



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

Civil Case 163 of 2007

PETER GICHORA MWAURAPLAINTIFF

VERSUS

JOSEPH WERU NDUNGO1ST DEFENDANT

HOUSING FINANCE COMPANY OF KENYA.....2ND DEFENDANT

RULING

In the application dated 8th May 2007, the 1st defendant/applicant seeks two main prayers namely;

- (1) That an order be granted for the inspection and preservation of the property in order to verify the status of the same and prevent further waste.**
- (2) That the plaintiff be declared a trespasser and be evicted from the suit premises L.R. No.14225/122.**

It is the contention of the applicant that he has bought the suit property for value and is the registered owner of the same. And he continues to incur further loss and damages since the plaintiff has adamantly refused to give vacant possession. It is also the case of the applicant that the suit property is on mortgage with the 2nd defendant and he continues to service the loan, while the plaintiff is in actual and constructive possession of the suit property.

The case of the applicant is that on 13th October, 2006, at a public auction conducted by **M/S Nguru Enterprises** in Nairobi, he bid for the suit property. And was declared the highest bidder at a price of Kshs.1,600,000/=. He signed an agreement and was issued with a certificate of public auction of the suit property by the said Auctioneers.

On 27th February, 2007, the property was transferred to him and is now the registered proprietor of the suit property therefore entitled to quiet possession.

The answer of the plaintiff/respondent to the application is that there was no public auction to enable the applicant to acquire any proper interest or rights, hence it is unfair to disturb the existing status quo. In support of that contention, the plaintiff annexed a letter dated 5th October, 2006, in which the 2nd defendant wrote to Auctioneers indicating that it had released a sum of Kshs.700,000/= from a prospective purchaser, being the applicant herein. He therefore asserts that there was no public auction held and the 2nd defendant sold the suit property without conducting a proper public auction.

The applicant's reply to the concerns raised by the plaintiff is that he noticed the suit property in an advertisement in the Daily Nation Newspapers on 26th September, 2006. and on 5th October 2006, he paid the 2nd defendant a sum of Kshs.700,000/= as a refundable deposit for the property so that he could be allowed to take part in the auction that was scheduled for 13th October, 2006 at the offices of **Nguru Enterprises Limited**.

The question for my determination is whether the applicant is entitled to an order of eviction as prayed in the application. No doubt that the applicant paid a sum of Kshs.700,000/= on 5th October, 2006 to the chargee, allegedly to participate in a public auction scheduled for 13th October, 2006. It is pertinent to reproduce the contents of the said letter. The letter was addressed to **M/S Nguru Enterprises**, the Auctioneers empowered to auction the suit property. The sale was scheduled to take place on 13th October, 2006. The letter states;

“We write to confirm that we have received Shs.700,000/= from a prospective purchaser, Mr. Joseph Weru Ndungo...”

The applicant says that he paid the money as a refundable deposit for the property, so that he could be allowed to take part in the auction that was scheduled for 13th October, 2006. The letter dated 5th October, 2006 does not say the money was paid as a refundable deposit but says the payee was a prospective purchaser of the suit property. The condition of sale as put in the advertisement of 26th September and 11th October, 2006 did not indicate that parties intending to participate in the intended auction were required to deposit a sum of Kshs.700,000/= with the chargee in order to be allowed to participate in a public auction.

The Auctioneer put two contradictory conditions of sale in the advertisement, which appeared in the newspapers. The 2nd condition was that all interested purchasers are requested to deposit 25% of the purchase price immediately after the sale either in cash or Banker's cheque and the balance within 90 days from the date of auction to the chargee while condition No.4 stated that all interested bidders will be required to first make a refundable deposit of Kshs.100,000/= by way of cash or banker's cheque in order to get a bidding number.

In my humble view conditions No. 2 and 4 of the conditions of sale as put by the agent of the chargee is contradictory and misconceived. In my view condition No.4 is restrictive and derogates the essence of having a public auction. It is my position that any condition that restricts the rights of the members of the public to participate in a public auction is contrary to the purpose and essence of holding a public event. The letter from the chargee to the Auctioneer did not state the sum of Kshs.700,000/= was a refundable deposit to enable the applicant to participate in the intended auction. The letter was categorical that the money was received from a prospective purchaser.

The question that arises is whether the applicant paid the money as a prospective purchaser or as a refundable deposit to enable him participate in the auction. According to condition No.4 of the conditions of sale, all interested bidders were required to make a refundable deposit of Kshs.100,000/= in order to get a bidding number. The applicant deposited a sum of Kshs.700,000/= and according to the chargee, the money was received from a prospective purchaser. And there is no indication in the letter dated 5th October 2006 that the sum of Kshs.700,000/= was received from an interested bidder intending to be allowed to take part in the auction that was scheduled for 13th October 2006. I have no evidence to show the money was paid to enable the applicant to get a bidding number.

The case of the plaintiff is that his property was never subjected to sale by public auction. There is no evidence to show that several people attended the auction and bid for the property. And after the bidding the applicant was declared the highest bidder, hence acquired a legal interest capable of protection and preservation on prima facie basis. In my understanding a chargor's equity of redemption can only be extinguished when there is a proper public auction conducted in the sale of his property. I also appreciate that a purchaser has no obligation to go behind the mechanism of sale and it is not for him to know

whether the chargee and his agents conducted themselves properly.

The question is whether a party who paid a sum of Kshs.700,000/= as a prospective purchaser on 5th October, 2006 for the sale of a property to be auctioned on 13th October 2006 can be rightly called an innocent purchaser for value. Without being definitive, I have grave doubts whether the applicant can fit that qualification or test. It is also instructive to note the applicant was financed by the 2nd defendant for the purchase price of the suit property, for the balance of Kshs.900,000/=. Perhaps one can be tempted to say that the advance payment of Kshs.700,000/= was not meant to be a deposit to enable the applicant to participate in the intended auction but a deposit for the purchase of the suit property.

According to the applicant, he was declared the highest bidder at the price of Kshs.1,600,000/= and was subsequently issued with a certificate of public auction in respect of the property by the Auctioneer on the date of the auction. I have noted that the certificate of public auction in respect of the suit property was issued to **M/S Jodacom Hardware and Metal Fabricators**, as the declared purchaser of the suit property. It is therefore save to say that the plaintiff's contention that the suit property was never subjected to a sale by public auction requires special attention. Such inconsistencies and contradictions confirm the assertions raised by the plaintiff that his property was irregularly and without any legal basis transferred to the applicant. Of course the applicant discounts that allegation and claims to be an innocent purchaser for value.

On my part, I am persuaded that there are issues which require full determination of the court at a full interparties hearing. I am also persuaded that the plaintiff has a good defence to the claim of the defendants. I do not think it would be fair and just to evict him from the suit property when there exists grave doubts as to the circumstances and events leading to the public auction conducted on 13th October, 2006.

In the premises, I do not sincerely think that the plaintiff is a trespasser on the suit premises. There is a prima facie evidence to show that his right to enjoy quiet possession of the property has not been properly and validly extinguished. It means he is legally and properly in possession of the suit property as matters stand. I therefore think that the applicant's application dated 8th May, 2007 is unmeritorious and is dismissed with costs to the plaintiff.

Dated and delivered at Nairobi this 10th day of July, 2007.

M. A. WARSAME

JUDGE