



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT CIVIL CASE NO. 3231 OF 1985

NATIONWIDE FINANCE CO. LTD.....PLAINTIFF

- V E R S U S -

MECK INDUSTRIES LTD1ST DEFENDANT

MICHAEL GERALD KIMANI.....2ND DEFENDANT

R U L I N G

This application is brought under Order XXI rule 79 of the Civil Procedure Rules (hereinafter referred to as “the Rules”). In it, the Plaintiff seeks to set aside the sale by public auction of Land Reference Number NYANDARUA/KARATI/728 (hereinafter referred to as “the suit land”).

On 7th March, 1988, the Plaintiff obtained judgment against the 2nd Defendant who was also the registered owner of the suit land. In execution of the decree under that judgment, a Notification of Sale under Order XXI rule 61 of the Rules was issued on 22nd January, 1998 for the sale of the suit land. A public auction was conducted on 18th March, 1998 and Mr. George Gikubu Mbuthia (hereinafter referred to as “the Interested Party”) was declared the purchaser of the suit land for K.shs. 650,000/=.

The Plaintiff’s case is that the sale by public auction was done contrary to the requirements of the Auctioneers Rules, 1997 and against its Advocates’ express instructions to the auctioneers who carried out the sale. In an Affidavit sworn by Mr. Kiragu Kimani, a partner in Hamilton, Harrison & Mathews, Advocates for the Plaintiff it was stated that the auction had been conducted without a reserve price contrary to the requirements of Rule 11 of the Auctioneers Rules. Mr. Kimani also deponed that the auctioneer accepted the bids at the auction without or contrary to instructions from the Plaintiff’s Advocates. According to that deposition, the auctioneer had been instructed not to accept any bids before they had been considered by the Plaintiff. As a result of these matters, it was alleged that the suit land had been sold at a gross under value so that the Plaintiff had been denied a chance to recover a substantial part of the judgment debt. According to a valuation report exhibited in Mr. Kiragu’s Affidavit the suit land had been valued at K.shs. 1,300,000/= with a forced sale value being K.shs. 950,000/= on 26th February, 1998. It was sold for only K.shs. 650,000/=.

The question in this application is whether the sale by public auction of the suit land ought to be set aside in view of non-compliance with rule 11 (1)(b)(x) of the Auctioneers Rules. That rule provides as follows:-

“11. (1) A court warrant or letter of instruction shall include, in the case of -

.....

(b) immovable property –

(x) the reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale.”

It is not disputed that the Notification of Sale did not contain a reserve price. At the time of its issue no valuation had been done. The power of the court to set aside a sale on the ground of irregularity is dealt with under Order XXI rule 79 of the Rules. That rule provides as follows:

“79. Where any immovable property has been sold in execution of a decree, the decree – holder, or any person whose interests are affected by the sale, may apply to the court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it: Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.”

Mr. Emende for the Interested Party argued that his client was not a party to the irregularity and that the Plaintiff should, in that case, have recourse against the auctioneers. He also argued that the Plaintiff had not suffered substantial harm.

To begin with, I do not think that the court’s power to set aside a sale which is published or conducted irregularly or fraudulently is affected by the fact that the property had been sold to a bona fide purchaser for value without notice of the irregularity. The Learned Author of volume II of MULLA ON THE CODE OF CIVIL PROCEDURE ACT V OF 1908 (13th Edition, 1967, N.M. Tripathi Private Ltd, Bombay) says as follows at p. 1182:-

“If the conditions of this rule are satisfied, the sale will be set aside though the purchaser may be a bona fide purchaser for value without notice of the irregularity or fraud in publishing or conducting the sale.”

The failure to comply with the relevant mandatory requirement of the Auctioneers Rules was a material irregularity. Failure to include the reserve price resulted in the property being sold for K.shs. 300,000/= less its forced sale value. This obviously occasioned substantial loss to the Plaintiff and ought to be set aside.

I, therefore, allow the Plaintiff’s application dated 6th January, 1999. I do not propose to make any orders as to costs.

DATED and DELIVERED at NAIROBI this 29th day of May, 2001.

ALNASHIR VISRAM

JUDGE.