



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 66 of 1999

NATIONAL BANK OF KENYA LTD. ....PLAINTIFF

VERSUS

SAMUEL K.TOWETT ..... DEFENDANT

**RULING**

Before me, is a notice of motion by the plaintiff purportedly made under **Order XXI Rule 81 (1) and 83** of the **Civil Procedure Rules** seeking an order of the court to confirm the sale by public auction of LR. No. Nakuru Municipality/Block 29/1104 (*hereinafter referred to as the suit property*) to the purchaser, Symon Kimutai Kiptum as absolute. The plaintiff further prayed for an order of the court granting the certificate of sale of the suit property to the said purchaser. Finally, the plaintiff prayed for an order of this court for the removal of the prohibitory order issued on 13<sup>th</sup> April 2006 which was registered against the title of the suit property. The grounds in support of the motion are on the face of the application. The plaintiff contends that the purchaser bought the suit property after the same had been attached and sold by public auction pursuant to an order of the court. The plaintiff contends that no application had been made to this court by any person or party to set aside the aforementioned sale by public auction. It was the plaintiff's view that it would be in the interest of justice that the ownership of the suit property be transferred and be vested in the name of the purchaser.

The defendant filed a replying affidavit in opposition to the application. In essence, the defendant challenged the said sale on the grounds that on the day that it was alleged that the sale by public auction took place, no such sale actually transpired. He further deponed that the plaintiff had sold the suit property at an under valuation. He was of the view that the alleged sale by public auction was a sinister move by the plaintiff to dispossess him of his property. He deponed that the plaintiff had no legal right to sell the suit property since it had not accounted for the proceeds of sale that it had received from the sale of the defendant's motor vehicle. He urged the court to dismiss the application with costs.

The hearing of the application was fixed for 19<sup>th</sup> May 2009 by consent of the parties who were present in court. On the scheduled date, the defendant did not attend court. This court allowed the plaintiff to proceed with its application, the absence of the defendant notwithstanding. I have carefully considered the oral submission made by Mr. Onyango on behalf of the plaintiff. I have also considered the pleadings filed by the parties in support of their respective opposing positions. The issue for determination by this court is whether the plaintiff made a case for the granting of the orders sought in the application. I perused the proceedings of this court. I noted that the court did grant a prohibitory order against the suit property which was established as the property of the defendant. Since then, the defendant made no attempt to set aside the said prohibitory order or to pay the debt due to the plaintiff to forestall or to prevent the suit property from being sold to satisfy the decree issued in favour of the plaintiff as against the defendant by the court.

The suit property was advertised for sale. The defendant made no effort to save the property from being sold. He did not file an appropriate application in court to stop the sale. The suit property was sold to the purchaser, Symon Kimutai Kiptum in a public auction authorized by the court. Although the defendant alleged in his replying affidavit that no such sale by public auction in actual fact took place, taking into consideration the past conduct of the defendant, this court is unable to put any credit to the said allegation

by the plaintiff. I think the real issue for determination by this court at this stage of the proceedings is whether the plaintiff established that it had sold the suit property in execution of the decree issued in its favour by this court. The issue is not whether the sale should be set aside on the grounds that no sale by public auction in reality took place. If the defendant was sufficiently aggrieved that no such sale had taken place, he should have filed an appropriate application in court to challenge the said sale.

I therefore hold that the plaintiff has established that it is entitled to the orders sought in its application. The objection to the completion of the sale to the said purchaser by the defendant does not have any legal foundation. The sale by public auction of L.R. No. Nakuru Municipality/Block 29/1104 to the purchaser Symon Kimutai Kiptum is hereby confirmed as absolute. This court hereby directs the Deputy Registrar of this court to issue a certificate of sale of the suit property to the purchaser, Symon Kimutai Kiptum. The prohibitory order issued by this court on 13<sup>th</sup> April 2006 and registered against the title of the suit property is hereby lifted and a vesting order is hereby issued declaring the LR. No. Nakuru Municipality/Block 29/1104 to be the property of the purchaser, Symon Kimutai Kiptum. The plaintiff shall have the costs of the application.

DATED at NAIROBI this 19<sup>TH</sup> day of MAY 2009.

**L. KIMARU**

**JUDGE**