchased the property known as Plot No. 1109/VI/M.N for a sum of Kshs.3,600,000/-.
- That the Plaintiff immediately paid the 25% being Kshs.900,000/- to the Auctioneer and a receipt was duly issued.
- That a certificate of Sale was also issued by the Court confirming the sale.
- That on 22nd November 2007, the Plaintiff paid the balance by way of a Banker's Cheque for the sum of Kshs.2,700,000/-.
- That the court has since issued a receipt for the sum of Kshs.2,700,000/- being the balance of the Purchase price.
- That what remains to be done is the issuance of the Vesting Order to enable the Plaintiff register the property in its name.
- That prior to the Sale the property had been advertised through the local daily newspaper.
- That there has been no application to set aside the sale so far.

That upon the directions of the court being given on 15th February 2008 the Defendant filed its defence in which the following grounds of Defence were set out:-

1. That the Orders sought by the Plaintiff are not capable of being granted. The Sale of the property was fraudulently and illegally close. The same was fraudulent in that:-

- (i) The sale was done without proper notification to the Defendant or family members.**

- (ii) The property sold was not capable of being sold as there existed an Order of Prohibition against it.**

- (iii) The proper procedure used in obtaining orders for its sale was not followed.**

- (iv) The purported auction was not properly conducted.**

- (v) The lower court at Kitui acted under misrepresentation of facts and law.**

2. That the present suit is brought in bad faith and is only meant to oust her from her late husband's premises.

3. The Plaintiff's suit is bad in law, fatally and incurably defective. That the suit as framed offends the mandatory legal provisions and ought to be struck out with costs.

The Plaintiff filed a Reply to Defence Dated 30th April, in which it denied the aforesaid allegations and averments in the defence.

By an application dated 15.10.2009 one Mutua Matiku, a Co-Administrator to the Estate of Matiku Kyengo Kavingo was by consent of the parties allowed to be enjoined as a party in this suit i.e. as a Defendant together with his mother, Nzeli Matiku. This Court in H.C. Succession Cause No. 2730 of 1995 – Nairobi, had made the grant of Letters of Administration to the Estate of the deceased who had died on 2.11.1995 to the two Administrators on 4.09.1997.

The hearing commenced before me on 30.09.2009 by way of viva voce evidence. The plaintiff called an Assistant Executive Officer from the Kitui Law Courts, one Beatrice Mwandothi, to produce the Original Court file in Kitui, RMCC No. 171 of 1997. She testified as follows that:-

- Judgment was delivered on 27.07.1999.
- Case was defended.

- The Plaintiff was Mbuli Mutongoi suing through her Next Friend Christina Mutongoi Ndemwa.
- The case was heard and finalized.
- The last order was made on 27.01.2009 when a ruling was delivered, dismissing an application to set aside the court's orders for sale of the suit property, Land parcel No. 1109/VI/MN situated in Mombasa given on 3.01.2006.
- There was a subsequent execution process of the decree.
- The Defendant was Matiku Kyengo Kavingo sued through Nzeli Matiku, the 1st Defendant.
- The Original Defendant was Taita Express Bus and James Mukolo Elisha and 6 others.
- The Plaintiff had been amended on 31.10.1997. The Defendants now included Nzeli Matiku as legal Representative of the deceased and one James Mukolo Elisha.
- The suit property was sold and a certificate of Sale dated 23.10.2007 was issued to Rumad Enterprises Limited by the Auctioneer.
- The Plaintiff had been awarded Kshs.170,000/- with costs on 27.07.1999.
- The Sale price at the Auction was Kshs.3,600,000/- the highest bidder being Rumad Enterprises Ltd.
- The Auctioneers were paid a deposit of Shs.900,000/-.
- The balance of Shs.2,724,050/- was paid into court.
- Payment was made by Trophy Auctioneers who had carried out the sale on behalf of the court.
- The court collection charges were paid.
- Original Receipt for Shs.2,724,050/- issued by the court on 5.11.07 was produced as P.Ex.No. 3(a)
- Receipt for collection charges for Shs.1500/- was also produced.
- That there was an application to set aside the sale but the same was rejected by the court at Kitui.
- That the monies deposited in court were disbursed to various advocates through several court orders including garnishee orders.
- Payments were on record.
- Payments from court were handled by various judiciary accountants.
- The Auctioneer only remitted the amount shown. The balance out of the deposit of Shs.900,000/- was paid to the law firm of Maseki and Company for the plaintiff. The amount paid was Kshs.765,575/25.

The Plaintiff's second witness PW2, was one Mansour Ahmed

Mohamed, the General Manager of the Plaintiff company. He testified on oath and took the court through how they saw the advertisement of the sale of the suit property in Port Reitz, Mombasa. The public auction was advertised to take place on 18.09.2007. He placed a bid of Shs.3,600,000/-. That his bid was accepted and he paid a deposit of shs.900,000/- after consultations with the seller. The payment was to Trophy Auctioneers. The balance was subsequently paid by banker's cheque in the name of the Resident Magistrate, Kitui Court.

On Cross-examination he stated that he attended the auction together with a director of the company Mr. Omar Fakih.

The Defendants called one witness, Mr. Mutua Matiku. He is the Second Defendant and Co-Administrator to the Estate of his father the late Matiku Kyengo Kavingo. He produced the grant of Letters of Administration made to him and his mother, the first Defendant. He testified on oath, inter alia, as follows:-

- His father was a Public Service Vehicle Transporter. He owned a fleet of buses.
- That at the time of his death he had 15 buses.
- That he was not aware of the existence of S.R.M.C.C. No. 171 of 1997 at Kitui court until he saw the Originating Summons herein.
- That he was not a party in the Originating Summons at the beginning.
- He sought legal advice and was enjoined as a party.
- He did not receive any money i.e. balance of decretal sum, as the Estate.
- The suit property is one of the properties of the Estate. It is a maisonette with 3 bedrooms and a servant quarters which has 2 bedrooms.
- He has never seen the original title which they have not been able to trace.
- The Grant of letters of Administration has not yet been confirmed by the court as there is a pending objection by M/s Maseki & Co. Advocates which filed the suit in Kitui.
- They have not registered an instrument against the Title.
- They seek the dismissal of the suit.
- There were other suits relating to accidents involving their vehicles.
- That his mother as co-administratoer applied to set aside the sale.

- The application was not allowed. He was not aware of any appeal being preferred.
- The bus belonging to the Estate are grounded as his father's business collapsed.
- The Estate has 3 other properties still available.

- His brother, William Matiku is the one in possession of the suit property. He is not paying any rent.
- He was not aware of the Settlement of terms of the sale by court.
- He was not aware that the sale proceeds were applied to off-set the debts of the Estate.

After the close of the Defendants' case Counsel recorded a consent order to file written submissions. The plaintiff and Defendants filed written submissions and also respective replies.

I have carefully considered the Originating summons, the Defence, the Reply to Defence and affidavits. I have also considered the testimonies of the witnesses, the evidence in general and the written submissions filed by counsel.

It is my opinion that the questions and/or issues that arise from the pleadings and for determination by the court are:-

1. *Whether the Sale of suit property known as Plot No. 1109/VI/M.N. at the Public Auction held on 18th September 2007, by Trophy Auctioneers to the plaintiff was valid, lawful and legal.*

2. *Whether the Sale was fraudulent as alleged in the Defence.*

3. *Whether the Plaintiff is entitled to the vesting order sought in relation to the property herein under the provisions of Section 48, Trustee, Act, Cap 167?*

4. *If so, whether a Vesting Order can issue and is enforceable in execution of the Decree by way of attachment of the property of the Deceased before the Administrators fully take over upon confirmation of the Grant and are registered as the proprietors?*

5. *Is the Plaintiff entitled to be put into possession?*

6. *Who should pay the costs of the suit?*

I now proceed to deal with the question/issues in seriatim:-

1. **Whether the Sale of suit property known as Plot No. 1109/VI/M.N. at the Public Auction held on 18th September, by Trophy Auctioneers to the Plaintiff was valid, lawful and legal?**

There is no dispute and is common ground that the sale that took place was as a result of the execution of the Decree of a Court of law in **R.M.C.C. at Kitui Civil Suit No. 171 of 1997 – MBULI MUTONGOI (MINOR) – V – MATIKU KYENGO KAVINGO (THRO') HIS PERSONAL**

REPRESENTATIVE, NZELI MATIKU & OTHERS.

In his Ruling when the 1st Defendant applied to set aside the Sale, the Hon. J. O. Omburah found as follows:-

“.....There is no dispute that there is a competent judgment delivered by the Court which has not been overturned and there was consequently a valid decree drawn which set into motion the process of execution. There is clear admission by the applicant in the Supporting Affidavit that the subject of plot was sold pursuant to that execution. From that affidavit there is no irregularity either on the execution process or the eventual sale of the property in question...”

I do find that the position has not changed ever since the date of the said Ruling on 27.01.2009. On the facts, I find that the plaintiff on 18.09.2007 attended a Public Auction in which it emerged as the highest bidder for the property known as Plot No. 1109/V/M.N. for a sum of Kshs.3,600,000/-. The Plaintiff paid a deposit of Kshs.900,000/- being the required 25% to the Auctioneer, M/s Trophy Auctioneers. The balance in the sum of Kshs.2,725,550/- was paid by way of Banker's Cheque to the Resident Magistrate, Kitui Law Courts. A certificate of sale was issued by the Court on 23rd October 2007.

I do find that as a result the sale was valid, lawful and legal as the execution was in pursuance of court execution and the public auction sanctioned by the court. The certificate of sale issued sealed the sale and the only thing remaining is for the transfer the property into the name of the purchaser, the plaintiff.

It is high time that the Defendants recognized that as long as the sale and certificate of sale remained unchallenged and valid, then the process is binding and unforceable subject to any other limitations which they must be shown. I will deal with these under the other issues.

2. Whether the Sale was fraudulent as alleged in the Defence?

In view of the findings of the court in question No. 1 above, the answer is No. The sale was carried out by Orders of the court in execution of a decree. The Decree is still valid and enforceable. There is no pending appeal or otherwise. The court cannot in the circumstances interfere with the said process. In fact, the High Court would not have jurisdiction to do so except if it deemed that it was so necessary under the supervisory jurisdiction i.e. if there was fraud or other material issue that went to the root of the process of sale. None has been shown to the court.

I hold that the sale was not fraudulent.

The Plaintiff has moved the High Court for a Vesting Order under the provisions of Section 43 of the Trustee Act Cap, however, it meant Section 48 and the same is duly amended as applied for in the submission. The mistake is not substantive but a misnomer. I allow this amendment under Section 100 of the Civil Procedure Act and order 50, Rule 12 of the Rules.

Section 48 provides:-

“48 Vesting Order consequential on order for sale or mortgage of land.

Where any court gives a judgment or makes an order directing the sale or mortgage of any land, every person who is entitled to or possessed of any interest in the land, or entitled to a contingent right therein, and is a party to the action or proceeding in which the judgment or order is given or made or is otherwise bound by the judgment or order, shall be deemed to be so entitled or possessed as the case may be, as a trustee for the purposes of this Act. And the court may make an order Vesting the land or any part thereof for such estate or interest as the court thinks fit in the purchaser or mortgagee or in any other person.”

The law is that where a person who owns property registered or otherwise dies and another person becomes the legal representative and in particular, is appointed as the Administrator to the said Estate, then such person in such legal capacity becomes a Trustee for the Estate of the deceased. The Administrator until confirmation and transmission owes duties of trustee and fiduciary to the Estate. He or she cannot dispose of any property without orders of the court but can sue for and collect properties, monies, debts etc due to the estate. He has a duty to collect, enhance, protect and preserve.

Section 48 herein specifically makes an Administrator of an Estate a Trustee of the property in his possession or he is entitled to a contingent right therein and who is a party to the action or proceedings in which the judgments or order is given or made or is otherwise bound by the judgment or order.

In this case, judgment was entered in favour of the Plaintiff in the Kitui Law case against the Estate of the deceased. The 1st Defendants was sued as Administrator and participated in the said proceedings. Having been appointed an Administrator together with the 2nd Defendant her son, they are in law trustees in common law and statute under the provisions of Section 48.

I hold and find that the plaintiff is entitled to a Vesting Order under the provisions of Order 48 Trustee Act. The judgment was against the Deceased and the cause of action survived him. His Estate was duly sued or joined in the suit and judgment entered against it. The Decree is enforceable against the property of the Deceased through his Estate which is under Probate Administration by the Administrators appointed by the court.

3. If so, whether a Vesting Order can issue and enforceable in execution of the Decree by way of attachment of the property of the Deceased before the Administrators fully take over upon confirmation of the Grant and are registered as the Proprietors?

The Defendants here submitted that execution against the properties of the deceased cannot in law be enforced by way of attachment of the land before the Administrators fully take over and are registered as the proprietors. The Defendants have invoked the provisions of Section 52 of the Registration of Titles Act, Cap 28, Laws of Kenya which provides as follows:-

“Part X- Transmissions

52. Whenever the proprietor of any land dies, the representative of the deceased proprietor shall before any dealing with the land make an application in writing to the registrar of the registration district within which the land is situated to be registered as proprietor, and shall produce to the registrar the probate or letters of administration, and thereupon the registrar shall enter in the register memorial of the date of the probate or letters of administration, the date of the death of the proprietor, when it can be ascertained and shall add the words “as representative” after the name of the person to whom the probate or letters of administration was granted, and upon entry being

made the representative shall be deemed to be the proprietor of the land and such part thereof as the time being remains undisposed of and the registrar shall note the fact of registration by memorandum on the probate or letters of administration:

Provided that the title of the representative to the land shall relate back and take effect as from the date of the death of the deceased proprietor”

To question now is that does this provision bar the attachment and sale of the deceased's property in execution of the decree against the Estate? It is common ground that the Defendant's Grant of Letters of Administration have not been confirmed and they have not become the proprietors of the property under S.52 of the Registration of Titles Act.

After careful consideration I hold the opinion that the purpose of Section 52 is to give the Administrators or legal representative to find authority to deal with the property and have the capacity to dispose or part on the property. Before innovation of S.52, an Administrator cannot sale any property regulated by the Registration of Titles Act. I doubt that such an Administrator can sell or dispose of any immovable properties before confirmation of the Grant and Compliance with statutory provisions similar to S.52 herein.

Be that as it may, this requirement only affects the powers of the Administrator but not the disposability of the property by attachment and execution of a court decrees/orders as against the Estate. As Administrators and Trustee, the Defendants are not proprietors. However the judgment/Decree is strictly against the deceased and his Estate and not against them personally. They were sued not in their personal capacities but as legal representatives duly appointed by the court at their own request or application. In this capacity they are bound to pay all the debts and liabilities, of the Estate including satisfying decretal sums ordered by a Court even before they are registered as Proprietors - cum - representatives of the deceased.

I do hold that the Defendants have misinterpreted the provisions of Section 52. In this case, the enforcement of a decree against the property is not “a dealing” by the Administrator envisaged in Section 52 but is an act by a court of law and fully sanctioned by the law.

There is no dispute whatsoever that the proprietor is registered in the name of the deceased, the absence of the title notwithstanding. After all, it is decided that it is the Administrators who are either in possession of the title documents or ought to know where it is. They never denied that the deceased was not the registered owner. To the contrary the record will show that it is an admitted fact by the Defendants throughout the proceedings that the deceased is the owner of the suit property and is still registered in his name.

The result of the foregoing is that the plaintiff is successful in its claim herein as against the defendants.

I do therefore hereby order the issuance of a Vesting Order vesting the property known as Plot No. 1109/VI/M.N. to the Plaintiff. The Registrar of titles in the relevant district shall effect registration of the Vesting Order upon service in accordance with the law.

5. Is the Plaintiff entitled to be put into possession of the property?

In law and in fact, the natural, logical and effectual result of the Vesting Order is to confirm that the Plaintiff is to the lawful and legal owner of the property herein. It is entitled to possession thereof as a matter of right having been kept out of possession by the Defendants. They are lucky that the Plaintiff did not make a claim for mesne profits. I therefore do order that the plaintiffs be put into possession of the suit property and in default an Eviction order to issue as against the Defendants and/or any person who claims under them or is in possession or occupation thereof.

This is necessary to give effect to the Order of possession and to bring this matter to finality and avoid any doubts of the effect of this judgment.

6. Who should pay costs of the suit?

As costs follows the event, the Defendants shall pay the costs of the suit as Administrators to the Estate of the deceased. Orders accordingly.

DATED and DELIVERED at Mombasa on this 20th day of May 2011.

M.K. IBRAHIM

J U D G E

Coram:

Ibrahim, J

Court clerk – Kazungu

Mr. Khatib for the plaintiff

Mr. Abir for the Defendant

Order:

Judgment delivered in their presence.

Ibrahim, J

20TH MAY, 2011