



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 197 of 2004

JOHN NZIOKA MATIVO 1ST APPLICANT/PLAINTIFF

DAVID MULI MATIVO

T/A KANDOLO WHOLESALERS..... 2ND APPLICANT/PLAINTIFF

VERSUS

INDUSTRIAL COMMERCIAL

DEVELOPMENT CORPORATION 1ST RESPONDENT/DEFENDANT

REGISTRAR OF LANDS 2ND RESPONDENT/DEFENDANT

RULING

(1) In their Chamber Summons filed on the 25th July 2007, the Plaintiffs have sought two main orders:

(a) That the ruling and order of Ransley, J given on the 3rd May 2006 be reviewed.

(b) That Reuben Musyoki Muli be joined in this suit as an “Interested Party”.

And that once Reuben Muli has been joined as such, he be ordered to pay back mesne profits plus interest.

(2) The Plaintiffs instituted this suit on the 16th April 2004 against Industrial & Commercial Development Corporation (“ICDC”) and the Registrar of Lands to restrain ICDC from selling their property known as Plot Title No SULTAN HAMUD TOWN/131, which they had given ICDC as security for a loan given to them by ICDC. The Plaintiffs defaulted in payment and ICDC caused the property to be sold by public auction to Reuben Muli.

(3) Immediately after filing the suit, the Plaintiffs applied for a temporary injunction to restrain ICDC from exercising its statutory power of sale. That application was heard by Ransley, J who dismissed it on the 3rd May 2006. In the course of his ruling, the learned Judge said:

“It appears from a letter of the 31.8.2005 written by the auctioneer to the 1st Defendant that there was a delay in paying the balance of the purchase price due to misleading information without a court order.

However, it is clear that the suit premises have been sold by the 1st Defendant under its statutory power sale [sic] and as such the orders sought in paragraph 3 of the application cannot be granted as the sale is a *fait accompli*. The remedy of the Respondent [sic] if any is in damages.”

(4) The Plaintiffs did not appeal against that ruling. Instead, they now ask the court to review it and also join Reuben Muli to whom the property was sold as what the Plaintiffs call an “Interested Party.”

(5) The supporting affidavit of John Nzioka Mativo dated the 12th April 2007 shows that the Plaintiffs’ complaint is that the statutory power of sale was improperly exercised. That was also their complaint in the application which was dismissed by Ransley, J. As the learned Judge said, the Plaintiffs’ remedy, if any, lies in damages.

(6) Under section 77(3) of the Registered Land Act [Cap.300] “any person suffering damage by an irregular exercise of the power of sale shall have his remedy in damages only against the person exercising the power.” [Emphasis Added]. If the Plaintiffs are aggrieved by the manner in which ICDC exercised their statutory power of sale, they may well have a cause of action in damages against ICDC but I cannot see that they have a cause of action against Reuben Muli who purchased at the auction.

(7) Apart from that, the Plaintiffs’ application for review must fail because they have not shown that they have discovered any new or important mater or evidence of which they were not aware at the time the first application came before Ransley, J. In other words, the application does not satisfy the requirements of Order XLIV rule 1 of the Civil Procedure Rules.

(8) As I have already said, the Plaintiffs have no cause of action against Reuben Muli (the purchaser). So there is clearly no point in nor the legal basis for joining him as a party. In any event, if the Plaintiffs thought they had a cause of action against him, they would have been well advised to file a suit against him and cite him as a defendant. As Reuben Muli himself has not indicated his wish to be joined as an “Interested Party”, no such order can be made against him.

(9) For the foregoing reasons, the Chamber Summons dated the 27th April, 2007 and filed on the 25th July 2007 fails and it is hereby dismissed with costs.

Those are my orders in this matter.

Dated and delivered at Nairobi this thirtieth day of May 2008.

P. Kihara Kariuki

Judge.