



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO.436 OF 1998

JAMES MWANGI

WANJAU.....1ST
APPELLANT

S.M.

KIVUITU.....2^N
^D APPELLANT

VERSUS

JOSEPH MACHARIA

KAIRU.....RESPONDENT

KENNETH KIMANI

MUIRURI.....INTERESTED
PARTY

RULING

1. There are two applications for hearing before me. The 1st application is a notice of motion dated 28th April, 2004 in which the appellant/deed holder seeks to have the order for stay of execution issued on 10th April, 2003 vacated, and the sale of land known as Loc3/Gacharage/712 and Loc3/Gacharage/715 on 11th April, 2003 confirmed. The appellant further seeks to have the sale declared absolute in so far as the interest of the judgment debtor in the suit property is concerned. The application is anchored on the following grounds:

- (i) That the sale of the land known as Loc 3/Gacharage/712 and Loc3/Gacharage/715 was ordered by the court and notification of sale issued on 31st March, 2003.
- (ii) That the property was sold by way of public auction on 11th April, 2003.
- (iii) That the orders of stay of execution had been overtaken by events as the same were served after the sale was complete.
- (iv) That the property was bought by the highest bidder one Kenneth Kimani Muiruri who is the

interested party.

(v) That no application has been made to set aside the sale.

2. The application is supported by an affidavit sworn by a licensed court broker and auctioneer Eliud Mungai King'ara who swears that the auction sale took place on 11th April, 2003 at 11.00 am and that he was served with the order for stay of execution on the same day at 1.30 p.m. long after the sale had taken place.

3. The 2nd application is a notice of motion dated 27th May, 2004, in which Joseph Macharia Kairu the respondent to the appeal seeks to have orders that this honourable court be pleased to set aside the purported sale by public auction of L.R. No.Loc3/Gacharage/712 and Loc3/Gacharage/715 allegedly held on 11th April, 2003.

4. The respondent's application is anchored on the following grounds:

(i) That the purported public sale was flawed with material irregularity and fraud, and mandatory rules and procedure were flouted in conducting and publishing the sale.

(ii) That the applicant herein has suffered substantial injury as a result of the purported sale.

(iii) That the purported public sale usurped powers and procedure and purported to make a sale under Section 74 of Registered Land Act, whereas the sale should have been pursuant to a court decree.

(iv) That the mandatory 30 days of notification were not met before the sale of parcels No.Loc3/Gacharage/712 and Loc3/Gacharage/715 as the judgment debtor herein did not authorize and or consent to the sale nor was he personally served with the notification.

(v) That the notification of sale was issued by court on 31st March, 2003 but auctioneers issued their own dated 4th April, 2003 for sale on 11th April, 2003.

5. The application is also supported by an affidavit sworn by the respondent on 27th May, 2004.

6. Mr. Tiego who appeared for the appellants argued that the interests of the respondent on the said properties were deemed to have been extinguished upon the sale of the properties. It was maintained that the auctioneer sold the said properties pursuant to an order of the court and that the interested party purchased the two properties at an auction sale. It was submitted that the respondent's application seeking to impugn the sale by public auction was defective as it seeks to set aside the acts of the auctioneer, without the auctioneer being joined as a party. It was contended that the respondent had come to this court with unclean hands as he admits being indebted to the appellants. It was maintained that although the respondent had proposed to liquidate the decretal sum by installments of Kshs.15,000/= to date, no payment had been made.

7. It is further contended that the bail bond that has been exhibited by the respondent to show that he was in jail on the date when the notification of sale was allegedly served, does not show where the respondent was on 3rd April, 2003 when the notification of sale was alleged to have been served. It was maintained that the respondent had exhibited bad faith by failing to deposit the decretal sum in court. With regard to the alleged Charge with the Barclays Bank, it is contended that the monies were fully paid and that the Barclays bank has executed a discharge of Charge.

8. Mrs. Wahome who appeared for the respondent urged the court to have the sale by the auctioneers set aside, as the same was fraudulent because procedures were flouted. It was contended that the mandatory 30 days notification of sale was not met, nor was the respondent served with the

notification of sale. It was further contended that the notification of sale exhibited is misleading as the auctioneer was not selling the said property pursuant to Section 74 of the Registered Land Act. It was maintained that under Section 74 the respondent was entitled to 90 days. It was pointed out that the auctioneers Act provides for an advert of a minimum of 14 days notice and the 2nd advert of a minimum of 7 days. Mrs. Wahome argued that under Order XXI of the Civil Procedure Rules, the court has powers to set aside the sale.

9. I have carefully considered this application. I have also perused the court record. I do find that a decree was issued against the respondent with regard to costs awarded to the appellant. Pursuant to a notice to show cause served on the respondent, warrant of attachment and sale of the suit properties were issued. The court record shows that the terms of sale were settled on 11th February, 2003. The auctioneer swears that he sold the suit property on 11th April, 2003 at 11.00 a.m.

10. The respondent has come to this court under Order XXI Rule 79 of the Civil Procedure Rules, under which the court may set aside a sale on the ground of material irregularity or fraud in publishing or conducting the sale. In this case, the respondent has complained that the sale was riddled with irregularities. Having considered the application, I find that the respondent was served with a notice before the terms of sale was settled, and that he was subsequently served with a notification of sale. The respondent's contention that he was actually serving time in prison at the time when the notification of sale was allegedly served has not been substantiated, as the copy of the bail bond exhibited merely shows that he was released on bail bond on 4th November, 2002. It does not show when he was arrested or whether he was in remand prior to release on bail bond.

11. It is further evident that the sale was advertised. The irregularities complained of by the respondent are minor irregularities which would not justify setting aside the sale and prejudicing the rights of the innocent purchaser at the auction. More so, when to date the respondent has not exhibited any good faith by depositing the required payments in respect of the appellant's costs. I find no merit in respondent's application dated 27th May, 2004. It is accordingly dismissed.

12. I grant the appellant's chamber summons dated 28th April, 2004, set aside the order of stay of execution issued on 10th April, 2003, and declare the sale of the suit property on 11th April, 2003 absolute.

Those shall be the orders of this court.

Dated and delivered this 23rd day of November, 2010

H. M. OKWENGU

JUDGE

In the presence of: -
Ogolla for the appellants
Advocate for the respondents absent
B. Kosgei - Court clerk

