



Dipa Pulling v Suchan Investments Limited & 3 others (Environment and Land Case Civil Suit 200 of 2008) [2022] KEELC 13332 (KLR) (27 September 2022) (Ruling)

Neutral citation: [2022] KEELC 13332 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 200 OF 2008
SO OKONG'O, J
SEPTEMBER 27, 2022**

BETWEEN

DIPA PULLING PLAINTIFF

AND

SUCHAN INVESTMENTS LIMITED 1ST DEFENDANT

SANDEEP RAJNI DESAI 2ND DEFENDANT

KEVIT SUBASH DESAI 3RD DEFENDANT

NIRANJAN JASHBHAI DESAI 4TH DEFENDANT

RULING

Background:

1. The full facts of this case are set out in the judgment of this court that was delivered on November 21, 2019. In the said judgment, this court stated as follows in part:

“I am of the view that, in a tenancy in common relationship, where co-owners cannot agree on how to occupy and use the property held in common and cannot also agree to partition the property, the only option left to them to resolve the stalemate is to sell the property and share the proceeds in which case priority can be given to co-owners who may wish to buy out the others to do so before the sale.

None of the parties sought an order for the sale of the suit property. I am of the view however that this is an order that the court can make in exercise of its inherent power to bring this long standing dispute to a close. I have noted that the sale of the suit property would also be subject to the consent of the commissioner of lands and may fall into the same headwinds that would befall a partition in the event that consent is refused. The commissioner of lands



is expected however not to withhold consent unreasonably and can be compelled to grant a consent if the same is unreasonably withheld.”

2. The court made the following final orders in the said judgment:

“In the final analysis and for the foregoing reasons, I hereby make the following orders with respect of the parties’ claims and counter-claims:

1. I declare that Land Reference No 209/1916/6 (“the suit property”) is owned by the plaintiff, the 1st defendant and the 2nd defendant as tenants in common in undivided shares of ½ for the 1st defendant and ¼ each for the plaintiff and the 2nd defendant.
2. The plaintiff and the 1st and 2nd defendants shall discuss and agree on how to partition and allocate the suit property amongst themselves in accordance with their respective shares in the property within 90 days from the date hereof.
3. In the event that the plaintiff and the 1st and 2nd defendants fail to agree on the partitioning of the suit property within 90 days given in the preceding order, a registered valuer agreed upon by the plaintiff and the 1st and 2nd defendants and failing agreement, a registered valuer appointed by the chairman of the institution of surveyors of Kenya at the instance of any of the parties with notice to the other parties shall carry out a valuation of the suit property for the purposes of ascertaining its current market value and a reserve price in the event of a forced sale.
4. The valuation costs shall in any event be shared between the plaintiff and the 1st and 2nd defendants in the ratio of the shares held by each in the suit property.
5. Following such valuation, the suit property shall be sold by public auction or, by private treaty if agreed upon by the parties, subject to a reserve price fixed by the valuer as aforesaid and the proceeds thereof shall be shared between the plaintiff and the 1st and 2nd defendants in accordance with their shares in the property less auction or sale expenses if any.
6. In case of an auction sale, the deputy registrar shall on application by either party with notice to the other parties appoint a licensed auctioneer to conduct the auction and the proceeds of sale shall be deposited in court for distribution to the parties in accordance with their shares in the property less auction expenses as aforesaid.
7. The parties shall co-operate fully with each other in the sale of the suit property should it become necessary and shall make available, all documents in their possession which may be necessary to complete the sale.
8. In the event that any of the parties fail to co-operate in the sale of the suit property should such sale become necessary, the deputy registrar of this court shall be at liberty to execute any document or instrument that may be necessary to facilitate the sale of the suit property and the distribution of the proceeds thereof in accordance with the orders made herein.



9. The plaintiff, the 1st defendant and the 2nd defendant or any of them shall be at liberty to purchase the suit property by private treaty if they all agree to such sale, and to bid at the auction sale.
 10. Pending the partitioning or sale of the suit property as aforesaid, an injunction is issued restraining the 1st defendant subject to order number 11 below from destroying and/or demolishing the structures or buildings on the suit property without the consent of the plaintiff and the 2nd defendant.
 11. In the event that the parties are unable to either partition or sell the suit property for whatever reason not attributable to any of the parties, the plaintiff and the 1st and 2nd defendants shall continue to hold the suit property as tenants in common in undivided shares and shall continue to occupy the property jointly in the same manner in which the property is occupied as of the date hereof and each party shall be at liberty to use and develop the portion in his possession until such a time that such partitioning or sale becomes possible.
 12. The 1st defendant shall pay to the 2nd defendant a sum of Kenya shillings five hundred thousand (Kshs 500,000/=) as general damages for trespass.
 13. Either party shall be at liberty to apply to court but limited only to procedural issues or matters arising from the foregoing orders.
 14. Due to the nature of the dispute before the court, each party shall bear its own costs of the suit and the counter-claims.”
3. Following the said judgment, the 1st and 2nd defendants filed separate applications seeking execution of the judgment. The applications were heard by the senior deputy registrar, IN Barasa (deputy registrar). In a ruling delivered on April 11, 2022, the deputy registrar stated as follows in part:

“...All prospective purchasers of the property at the public auction will undertake their due diligence on the property as the public auction will be carried out in strict compliance with the law and laid down procedures. The Auctioneers Licensing Board availed a list of 244 Class “A” Licensed Auctioneers and 324 Class “B” Licensed Auctioneers as at 18th March 2022. I will appoint an auctioneer to undertake the public auction from the lists provided. Having said all these, I make the following directions in relation to the sale of LR 209/1916/6 (IR 99139) by public auction;

1. The public auction of LR 209/1916/6 (IR 99139) shall be conducted by Messrs Keysian Auctioneers of PO Box 2788 – 00200, Nairobi, CPF House, Haile Selassie Avenue. The deputy registrar shall notify Messrs. Keysian Auctioneers of this appointment.
2. The auctioneers shall advertise the property for sale by public auction and give prospective purchasers not less than 45 days’ notice of the said sale.
3. The property shall be sold on the open market, subject to the reserve value of KShs. 412,500,000/- provided by Messrs Lekker Consult Limited in the valuation report dated January 24, 2022.
4. The auction expenses shall be recovered from the proceeds of the sale of the property and to this extent, the said expenses shall be as provided in the



auctioneers rules. Messrs Keysian Auctioneers shall file in court a schedule of the expenses incurred in conducting the sale of the property by public auction.

5. The proceeds of the sale of the property by public auction shall be deposited in the Milimani law courts bank account for distribution to the parties in compliance with the decree of the court issued on the November 21, 2019.
 6. The 2nd defendant's decretal amount shall be paid out of the 1st defendant's share of proceeds of the sale of the property by public auction. The amount due to the 2nd defendant shall be calculated by the court."
4. Following that ruling, the deputy registrar wrote to Muganda Wasulwa t/a Keysian Auctioneers (the auctioneer) on April 21, 2022 informing him of his appointment to carry out the sale of the suit property. In the letter, the deputy registrar asked the auctioneer to take note of the following:
1. "The property to be sold by public auction is LR 209/1916/6 (IR 99139);
 2. The auction expenses shall be recovered from the proceeds of the sale of the property and to this extent, the said expenses shall be as provided in the Auctioneers Rules.
 3. The auctioneers shall advertise the property for sale by public auction and give prospective purchasers not less than 45 days' notice of the said sale.
 4. The property shall be sold on the open market, subject to the reserve value of KShs 412,500,000/- provided by Messrs Lekker Consult Limited in the valuation report dated January 24, 2022.
 5. The proceeds of the sale of the property by public auction shall be deposited in the Milimani law courts bank account for distribution to the parties in compliance with the decree of the court issued on the November 21, 2019. The specific bank details shall be provided in due course.
 6. The deputy registrar shall execute any document or instrument necessary to facilitate the sale of the suit property by public auction; and
 7. Dipa Pulling, Suchan Investments Limited and Sandeep Rajni Desai, the plaintiff, the 1st defendant and the 2nd defendant are at liberty to bid at the auction."
5. In a letter dated May 5, 2022, the auctioneer acknowledged receipt of the deputy registrar's letter and undertook to comply with the directions contained therein. The auctioneer requested the deputy registrar for notification and conditions of sale that were issued to him on May 6, 2022. According to the said notification of sale, the sale of the suit property was to be held on July 12, 2022. The said notification of sale was served by the auctioneer upon the advocates for the parties herein on May 8, 2022 and an affidavit of service filed in court.
6. The auctioneer advertised the sale of the suit property in the Daily Nation Newspaper of June 27, 2022. On July 8, 2022 before the date of the sale that was scheduled to take place on July 12, 2022 at 11.00am, the 2nd defendant filed an application by way of notice of motion dated July 7, 2022 seeking an order to stop the sale. The 2nd defendant contended that the auctioneer failed to give prospective purchasers 45 days notice of the intended sale as was directed by the deputy registrar on April 11, 2022. The 2nd Defendant's application came up on July 8, 2022 for directions ex parte when the court ordered that the same be served for hearing inter-partes on July 12, 2022 at 8.30am.



7. In the meantime, the Attorney General (the AG) had also filed an application dated June 7, 2022 on June 8, 2022 seeking an order to stop the sale of the suit property on the ground that the same is a National Monument. The AG's application came up for direction on June 10, 2022 when the court directed that the same be served for hearing on July 11, 2022 which was declared a public holiday. The application was therefore mentioned together with the 2nd defendant's application on July 12, 2022. When the two applications came up for hearing on July 12, 2022, the court gave directions on the hearing thereof and ordered that pending the determination of the same, the public auction of the suit property that was scheduled to take place on the same date namely, July 12, 2022 was stopped. The said orders of July 12, 2022 were made in the presence of the advocates for the plaintiff, the 1st defendant, the 2nd defendant and the AG.
8. Despite the issuance of the said order stopping the sale of the suit property, the auctioneer proceeded with the sale on July 12, 2022. The suit property was sold to Turbisalam Company Limited (the auction purchaser) which was the highest bidder at Kshs 413,000,000/-. The 2nd defendant has contended that the auctioneer was notified of the said court order stopping the sale and that he proceeded with the sale in defiance of the order. The auctioneer has on the other hand contended that as at the time he conducted the sale of the suit property, he was not aware of the court order stopping the sale.

The current applications before the court:

9. What is now before the court are three applications. I have the AG's notice of motion application dated June 7, 2022, the 2nd defendant's amended notice of motion application dated July 26, 2022 and the plaintiff's notice of motion application dated July 25, 2022.

The AG's application dated June 7, 2022:

10. In his application, the AG sought the following orders;
 1. That the cabinet secretary sports, culture and arts (the applicant) be joined in the suit as a defendant or interested party for the purpose of prosecuting the application.
 2. That a permanent injunction do issue restraining the Respondents by themselves or through their agents, servants, employees, representatives or any person acting on their authority from advertising for sale, auctioning or otherwise disposing of all that property known as LR No 209/1916/6(IR 99139) (the suit property).
 3. That the honourable court be pleased to set aside, vary and vacate the judgment delivered on April 11, 2022.
 4. That the suit be heard de novo to enable the applicant to tender its evidence for a fair and just determination of the matter.
 5. That in the alternative, the court be pleased to grant a stay of execution of the said judgment or any further proceedings in this suit pending the hearing and determination of Milimani ELC Case No 108 of 2017, *Suchan Investments Limited v Attorney General and 3 others*.
 6. That the costs of the application be in the cause.
11. The application is brought on the grounds set out on the face thereof and on the affidavit and further affidavit of Dennis Milewa. The applicant has contended that there is a house on the suit property known as Desai House (Desai House). The applicant has contended that Desai House was declared a National Monument by the National Museums of Kenya under section 25(1) (b) and (e) of the



National Museum and Heritage Act, No 6 of 2006 through gazette notice No 4113 published on October 14, 2016. The applicant has contended that it is in the process of having its interest in the suit property registered as an encumbrance against the title of the suit property. The applicant has averred that a similar suit involving the suit property was pending before the High Court at Milimani namely; HCCC No 108 of 2017 (the High Court Case). The applicant has averred that if the judgment entered herein is not set aside, it is likely to lose its interest in the suit property which is of a public nature through the sale of the suit property. The applicant has averred that the purchaser of the suit property is likely to destroy Desai House which a National Monument. The applicant has averred that the government is still desirous of exercising its right to protect the said monument. In the supporting affidavit, the applicant has stated that it is yet to confirm or withdraw the notice declaring Desai House a national monument following the objection that was raised by the 1st respondent herein. The applicant has averred that since it has not withdrawn the gazette notice declaring Desai House a National Monument, it remains a monument.

12. The AG's application is opposed by the plaintiff and the 1st defendant. The 1st defendant opposed the application through notice of preliminary objection dated July 1, 2022. In its notice of preliminary objection, the 1st defendant has contended that the office of the cabinet secretary sports, culture and arts (the applicant) is not a body corporate capable of suing and being sued in its own name. The 1st defendant has contended further that applicant being a ministry within the national government has no locus standi, capacity and/ or competence to initiate the said application and prosecute it. The 1st defendant has contended that under section 12 of the Government Proceedings Act, such proceedings can only be instituted by the attorney general. The 1st defendant has contended further that since the applicant is not a party to this suit, the applicant can only seek to join this suit either as a plaintiff or a defendant.
13. The 1st defendant has contended further that the applicant cannot be joined as a party to a suit that has already been determined. The 1st defendant has contended that the applicant is guilty of laches. The 1st defendant has contended further that the applicant's application seeks a review of a judgment allegedly delivered on the April 11, 2022 when in fact no such judgment exists on record as the judgment in these proceedings was delivered on the November 21, 2019. The 1st defendant has contended that the applicant's substantive prayer in the application is incompetent, bad in law and cannot be sustained as the issue sought to be ventilated is *res judicata* having been conclusively decided by the Court of Appeal at Nairobi in Civil Appeal Number 46 of 2012 on March 4, 2016 which decision was fully adopted in the present suit.
14. The 1st defendant has contended that since the applicant did not challenge the finding of the Court of Appeal that the suit property was not a national monument in a higher court, its re-gazettement of the same property as a national monument through gazette notice number 4113 published on October 14, 2016 demonstrates its arrogance, capriciousness, oppressiveness and lack of accountability in public office for the said re-gazettement was being effected in open defiance and contempt of the said decision of the Court of Appeal.
15. The 1st defendant has contended that the application is incompetent, mischievous and an abuse of the process of the court as the applicant has blatantly refused to comply with the mandatory provisions of section 25 (3) of the National Museums and Heritage Act which requires it within two (2) months of the said re-gazettement to confirm or withdraw the said re-gazettement which it has not done almost 6 years later.
16. The 1st defendant has contended that the applicant's failure to either withdraw the said re-gazettement or confirm it raised the 1st defendant's legitimate expectation that the suit property would not be



- declared a national monument as this issue had been settled finally and conclusively by the Court of Appeal.
17. The 1st defendant has urged the court to strike out the AG's application or dismiss it for being baseless, misconceived and an abuse of the process of the court.
 18. The plaintiff has opposed the application through a replying affidavit sworn on July 6, 2022. The plaintiff has contended that the AG's application is stale and constitutes a grave abuse of the court process and the plaintiff's proprietary rights over the suit property as enshrined under article 40 of the [*Constitution of Kenya 2010*](#). The plaintiff has contended that the timing of the application is dubious in that the plaintiff has at all material times opposed any attempt by the applicant to enforce the gazette notice No 4113 on several grounds. The plaintiff has contended that the applicant's failure to confirm the impugned gazette notice No 4113 within two (2) months from 14 October 2016 as required under Section 25 (3) of the [*National Museums and Heritage Act*](#) No 6 of 2006 renders the applicant's claim herein stale as it has been overtaken by events.
 19. The plaintiff has contended further that applicant's failure to confirm the impugned gazette notice No 4113 within the statutory period of two (2) months constitutes a delay of more than 5 years and eight months which delay is inordinate and breaches the plaintiff's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The plaintiff has contended that the applicant has failed to give any consideration to the plaintiff's objections to any attempt to confirm the impugned gazette notice.
 20. The plaintiff has averred that despite the applicant having been given notice of the intended sale of the suit property by the 2nd defendant through a letter dated May 20, 2021; that is more than twelve (12) months ago, it is now that the applicant is making a belated attempt to disrupt a lawful sale of the suit property in full compliance with the judgment of this court which Judgment has not been appealed against by any of the parties hereto. The plaintiff has contended that in the absence of confirmation of the impugned gazette notice within the stated statutory timeline of two (2) months as provided under law, the applicant has no interest in the suit property that is registrable or which supersedes that of the plaintiff who is one of the duly registered proprietors of the suit property since the suit property cannot be reasonably deemed by any stretch of imagination to be a national monument.
 21. The plaintiff has contended that the status of the suit property as a national monument lapsed on December 13, 2016. The plaintiff has contended that the applicant is unlawfully attempting to rely on an unconfirmed gazette notice to displace a judgment of this court which has taken almost three (3) years to enforce and which constitutes the culmination of eleven (11) painstaking years of court proceedings. The plaintiff has contended further that the applicant is misguidedly and belatedly seeking to be included as a party in these proceedings on the strength of a stale and unconfirmed gazette notice which has no legal effect.
 22. The plaintiff averred that the applicant has ignored all the requests by the plaintiff to hold a meeting to enable the parties attempt to settle the matter amicably. The plaintiff has averred that she is a stranger to the applicant's claim that he met with members of the "Desai" family. The plaintiff has averred that she was neither privy to any such meeting nor did she ever participate in the same. The plaintiff has averred that, it would be extremely prejudicial to the plaintiff's interest in the suit property if the court were to allow the applicant's application.
 23. The plaintiff has averred that the prayers being sought by the applicant are discretionary in nature and that in this case the applicant is undeserving of the exercise of the court's discretion in its favour considering that the applicant is guilty of laches and has failed to comply with the applicable statutory



timeline of two (2) months to confirm the impugned gazette notice which gazette notice has remained unconfirmed for almost six (6) years.

24. The 2nd defendant swore an affidavit on July 10, 2022 in which he to a large extent supported the AG's application. The 2nd defendant contended that the national museums of Kenya has a charge over the suit property and as such its consent should have been sought before the property was put up for sale. The 2nd defendant has contended that the sale of the suit property should be stayed pending the registration of the national museums of Kenya's charge against the title of the property and potential purchasers notified of the charge.

The 2nd defendant's amended notice of motion application dated July 26, 2022:

25. The 2nd defendant has sought the following prayers in his application;
1. Spent.
 2. The change of advocates representing the 2nd defendant/applicant as set out in the notice of change of advocates filed herewith be approved by this honourable court.
 3. There be a stoppage of the sale by public auction of that property known as Land Reference No 209/1916/6 (IR 99139) Parklands, Second Avenue, Nairobi ("the Suit Property") slated for July 12, 2022, pending the hearing and determination of this application.
 - a. The cabinet secretary, ministry of sports, culture and arts and turbisalam company limited be enjoined into this application as interested parties.
 - b. The sale of the suit property to turbisalam company limited by public auction conducted on July 12, 2022 be set aside.
 - c. The amounts paid by Turbisalam Company Limited in respect of the sale of the suit property be paid back to Turbisalam Company Limited.
 4. The order for sale by public auction of that property known as Land Reference No 209/1916/6 (IR 99139) Parklands, Second Avenue, Nairobi ("the Suit Property") issued on April 11, 2022 be set aside stayed, pending appointment by this court of another auctioneer to conduct the auction and the issuance of a fresh and complete public notice of the auction.
 5. Costs of this application be provided for.
26. The application which is supported by the affidavit of the 2nd defendant sworn on July 26, 2022 is brought on the following grounds;
1. This court on 11 April 2022 gave directions on the sale of the suit property by public auction.
 2. The court's directions have been materially flouted by the auctioneer who was meant to execute them.
 3. The manner in which the auctioneer has flouted the court's directions exposes the applicant to a significant and imminent impairment of his legal and financial interest in the suit property.
 4. The integrity of this application and the applicant's legal and financial interests in the suit property would be subverted should the court decline to grant prayer 3 of this application pending its substantive hearing and determination.
 5. In contrast, no prejudice will be suffered by the respondents should the orders sought in the application be granted as their financial interest in the property remains intact.



6. This application has been filed timeously.
27. In his affidavit in support of the application, the 2nd defendant averred that although the court had directed the auctioneer to advertise the suit property for sale and give prospective buyers not less than 45 days notice of the sale, the auctioneer in breach of the said direction did not issue a public notice of the auction sale until June 27, 2022 which was barely 14 days notice of the sale that was to be conducted on July 12, 2022. The 2nd defendant has averred further that the public notice that was issued by the auctioneer did not indicate the reserve price for the suit property. The 2nd defendant has averred that failure to comply with the directions of the court by the auctioneer was prejudicial to him in that it restricted or limited notice of the auction to only a few prospective purchasers. The 2nd defendant has averred that the 14 days notice given by the auctioneer was not sufficient for prospective purchasers to raise the purchase price. With regard to the reserve price, the 2nd defendant contended that it denied prospective purchasers of material information regarding the sale. The 2nd defendant has also taken issue with the auctioneer's statement in the notice that the sale was being conducted on behalf of a chargee which was misleading. The 2nd defendant averred that his application dated July 7, 2022 seeking to stop the sale of the suit property which was to come up for hearing on July 12, 2022 was served upon the auctioneer and as such the auctioneer was aware that the application was coming up on that day and that there was a possibility of the sale being stopped.
28. The 2nd defendant averred that on July 12, 2022 at about 9.45am, the court issued an order stopping the auction that was scheduled to take place on that day at 11.00am. The 2nd defendant has stated that it was not possible to extract a court order and serve the same upon the auctioneer by 11.00am. since the court file was in chambers. The 2nd defendant has averred that his advocates sent an e-mail to the auctioneer at 10.32a.m informing him of the order stopping the sale. The 2nd defendant has averred that he learnt on July 18, 2022 that despite notice that was given to the auctioneer of the order stopping the sale, the auctioneer had proceeded with the auction and the suit property sold to Turbisalam Company Limited (the auction purchaser). The 2nd defendant has averred that the sale of the suit property by the auctioneer despite the existence of an order stopping the sale was irregular. The 2nd defendant has averred that the sale should be set aside, the purchase price refunded to the auction purchaser and a fresh auction conducted by another auctioneer other than Keysian Auctioneers who appears to have an in interest in the matter.
29. The 2nd defendant's application was opposed by the plaintiff, the 1st defendant and the auctioneer. In an affidavit sworn by her advocate, Pearlyne Omamo on July 12, 2022, the plaintiff averred that in her directions given on April 11, 2022, the deputy registrar gave an ultravires order by directing the auctioneer to give prospective purchasers of the suit property not less than 45 days notice of the intended sale of the suit property. The plaintiff has contended that the said condition had no basis in the court's judgment or the [Auctioneers Act](#) 1996. The plaintiff averred that in view of the foregoing, the 2nd defendant's application seeking to stop the sale has no basis. The plaintiff has averred that the auctioneer had complied fully with the [Auctioneers Rules](#) and the terms and conditions of sale. The plaintiff has averred that there is no legal requirement that a reserve price be expressly stated in the advertisement. The plaintiff has averred that there is no encumbrance on the suit property and as such the auctioneer could not have mentioned any. The plaintiff has stated that all the parties to the suit were aware of the date of the auction and that the 2nd defendant stands to suffer no prejudice if the sale of the suit property proceeds.
30. In a further affidavit also sworn by Pearlyne Omamo on August 2, 2022 in opposition to the AG's and the 2nd defendant's applications, the plaintiff averred that the cabinet secretary for sports, culture and arts (the cs/applicant) had never made any proposal pursuant to section 35 of the [National Museums](#)



and Heritage Act, 2006(the Act) to purchase the plaintiff's share in the suit property. The plaintiff has contended further that the CS had through the back door taken steps to undermine the court's judgment and the plaintiff's interest in the suit property by maliciously publishing several "Buyer Beware" notices in the newspapers prior to the filing of his application. The plaintiff has averred that the low turnout at the auction can only be attributed to the said conduct of the CS.

31. The 1st defendant opposed the 2nd defendant's application through a replying affidavit sworn on August 4, 2022. The 1st defendant has averred that the auctioneer conducted the auction in accordance with the orders of the court. The 1st defendant has averred that the auctioneer served all the parties to the suit with a notification of sale 66 days before the date of the auction. The 1st defendant has denied that the 2nd defendant only came to know of the date of the auction on June 29, 2022. The 1st defendant has averred that the 2nd defendant was all along aware of the date for the auction sale together with the venue and that the application was filed late in the day to frustrate the sale of the suit property. The 1st defendant has averred that the sale of the suit property was properly carried out and that an attempt to stop the sale would be an academic exercise. The 1st defendant has averred that the 2nd defendant has not advanced any valid reason such as fraud, irregularity or substantial loss that would warrant the setting aside of the sale of the suit property.
32. The 2nd defendant's application was also opposed by the auctioneer through an affidavit sworn by Muganda Wasulwa on September 1, 2022. In the affidavit, the auctioneer has stated that he conducted the auction sale of the suit property in an open and transparent manner in accordance with the relevant law, rules and regulations. The auctioneer has averred that the 2nd defendant was aware of the date, time and place of the auction sale his advocates having been served with the Notification of Sale as soon as it was issued on May 6, 2022. The auctioneer has denied that he was served with the 2nd defendant's application dated July 7, 2022 seeking to stop the sale of the suit property. The auctioneer has denied further that he was aware or was notified of the order that was made by the court on July 12, 2022 stopping the sale of the suit property. The auctioneer has stated that as at 11.00am when the auction sale took place he had not been served with a court order stopping the sale of the suit property. The auctioneer has averred that there are no sufficient reasons put forward by the 2nd defendant to warrant setting aside of the sale that took place on July 12, 2022.

The plaintiff's notice of motion application dated July 25, 2022:

33. The plaintiff has sought the following orders;
 1. Spent.
 2. Order 2 of hon deputy registrar's ruling dated and delivered on 11 April 2022 be hereby reviewed and set aside.
 3. Order 7 of the orders issued by this honourable court on 12th July 2022 be hereby reviewed and set aside.
 4. Pursuant to granting prayers 1, 2 and 3 hereinabove, the remainder of the proceeds of the auction sale of the property known as LR No 209/1916/6 (Original No209/1916/1/1), 2nd Parklands Avenue, Nairobi, totaling Kshs 309,750,000/= be hereby deposited by Keysian Auctioneers into the joint interest earning account pending further Orders of this Honourable Court.
 5. Costs be in the cause.



34. The application which is supported by the affidavit of Pearlyne Omamo sworn on July 25, 2022 is brought on the following grounds;
1. This court in its judgment delivered on November 21, 2019 ordered among others that:

“In case of an auction sale, the deputy registrar shall on application by either party with notice to the other parties appoint a licensed auctioneer to conduct the auction and the proceeds of sale shall be deposited in court for distribution to the parties in accordance with their shares in the property less auction expenses aforesaid.”
 2. The deputy registrar erred and acted ultra vires by including a general condition that all prospective buyers must be given not less than forty-five (45) days notice of the intended sale of the suit property by public auction.
 3. The impugned condition is neither founded in this court’s judgment nor the *Auctioneers Act* No 5 of 1996 which renders the same erroneous.
 4. In breach of section 1A of the *Civil Procedure Act* cap 21, the 2nd defendant and the cs induced this honourable court to issue orders on 12 July 2022 restraining the auction of the suit property pending the determination of their respective applications in vain as they neglected to serve the said orders upon the auctioneers as required under law.
 5. Consequently, the suit property was sold by public auction on July 12, 2022 for Kshs 413 million in full compliance with both the judgment of this court and *Auctioneers Act*.
 6. The plaintiff has a reasonable apprehension that the longer the delay in concluding the enforcement of the judgment in this matter the more convoluted this matter becomes with no end in sight.
 7. In the absence of any appeal seeking to set aside the judgment of this court, it shall serve the interest of justice and the principles enshrined under article 159 2(b) and (d) of the *Constitution of Kenya 2010* to allow the application so that litigation can come to an end and the successful parties in this matter allowed to enjoy the fruits of the judgment in their favour.
35. The application is opposed by the 2nd defendant through a replying affidavit sworn on July 26, 2022. The 2nd defendant has averred that the application is incompetent in that under order 49 rule 7(3) of the *Civil Procedure Rules*, any appeal against the decision of the deputy registrar must be filed within 7 days of the decision. The 2nd defendant has averred that the plaintiff’s application was filed 105 days from the date of the deputy registrar’s order. The 2nd defendant has contended further that any challenge to the deputy registrar’s order should be brought to court through a memorandum of appeal and not through a notice of motion application.
36. The 2nd defendant has contended further that the application has no merit as the deputy registrar was not bound by the provisions of the *Auctioneers Act* 1996. The 2nd defendant has averred that the deputy registrar acted within the law and particularly order 22 rule 57 in giving directions that were to ensure that adequate notice of the auction was given. The 2nd defendant has averred that there is no basis for the plaintiff’s prayer for lifting of the orders granted on July 12, 2022 since the auctioneer was aware of the 2nd defendant’s application seeking to stop the auction and conducted the auction after the court had issued an order stopping the sale which order he was aware of. The 2nd defendant has urged the court to strike out and/or dismiss the application with costs.



The submissions:

37. The three applications were heard together by way of written submissions. The AG filed his submissions dated July 27, 2022. In his submissions, the AG has reiterated the grounds set out on the face of the CS's application and the affidavit filed in support thereof. The AG has submitted that Desai House on the suit property is still a National Monument. The AG has submitted that the CS has made out a case for his joinder in the suit and for stay of the judgment of this court.
38. The 2nd defendant filed submissions dated July 28, 2022. The 2nd defendant has similarly reiterated the grounds in support of his application set out on the face of the application and his various affidavits in support of his application and the application by the CS, and in opposition of the applications by the plaintiff and the 1st defendant. The 2nd defendant has submitted that the CS's application is well founded and the same should be allowed. The 2nd defendant has submitted further that the 1st defendant's notice of preliminary objection has no basis since the CS has a right to file civil proceedings to protect public interest in the suit property. With regard to his application, the 2nd defendant has submitted that he has established material breaches of the court order made on April 11, 2022

Determination:

39. I have considered the three applications before me together with the affidavits filed in support of and in opposition thereto. I have also considered the submissions by the advocates for the parties and the authorities cited in support thereof. I will determine the applications one after the other starting with the AG's application. I will thereafter consider the 2nd defendant's application and finally, the plaintiff's application.
40. With regard to the AG's application dated June 7, 2022, I am of the view that the application is an abuse of the process of the court for several reasons. First, the CS was aware of the existence of this suit as early as 2017 when the 1st defendant herein filed another suit namely Milimani Commercial Court HCCC No 108 of 2017 complaining about the second declaration of Desai House as a National Monument. In that suit the 1st defendant disclosed that the plaintiff herein had filed this suit. I am of the view that if the CS felt that it was important that it be heard in this matter, he should have seized the earliest opportunity to seek to be joined as a party to this suit. It was not necessary to wait until the suit was heard and determined to seek joinder. Secondly, it is not disputed that the National Museums of Kenya on whose behalf the application has been brought by the CS was notified by the 2nd defendant through a letter dated May 20, 2021 that judgment had been entered in this matter on November 21, 2019 and that the court had directed among others that the property be sold. It was until a year later on June 8, 2022 that the CS came to court seeking to join the suit and to have the judgment set aside. I am in agreement with the 1st defendant and the plaintiff that the CS is guilty of laches and is not deserving the exercise of this court's discretion.
41. I am also not satisfied that the CS's interest in the suit property has crystalized. It is not disputed that after the 2016 gazette notice declaring Desai House as a national monument, the 1st defendant objected to the declaration. The CS was supposed to consider the objection after which he was to confirm the declaration or withdraw it. It is common ground that the CS 6 years down the line has neither confirmed nor withdrawn the said declaration. In the circumstances, I am in agreement with the 1st defendant and the plaintiff that they have had a legitimate expectation that the CS did not wish to pursue the declaration of Desai house as a national monument.
42. Since the CS has not confirmed the declaration, he has not imposed any control over access, use or development of Desai House and the adjoining land that was declared a monument. Contrary to the



belief by the CS and the 2nd defendant, the suit property was not declared as a national monument. It was Desai House and the adjoining land measuring 34m by 40m (approximately 0.35acres) that was declared a national monument. The whole of the suit property measures 1.7 acres. Under section 34 of the Act, the CS has power through a notice in the gazette to control access to, use and development in a protected area. There is no evidence that the CS who has not even confirmed his declaration of Desai House as a national monument has issued any notice controlling access, use or development in or around Desai House. I am of the view that even if the CS was to issue such a notice, it would only be with regard to the portion of the suit property measuring 0.35acres and not in respect of the entire 1.7 acres comprised in the suit property. I therefore find no basis for the CS's attempt to stop the sale of the suit property. Section 42 of the Act allows the CS to acquire a National Monument compulsorily if he considers like in this case that the monument is in danger of being destroyed, injured or allowed to decay. The CS who was aware that the suit property was on sale was at liberty to attend the auction and bid for the suit property.

- 43.. Due to the foregoing, I find no merit in the CS's application brought by the AG. The application is for dismissal.
44. With regard to the 2nd Defendant's amended notice of motion dated July 26, 2022, I am satisfied that the same is merited only on one ground. I am in agreement with the 2nd defendant that the notice of the auction sale that was given by the auctioneer was contrary to the order that was given by the deputy registrar on April 11, 2022 and which was communicated to the auctioneer in writing. Instead of giving 45 days notice, the auctioneer gave about 17 days notice. I am not in agreement with the plaintiff that the deputy registrar had no power to direct that prospective purchasers be given 45 days notice of the auction sale. The court had given the deputy registrar power to appoint an auctioneer to sell the suit property. The deputy registrar while appointing the auctioneer had power to settle terms of sale and give directions necessary for the conduct of the sale. The direction by the deputy registrar that the prospective purchasers be given 45 days notice was therefore not contrary to the judgment of the court. Save as aforesaid, I find no merit in the other issues raised by the 2nd defendant. The auctioneer clearly stated in the advertisement that the sale was subject to a reserve price. It was not necessary for the auctioneer to indicate the reserve price in the advertisement. I also find the 2nd defendant's contention that the auctioneer had personal interest in the sale unproved. There is no evidence before the court that the auctioneer had a particular purchaser in mind while putting up the suit property for sale. The contention that the auctioneer failed to indicate that the suit property had an encumbrance equally has no basis. The property has no encumbrance and as such none could have been indicated in the notice by the auctioneer. I agree that the auctioneer made an error in indicating that he was selling the suit property on behalf of a chargee. The error was however inconsequential and did not affect the sale. I am also not satisfied that the sale was conducted in breach of the order that was issued herein on July 12, 2022. There is no evidence that the auctioneer had notice of the order when he conducted the auction.
45. Due to the foregoing, the 2nd defendant's application would be allowed in part.
46. In view of what I have stated above in respect of the 2nd defendant's application, the plaintiff's notice of motion application dated July 25, 2022 is not for granting. The application fails on merit but also for being incompetent the same having been filed contrary to order 49 rule 7(3) of the Civil Procedure Rules.

Conclusion:

47. In conclusion, I hereby make the following orders in respect of the three applications;
 1. The attorney general's application dated June 7, 2022 is dismissed.



2. The plaintiff's application dated July 25, 2022 is dismissed.
3. The 2nd defendant's amended application dated July 26, 2022 is allowed on the following terms;
 - a. The 2nd defendant is granted leave to change advocates from Daly & Inamdar Advocates to Adra Advocates LLP.
 - b. The sale of L.R No 209/1916/6(I.R 99139) (the suit property) that was conducted through public auction by Keysian Auctioneers on July 12, 2022 is set aside.
 - c. Keysian Auctioneers shall conduct a fresh sale by public auction under the same directions and on the same terms and conditions of sale that were settled by the deputy registrar save for the dates. For the avoidance of doubt, while advertising the suit property for sale, the auctioneer shall give prospective purchasers not less than 45 days' notice of the sale. In other words, the auction sale shall not be undertaken before the expiry of 45 days from the date of the first advertisement.
 - d. Turbisalam Company Limited shall be at liberty to attend the fresh auction and to bid for the suit property.
 - e. In the event that Turbisalam Company Limited once again becomes the highest bidder at the auction, the sum of Kshs 103,250,000/- already paid as a deposit shall constitute part of the deposit to be paid by it under the new sale agreement.
 - f. In the event that Turbisalam Company Limited does not intend to participate in the fresh auction or does not emerge the highest bidder, the sum of Kshs 103,250,000/- that was paid by it as a deposit together with accrued interest if any less any finance charges shall be refunded or paid back to it.
 - g. Subject to orders (d), (e) and (f) above, order No 7 in the orders made by the court on July 25, 2022 shall remain in force.
 - h. Since the sale conducted on July 12, 2022 has been set aside solely on account of the fault on the part of the auctioneer, the auctioneer shall be entitled to its disbursements only in respect of that sale. The disbursements incurred in the sale that has been set aside, shall be recovered by the auctioneer together with the auctioneer's fees and disbursements payable for the fresh auction from the proceeds of the fresh auction unless ordered otherwise by the court.
4. Each party shall bear its own costs of the three applications.

DELIVERED AND DATED AT NAIROBI THIS 27TH DAY OF SEPTEMBER 2022

S. OKONG'O

JUDGE

Ruling delivered in open court in the presence of:

Ms. Omamo for the Plaintiff

Mr. Kamau AG.N for the 1st Defendant

Mr. Leshan for the 2nd Defendant

N/A for the 3rd and 4th Defendants



Mr. Mudanya for the auctioneer

Mr. Muganda for the auction purchaser

Ms. C. Nyokabi - Court Assistant

