



REPUBLIC OF KENYA
IN THE HIGH COURT OF NAIROBI
ELC NO. 658 OF 1991
NJOYA JACKSON MBICHI

.....**PLAINTIFF**

Alias Njoya Jacton

VERSUS

K S KIMOTHO**1ST**

DEFENDANT

JOSEPH MUGONDO MUGO

Alias Josphat Magondu**2ND DEFENDANT**

JUDGEMENT

The plaintiff claims mainly that he is the proprietor of plot No. 25 situated at Togonye Market, Kirinyaga District (referred to hereinafter as ‘the suit property’) and that as per the decree of the Court, the suit property was to be sold by public auction on 11th February, 1988 to recover the sum of Kshs.24,016/50. That the suit property was not sold on the said date by public auction and even if it was so sold, the sale was fraudulent and particulars of the fraud were enumerated in paragraph 3 of the Plaint. The plaintiff thus seeks the order of nullification of the purported sale and all the consequential orders. In the Statement of Defence of both Defendants dated 22nd January, 1992, the claim of the plaintiff is denied and issue of *res judicata* was raised along with and other legal issues. The Defendants claim that the sale was lawfully effected and matter is concluded by the court and the suit is not competent.

At the trial, the bundle of documents filed by the parties were by consent produced in evidence. The plaintiff in his evidence stated in brief that he was allotted the suit property and after the suit against him was allowed he was required to pay Kshs.24,061/50. (vide RMCC No. 4188 of 1975 and Civil Appeal No. 65/79). He was served with the Notice dated 6th January, 1988 notifying him that the suit property would be sold on 11th February, 1988 for the attached amount of shs.24,061/50 (P exhibit 1). He went to the place of auction i.e. Kutus Market at 10.00 am and stayed there upto 2.00 pm. The suit property was not auctioned or sold. Thereafter he did not receive any further notice of sale. He still occupies the front portion of the suit property and the defendant through his people occupies the rear part thereof. He has produced receipts from Kirinyaga County council for Trading Licence, rent upto the year 1990 and agreed that he had not paid rates after the defendant informed him of the purchase. For whatever reason, he also produced a letter from the said County Council dated 24th May, 1990 stating *inter alia* that the plot no. 25 was allotted to him but later it was registered in the name of the defendant following a court order in Misc. Application No. 142 of 1989 dated 24th October, 1989. That order is the vesting order produced by the defendant (D exhibit4). It declares that the suit property is vested to the defendant under Cap 300 of Laws of Kenya which is the Registered Land Act. A valuation report dated 5th May, 2009 produced by the plaintiff estimated the value of the suit property as kshs.450,000/=. The valuer inspected the suit property in March, 2009. It is thus evident that the said report would not have much bearing to this suit.

The plaintiff also called one Miano Murage who had seen the Notice of Auction for the suit property to be held on 11th February, 1988 at 10.00 am at Kutus Market. He was interested in buying the suit property. He went with two other persons, Nyaga Kabute and Kaguru Ileri. It was stressed by the Defence that this witness had not been named by the plaintiff who only mentioned one Nyaga Kabute who is also referred by this witness. He had carried shs.50,000/-. He reiterated what was stated by the plaintiff that

the auction did not take place. He also stated in cross examination, that he was not with the plaintiff on that day and reiterated that he was with two aforementioned persons whom he saw at the market. The defendant testified that he came to Kutus market from Kirinyaga and saw an auction being held. He placed his bid for shs.20,000/=. He had shs.15,000/- which he carried to buy grocery. After his bid was accepted he paid the said sum and paid the balance after a week.

He was given a Certificate of Sale by the auctioneers and obtained thereafter a vesting order from the High Court. On the basis of the vesting order, the Kirinyaga County accepted the transfer in his name (D exhibit 3, 4 and 5). He started paying thereafter the rates and rents to the council. He also produced authority letter to develop the suit property from D.O. of Gichugu Division (D Exhibit 8). He complained to the Area Chief against occupation by the plaintiff of part of the suit property but was advised to await the outcome of the present suit.

He agreed that his home is at a distance of 30 km from Kutus Market and there are five stages of matatu in that market. According to him, he just happened to be there and decided to place bid on the suit property which he had not seen before. He has been a councilor upto the date of the trial. He gathered some details of the property from the people who had gathered after the bell was rung.

I may note that the above story may sound a bit strange specially in respect of a person carrying shs.15,000/= to buy grocery and travelling 30 km from Kirinyaga to a smaller market at Kutus. Moreover, he just placed his bid on a spur of a moment which was accepted. However, many waters have passed under the bridge since that date in terms of further actions by way of applying for vesting order, and acceptance thereof by the Kirinyaga County Council and acceptance by it of rates etc from the Defendant as well as the letter dated 24th May, 1996 from the County Council to the previous Advocate of the plaintiff stating that the plot was registered (sic) in the defendant's names after the vesting order. The plaintiff came to know of the purchase and vesting order in the year 1990 without any action taken against the said order of the court. He has though filed the present suit.

The above in short is the evidence before the court. However, considering the causal way the plot in question was purportedly sold in an auction led me to raise a very vital issue i.e. ***“What is the effect in law as regards proprietorship on the property allotted to a person by a local authority.”***

Submissions were made and it was contended by the learned counsel for the defendant that the local authority has power to allot land vested in it and that the same allotment suffices to confer proprietary right over the land parcel in question.

I have considered the said submissions along with contentions that the allotment letter confers a registrable interest under Registered Land Act Cap 300. No proof of such registration is before the court. In any event, it is now trite law, that an allotment is just an offer or invitation to treat and unless the title is actually issued and it does not confer any interest before that. Before me, though, there is no proof of any allotment or lease/licence to the plaintiff by the local authority. The receipts produced by the plaintiff showed trading licence fees, application forms, plot rent, poll rates, registration fee for retail trade, service etc. There is one receipt dated 9th August, 1988 for shs.600/= in respect of stand premium. The alleged auction took place on 11th February, 1988 long before the aforesaid payment. In any event, there is no evidence of registration of any interest as owner of the suit plot, either in the names of the plaintiff or the defendant. If there is no such registration, none of the parties can claim any proprietary right over the suit plot.

In the case of ***Wreck Motors Enterprises –vs- The Commissioner of Lands & Others CCA No. 71/97 at Nairobi (UR)***. The Court of Appeal has, in no uncertain terms observed that:-

“Title to landed property normally comes into existence after issuance of letter of allotment, meeting the conditions stated in such letters and actual issuance thereafter of title document pursuant to provisions under which it is held.”

The case of ***Dr. Joseph N. K. ARap Ng’ok vs. Justice Maijo Ole Keiwua & 4 Others*** Civil Application No. Nairobi 60 of 1997 (UR) was also cited in the said judgment.

The Registered Land Act Cap 300, which is highly relied upon by both counsel, defines ‘lease’ and ‘licence’:-

““lease” means the grant, with or without consideration by the proprietor of land of the right to the exclusive possession of his land, and includes the right so granted and the instrument granting it, and also includes a sublease, but does not include an agreement for lease;”

““licence” means a permission given by the proprietor of land or a lease which allows the licensee to do some act in relation to the land or the land comprised in the lease which would otherwise be a trespass, but does not include an easement or a profit.”

It cannot be gainsaid that neither the grant of lease or grant of licence confers on the grantee a proprietary rights. What the grant of these interests gives is the right of exclusive possession if it is a lease or the permission to do some act in relation to the land only in case of licence

The receipts shown by the plaintiff do suggest more likely the grant of lease to carry on trade in the suit premises as per Sec.117 of the erstwhile constitution. The payment of “standing premium” by the Plaintiff is after the date of alleged public auction.

Even the minutes of County Council produced by the defendant only reflects as under:-

“A court order instructing the council to replace the name of Njoya J. Mbuchi with the name of Josphat Magondu Mugo on plot no. 25 Togonye was considered and ACCEPTED”.

The vesting order dated 24th October, 1989 (D exhibit 4) also refers the defendant as “a purchaser of the suit plot in a public auction described at a public auction held on 11th February, 1989” and that the said plot was described as “belonging to the judgment-debtor under Cap 300 of the Laws of Kenya.”

The vesting order thus describes the plaintiff as a title holder of the suit plot which is a part and parcel of Trust Land as per the erstwhile constitution (Sec. 117) and Public Land as per the New Constitution (Article 62). It is thus not correct in law and in fact to describe the Plaintiff as a proprietor of the suit plot. The question thus remains to be determined is whether the plaintiff was a proprietor of the suit plot as at the date of the public auction and if not, whether the suit plot could be sold by public auction to liquidate the personal debt of the plaintiff.

In the Court of Appeal Case between *M'Rinkanya and Another vs. Kabeere* (CA No. 13/80 (1980) LLR 4523 (CAK). The court has succinctly stated the scope of the right of a lessee which is an immediate and exclusive possession of a piece of land which right is different that of an from ownership.

Part VI of the Trust Land Act deals with lease and licence. Looking to the circumstances of this case, the suit plot was a part of land set apart by the County Council for **use and occupation** as per Sec. 117 of the previous Constitution and part IV, Sec. 3 of Trust Land Act (Cap 288). The Trust Land Act also provides forfeiture of leases and licences under Sec. 39 of the Act. I shall cite Sec. 39 (1) herein;-

“39. (1) **If, in respect of land which is held under a lease granted under this Act –**

(a) Any rent is at any time in arrear for a period of twenty-one days after it first became due; or

(b) There has been any breach of any of the lessee’s covenants; or

(c) The lessee or a person deriving title under him remains in possession of the land after the expiration or other lawful determination of the lease,

the council may serve on the lessee a notice specifying the rent in arrear, or the covenant or condition broken, or the unlawful possession, as the case may be, and the council may, at any time after thirty days from the service of the notice, bring proceedings for the recovery of the land in the Resident Magistrate’s Court, if the value of the land falls within the limits of the court’s civil jurisdiction, and to the High Court if it does not.

The words “use and occupation” stated in the Constitution, the exclusive possession under the Registered Land Act and the right of forfeiture of leases and licences by the County Council irresistibly point out the position in law that the suit plot belonged to the County Council and its ownership had not been granted to the plaintiff.

The allotment and/or grant of lease can be assimilated with a tenancy agreement wherein the landlord gives exclusive use and occupation and exclusive possession of the leased property to a tenant/lessee. That agreement does not and cannot confer any proprietary right on the lessee and in turn the leased property cannot be sold to liquidate personal debt of the lessee who is using and occupying the same exclusively.

In the premises, I do find that the plaintiff did not exercise or did not have any proprietary right over the suit plot and did not own the same. The reference contrary to this fact in the vesting order of the court was thus ultra virus, null and void and without any jurisdiction.

The purported sale by public auction of the suit plot in attempt to liquidate the personal debt of the plaintiff in civil proceedings filed by a third party was consequently an absolute nullity and without any support of law and thus null and void without any jurisdiction.

I thus find that the alleged public auction held on 11th February, 1988 and subsequent vesting order dated 24th October, 1989 are null and void. I thus do find and declare as aforesaid because it is a trite law that once an action is a nullity in law any subsequent action taken based on the earlier null and void act is also a nullity. **Nothing can stand on nothing.**

I had given adequate opportunity to both counsel to submit on the issue which was raised and accepted by them to be pertinent and relevant to be heard and determined.

I accordingly make the following order:

(1)The public auction to sell plot No. 25 Togonye and acceptance of the alleged bid of the defendant was ultra vires the Constitution, Trust Land Act and relevant laws and thus null and void.

(2)The vesting order dated 24th October, 1989 issued in Misc. Application No. 142 of 1989 and the minutes No. WTPM & H 115/89 Kirinyaga County Council dated 8th December, 1989 in respect of the suit plot are accordingly declared to be null and void.

(3)The plaintiff and defendant being in part possession of the suit land be permitted to apply for grant of lease/licence in respect of the suit plot to KirinyagaCounty Council as per relevant law and the said County Council to make its decision accordingly on those applications.

(4)Each party to bear his own costs.

Orders accordingly.

Dated, signed and delivered at Nairobi this 9th day of November, 2010

**K. H. RAWAL
JUDGE
9.11.2010**