



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1891 OF 1998

RUTH NJOKI NDEGWA.....PLAINTIFF

VERSUS

**THE RECEIVER FOR CONTINENTAL CREDIT
FINANCE LTD & ANOTHER.....DEFENDANT**

RULING

This is an application for an order that the Deputy Registrar be authorized to execute, signed the transfer, letter of consent and all relevant documents in respect of L.R Loc 3/Gacharage/88 for effectual registration in the name of the plaintiff.

Applicant took out an originals summons under Order XXXVI Rule 3 Civil Procedure Rules for determination of two main question viz:

- (i) As to why first defendant should not release the original title Deed number L.R Loc 3/Gacharage/88 for purpose of registration thereof
- (ii) As to why the official receiver should not complete the transaction of transfer by surrendering the said original title to the plaintiff.

The applicants case as disclosed by the supporting affidavit is that she purchased land parcel no. Loc 3/Gacharage/88 which was being sold by first defendant in exercise of its chargees power of sale. The first defendant as the charge and the second defendant as the auctioneer did not enter appearance.

On 27.6.2000 Oluoch J. granted orders in terms of prayer 1 of the originating summons and directed the official receiver to surrender the original title documents to plaintiff. The present application is brought on the ground that the official receivers to surrender the original title documents to the plaintiff. The present application is brought on the ground that the official receiver has refused to release the original documents.

The originating summons is supported by plaintiffs affidavit and documents. She states in para 3 of the affidavit that the land is owned by John Mwangi Chege (deceased) but the chargers were Nancy Wangui Mwangi and Waithira Mwangi. The letter dated 26.8.96 from the auctioneer shows that the two ladies are widows of the registered owner. I have called for a certificate of Official search which shows that it is Mwangi Chege the Registered Owner who charged the land to the first defendant on 2.7.80 to secure a loan of shs 150,000/= The charge was still on the Register as at 20.7.2000.

Plaintiff deposes in the supporting affidavit that she bought the land at shs 400,000 and promptly paid shs 100,000 as the 25% of the purchase price. She claims to have paid the balance of shs 300,000 to the

auctioneer thereafter. The applicants affidavit and the auctioneers letter dated 26.8.96 verify that the public auction was held on 26.8.96 she annexed three receipts for payment as follows:

(i) Receipt dated 8.11.95 – deposit of shs 100,000.

(ii) Receipt dated 18.12.95 – shs 90,000

(iii) Bank cheque dated 8.11.95 for shs 100,000 payable to the auctioneers but receipt for payment is not annexed.

The first two payments were made without prejudice. As I have observed above, there is no receipt for the last payment by bank cheque. Further, there is no receipt from the auctioneer for the payment of any further sums. One strange thing to note in that all those payments were made in 1995 long before the date of the alleged public auction on 26.8.96. Apparently Aluoch J. did not notice these discrepancies.

If indeed there was a public auction on 26.8.98, then a contract of sale was made between plaintiff and the first defendant. Questions arising from that contract of sale other than question affecting the existence or validity of the contract can be brought through an originating summons (Order XXXVI Rule 3 Civil Procedure Rules)

The complaint brought by the originating summons was that the chargee had refused the release the documents of title to the plaintiff. The order made by Aluoch J was that chargee do surrender the original title documents to plaintiff. Did that order give plaintiff unaffecting remedy? I do not think so for mere release of the original title Deed to the land without formal transfer of the land to plaintiff does not give her title to land.

Apparently this was a case where the chargee was refusing to perform the alleged contract of sale made at the Public Auction. If the chargee agreed to perform the said contract of sale. It would have discharged the charge and proceed to execute a transfer in favour of the plaintiff. As this land in dispute an agricultural land, the chargee or the plaintiff would have then filed an application before the local Local Land Control board for its consent for the transfer. The application for consent of the land Control Board had to be made to the Land control Board within six months of the sale – that is within 6 months from 26.8.96. It was never made and therefore the sale became null and void ab initio. So by the time Oluoch J made the order for release of original title documents on 27.6.2000 the sale had become null and void.

As this was a case where the chargee had refused to perform the alleged contract of sale, Plaintiffs remedy was to file a suit for specific performance of the contract of sale. The originating summons would not give plaintiff an effective remedy as court had no jurisdiction decide on the issue of validity of the contract of sale and give a declaration of the validity of the contract of sale and an order for transfer. When Aluoch J granted the orders the originating summons was determined. The applicant did not get an order for specific performance of the contract of sale I repeat that she only go an order that original title documents be released to her. By the present application prays for an order that the Deputy Registrar be authorized to execute transfer documents and other documents. The application brings in a new cause of action different from the questions which were to be determined through the originating summons. The court would be acting in excess of its jurisdiction in this suit. If it were to grant the orders sought in the absence of a decree for specific performance. Moreover, the court would be acting contrary to Land control Act. If it grants the order as the contract of sale has become null and void for reasons I have stated above.

The application is therefore incompetent and is dismissed.

E. M. Githinji

JUDGE

15.7.2002

Mr. Muhoro for applicant present

Njoroge Court clerk