



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 686 OF 2009

DOMINIC GATHECHA

KINYANJUI.....PLAINTIFF/APPLICANT

VERSUS

CITY COUNCIL OF

NAIROBI.....1ST

DEFENDANT/RESPONDENT

DOMICILE SERVICES LIMITED.....

.....2ND **DEFENDANT/RESPONDENT**

RULING

By an Amended Notice of Motion dated 11th August, 2009, said to have been brought under **Order XXX1X Rule 1** of the Civil Procedure Rules the applicant, Dominic Gathecha Kinyanjui seeks orders of this court, *inter alia*, as follows;-

1. **THAT this Honourable Court do issue orders setting aside the sale by auction of L.R. No. 31/3/ Ruaraka carried out by the 2nd Defendant/Respondent, Domicile Services Ltd under the instructions of the 1st Defendant/Respondent, the City Council of Nairobi.**
2. **THAT this Honourable court be pleased to issue a temporary injunction prohibiting the 1st Defendant/Respondent, its agents, and/or nominees from further or more dealings, alterations or any disposal of title to Land Reference No. 31/3/ Ruaraka until the final determination of this suit.**
3. **THAT the costs of the application be in the cause.**

The Plaintiff/Applicant’s claim arises out of orders made in **RMCC No. 16 of 2008** on 20th November, 2008 whereby an ex parte judgment, in default of appearance, was entered against the applicant in a suit where the 1st Defendant/Respondent was claiming arrears of rates from the applicant. Pursuant to the said judgment the suit property was auctioned on 16th July, 2009. The applicant challenges the said auction on the grounds that it was actuated by malice and ill-will in that no notification of sale was served as required by Law. Also that the manner in which the property was advertised and auctioned was tainted by material irregularity and fraud.

A status quo order was recorded when the applicant first attended before this court under certificate of urgency on 17th August, 2009. Thereafter parties entered into negotiations which appear not to have borne any fruit. They later took directions to file written submissions in the application which they did. The same have been carefully considered.

The applicant's main complaint is that his property was sold in breach of the law in that he was never notified of the suit filed against him by the 1st Defendant as regards the rates arrears. Specifically, he complains that he was not served with;

- (i) **The summons to enter appearance in RMCC No. 16 of 2008**
- (ii) **The Hearing Notice**
- (iii) **The Notice to Show Cause**
- (iv) **The Notification of Sale**

He says that it is a result of the above that he filed ***"this suit"*** and the application, having been taken by surprise when his attention was drawn to a Notice appearing at the Milimani Commercial Court Notice Board, to the effect that his property (the suit property) was up for auction. In an affidavit filed on 4th October, 2010, pursuant to leave granted on 10th June, 2010, the applicant has deponed that he requested for the particulars of the rates due and has paid the same in full. Also that to the best of his knowledge the intended auction of the suit property never took place. He has however, not disclosed the source of the information he relies on, leaving the issue hinging between his word and that of the opponent. I find three fundamental procedural defects in the Notice of Motion.

Firstly, it appears to me to be an appeal from **RMCC No. 16 of 2008** couched in the form of a Miscellaneous Application. If indeed the applicant's intention was to set aside the sale, he ought to have specifically pleaded the fraud or material irregularity which he alleges to have tainted the auction as required under **Order V1 Rule 4(1)** of **Civil Procedure Rules**. If the orders were obtained behind his back, why did he, immediately upon becoming aware of the same, not move the trial court for a stay and setting aside of the judgment prior to the auction date?

Secondly, it appears from the record, that the application has been filed on its own without a Plaintiff being filed, contrary to the provisions of **Order 1V Rule 1** of the **Civil Procedure Rules** which stipulates that;

"Every suit shall be instituted by presenting a plaintiff to the court or in such other manner as may be prescribed".

Besides a plaintiff, the other method of filing a suit for the reliefs such as those sought herein would be by way of Originating Summons to have the auction declared illegal.

Thirdly, no orders under **Order XXXIX** can issue in the absence of a suit having been filed in the manner stated above or as otherwise prescribed under statute.

In view of the above, I find no merit in the application which I hereby dismiss with an order that each party bears its own costs.

DATED, SIGNED and DELIVERED at NAIROBI this 18TH day of NOVEMBER, 2010

M. G. MUGO
JUDGE

In the presence of:

Ms. Bubi holding brief for Mr Nabutete For the plaintiff

Ms. Gichuri holding brief for Mr Orina For the defendant