



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CIVIL CASE 353 OF 1994**

TIMOTHY OGUCHA OMATO.....APPLICANT

VERSUS

NATIONAL BANK OF KENYA.....RESPONDENT

**RULING**

This is a notice of motion brought under **Order XXI Rule 61(1), 2(a), (b), (c), (d)** and **Order XXI Rule 79 of the Civil Procedure Rules** by the defendant, Timothy Ogucha Omatu (*hereinafter referred to as the applicant*) seeking the orders of this court to set aside the sale conducted by Public Auction through Legacy Auctioneers on the 6<sup>th</sup> of April 2004 together with all the consequential entries made by the Registrar pertaining to land parcel No. **Kericho/Chesinende/150**. The grounds in support of the application are that the said sale was tainted by material irregularities and fraud. The applicant has further stated that he sustained substantial injury as a result of the irregularity and fraud committed by the plaintiff, National Bank of Kenya Ltd (*hereinafter referred to as the respondent*). The application is supported by the annexed affidavit of Timothy Ogucha Omatu. In the said affidavit the applicant has deponed that the said property was sold in a public auction before a valuation was done. The applicant further depones that the respondent breached the mandatory provisions of **Order XXI rule 61 of the Civil Procedure Rules** in that the time and place of sale, the amount recovered and the value of the property was not disclosed. The applicant was of the view that the property was sold at a gross under valuation. The applicant faulted the respondent for selling the said property in a public auction held at Kericho instead of Nakuru as it was advertised in the newspaper. The applicant therefore urged this court to set aside the said sale, which according to him, was vitiated by irregularity and fraud. The applicant further complains that he was not served with the notification of sale as required by the law.

The application is opposed. The respondent's Nakuru Branch Manager, Samuel O. Odiya, has sworn a replying affidavit in opposition to the applicant's application. He has deponed that the suit property was sold on the 6<sup>th</sup> of April 2004 after all the procedures established by law had been followed and complied with. He further deponed that one Susan Cheptoo Maritim was the highest bidder and the property was duly sold to her. The court had issued a certificate of sale and a vesting order. He further deponed that a valuation of the property was done before the said sale took place in compliance with the law. The respondent urged the court to dismiss the application by the applicant with costs.

At the hearing of the application, I heard submissions made by Mr Ombui for the applicant and Mr Kiburi for the respondent. Mr Ombui argued that the sale of the suit property violated the provisions of **Order XXI rule 79 of the Civil Procedure Rules** and further violated the initial order issued by the court. He submitted that the court had ordered the sale of the property by public auction to be advertised in the "*Nation*" newspaper. Instead the respondent advertised the sale in the "*Standard*" newspaper. Instead of conducting the sale at Nakuru (*where it had been advertised that the sale would be conducted*), the said property was sold in a public auction held at Kericho. According to the applicant, these were material irregularities which went to the root of the public auction held in that potential bidders were prevented from attending the said public auction thus resulting in the said property being sold at a lower price than anticipated.

The applicant was aggrieved that no valuation of the said property was carried out before the said property was sold in a public auction. The valuation report purportedly relied on by the respondent to sell the property was outdated as it was undertaken in 1993. The applicant further submitted that the sale of the said property was completed after the expiry of fifteen days after the certificate of sale was issued by

the court. The applicant submitted that as a result of these irregularities, the property was sold at half of its value. The applicant was consequently injured by the said sale and therefore suffered substantial loss. The applicant urged the court to set aside the said sale which, in his view, was tainted by material irregularities and fraud.

Mr Kiburi, Learned Counsel for the respondent opposed the application. He submitted that the court could only set aside the sale if there was material irregularity or fraud that would adversely affect any party. According to him **Order XXI rule 79 of the Civil Procedure Rules** provides circumstances under which the sale may be set aside; The aggrieved party must establish that he sustained substantial injury. He submitted that the complaint by the applicant that the property was sold after it had been undervalued was not true as the suit property was valued four months before the said sale. He further submitted that the property was sold at Kshs 2,640,000/= which was the reserve price set by the valuation report. Mr Kiburi argued that the present application had not been made in good faith as the applicant filed the application long after the sale had been completed.

In his view, the respondent had been put at unnecessary expenses by the applications filed by the applicant. He further submitted that although there was a third party who had been enjoined in the suit, the said third party had not been served with the application and thus the applicant was seeking orders against a party who had not been served to appear in the proceedings herein. He submitted that the sale by public auction was advertised as ordered by the court and further that the venue of the sale could not have adversely affected the applicant. He submitted that the applicant was duly notified that the suit property would be sold pursuant to the court order. He submitted that the application was an abuse of the due process of the court and therefore ought to be dismissed with costs.

In response, Mr Ombui reiterated that the sale was conducted contrary to the provisions of **Order XXI rule 83 of the Civil Procedure Rules**. He submitted that the applicant had not been indolent. He argued that there was no proof that the property was advertised in the "*Nation*" as ordered by the court. He urged the court to allow the application so that the applicant's land which had been unlawfully sold be reverted back to him as he had suffered substantial injury.

I have read the pleadings filed by the parties in support of their respective positions in this application. I have also carefully considered the arguments made by the said parties to this application through their respective counsels. The issue for determination by this court is whether the applicant has established that the sale of the suit land was irregularly and fraudulently conducted to the extent that it should be set aside. The applicant has made several complaints. He has complained that the suit property was sold without a valuation report being first prepared to determine the value of the suit land. However in response to the applicant's allegation, the respondent annexed a valuation report in its replying affidavit marked "S002" which clearly show that a valuation of the suit property was undertaken on the 14<sup>th</sup> of November 2003, about five months before the said property was sold by public auction. I therefore find no merit with this submission by the applicant.

The applicant has further complained that the said property was sold at a throw away price therefore resulting in the applicant suffering substantial injury. I have looked at the valuation report. The forced sale price of the suit property was stated to be Kshs 2,640,000/=. The said value was considered by the respondent to be the reserve price. The said property was sold at Kshs 2,640,000/=:, the reserve price. Obviously, the applicant would have wished that the said property be sold at its market value. But unfortunately in the circumstances where the said property is sold at a public auction, the possibility of the said property attracting its market value in terms of the purchase consideration is remote or far fetched, to the say the least. I do hold that the said property was sold at its reserve price. I therefore find no merit with the complaint made by the applicant and consequently disallow the said same.

The applicant has finally complained that the said property was sold contrary to the order issued by the court and further contrary to provisions of **Order XXI rules 79 and 83 of the Civil Procedure Rules**. I have considered the said rules in the light of the facts of this case. After carefully considering the allegations of irregularity made by the applicant, I do hold that the said irregularities are not of the kind envisaged by **Order XXI rule 79 of the Civil Procedure Rules**. The said rule provides that a sale

of immovable property shall be set aside if it is proved to the satisfaction of the court that the aggrieved party sustained substantial injury as a result of the material irregularity or fraud in the publishing or the conducting the sale. In the present case, the applicant knew that the suit property was stated to be sold pursuant to a decree issued by the court. The applicant made no effort whatsoever to settle the amount that he was decreed to pay by this court. The applicant could have for instance sold part of the suit property at the market value and therefore offset part of the decretal amount due from him. He however decided to wait for the fall of the hammer in a public auction conducted by the respondent before he woke up to the fact that he had lost his land. He now complains that his land had been sold at a throw away price.

In the circumstances of this case, I do hold that the applicant has not proved to the satisfaction of this court that he has suffered substantial injury by reason of such irregularity or fraud. The allegations that the public auction was advertised in the “wrong” newspaper or that the venue of the public auction had been changed constitutes grounds for the applicant to file suit for damages for irregular sale and does not constitute grounds to set aside a valid sale. The respondent has submitted that the vesting order has already been issued by this court vesting the said property to the purchaser. I do not find any legal reason that would compel me to lift the vesting order already issued. For these reasons I find no merit with the application filed by the applicant. I consequently dismiss the same with costs. I confirm the sale of the suit land to the purchaser and make it absolute as provided by **Section 81(1) of the Civil Procedure Rules**.

**DATED at NAKURU this 21<sup>st</sup> day of September 2005.**

L. KIMARU

JUDGE