



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 797 OF 2000

KENNEDY KAMAU NGARUIYA.....PLAINTIFF

T/A DAILY CHICK SUPPLIES

-VERSUS

INDUSTRIAL & COMMERCIAL

DEVELOPMENT CORPORATION.....1ST DEFENDANT

NAMBU HOLDING.....2ND DEFENDANT

RULING

1. In this matter there are two applications:-

(i) By the plaintiff dated 26.4.2000 for an injunction to:

a) Stop the sale of Kabete/Kibichiko/1346/the suit premises.

b) Prevent him and his family from being evicted from the suit premises.

(ii) Again by the Plaintiff dated 30.5.2000 for a Stay of the Order of Gacheche Commissioner dated 30.5.2000 to evict the Plaintiff from the property pending an appeal.

2. This is one of those cases where events had moved faster than the Plaintiff. In the events which happened

i) The property was apparently sold by public auction on 19th January 2000.

ii) The 2nd Defendant was declared the purchaser at a price of Shs.1,000,000/-

iii) The 2nd Defendant was registered as the proprietor on 14th March, 2000.

3. The plaintiff claims that this sale was fraudulent on the following grounds:

i) Not serving a Notice of Sale to the Plaintiff

ii) Selling the said property at an unknown date and unknown place and time.

- iii) Selling the property a price far much below the market price.
- iv) Failing to advertise the sale
- v) Failing to conduct a public auction
- vi) Failing to give the Plaintiff his chance to exercise his right of redemption.

4. The affidavit in reply by Elizabeth Ouma dated 4th May, 2000 deals with these matters as follows: i) Statutory Notice. She exhibits a 3 month notice sent to the Plaintiff on 3rd September, 1997 by ordinary post at P.O. Box 12177 Nairobi. The same box number for the Plaintiff as appears in his loan agreement with the 1st Defendant (ICDC) and also in the charge dated 8th December, 1995.

Neither the charge nor the loan agreement provide for the service of notices so I am thrown back on Sections 74 and 153 Registered Land Act: Section 153 provides:

“ A notice under this Act shall be deemed to have been served on or given to any person –

- a) if served on him personally;
- b) if left for him at his last known place of residence or business in Kenya.
- c) if sent by registered post to him at his last known postal address or at his last known postal address in Kenya.
- d) if served in any of the above-mentioned ways on an attorney holding a power of attorney whereunder such attorney is authorised to accept such service.
- e) if service cannot be effected in one of the abovementioned ways by displaying it in a prominent place on the land.

There is nothing in the affidavit of Elizabeth Ouma to indicate that the Statutory Notice was served in accordance with any of Section 153 (a), (b), (c), (d) or (e) of the Registered Land Act. I find on the evidence before me for the purpose of this application only that the Statutory Notice was not properly served.

ii) Sale of property at an unknown date, time and place. This is a slightly more complicated inquiry as the property was advertised for sale on 24th November, 1999 in the East African Standard of 8th November, 1999. A notification of sale dated 18th September, 1999 was served on that day by a duly authorised process server but the Notification of Sale was defective in that:

- (a) It failed to stipulate the value of the property under Rule 15 (b) Auctioneers Rules.
- (b) It failed to specify the amount required to redeem the property under Rule 15(d) Auctioneers Rules.
- (c) The Auctioneer failed to certify as required by Rule 15 (c) Auctioneers Rules that the plaintiff's wife had refused to sign the notification of sale although the court process server had sworn an affidavit to that effect.

That sale attracted favourable bids but no bidder paid the 25% deposit required and accordingly aborted.

The Auctioneer, Josrick Enterprises re-scheduled the auction for 19th January, 2000. The property was re-advertised in The People on 31st December, 1999. That was apparently in order although I have some reservations about the circulation of that newspaper. On 29th December, 1999 the Auctioneer informed the plaintiff by ordinary post to the same box number that the auction had been re-scheduled for 19th

January, 2000.

A question does arise as to whether a fresh notification of sale is necessary or not. I do not have to decide that in this case as the original Notification of Sale was invalid. Had a fresh valid Notification of Sale been issued for the second sale that would have cured the defect in the Notification of Sale for the first sale but that did not happen.

iii) Selling the property at a price far below the market price.

It is one of those strange quirks of commercial life that sales of immovable property by public auction in England usually attract the best prices but in Kenya the reverse is true. In Kenya public auctions yield poor prices and of that I take judicial notice.

Elizabeth Ouma nowhere depones to the market value or otherwise of the property, she does not say it was a fair price or a bad price or even an open market price, but in the defence paragraph 8 it is alleged that this property was valued at Shs.1,430,000/- making an auction price Shs.1,000,000/- not unreasonable. Strangely nor has the plaintiff deponed to value; again merely an allegation in his plaint. I leave open whether the sale price was at an under value: on the papers before me all I have are cross-allegations and no proof.

iv) Failing to advertise the property.

From what I have said in the earlier part of this ruling, it is clear that this property was properly advertised on both occasions.

v) Not conducting a public auction

The only evidence is that of Elizabeth Ouma to the effect that on 19th January, 2000 there was a public auction and there is nothing to indicate that there was any breach of Rule 17 or 18 of the Auctioneers Rules.

vi) Failing to give the plaintiff the chance to exercise his right of redemption.

The most important aspect of this is compliance by the Auctioneers meticulously with Rule 15 Auctioneers Rules. It would certainly have been good practice to serve a fresh correct notification of sale for the second sale because amongst other things the amount required to redeem would have changed. I accordingly conclude that from the breaches of the Auctioneers Rules already described there was in all probability no proper sale: I hesitate to say the purported sale was fraudulent but it was certainly mistaken and in breach of the law.

I conclude that the Plaintiff has a prima facie case with a probability – indeed in some respects a certainty of success. Damages are not an adequate remedy.

Accordingly, I grant a temporary injunction to the Plaintiff pending further orders to prevent the Defendants and servants or agents of either Defendant from evicting the Plaintiff or his family from the suit premises and a stay pending further orders for the Order of Gacheche Commissioner, dated 30th May, 2000. The Plaintiff will file an undertaking as to damages under seal within 14 days.

I caution the Plaintiff that although he may have won this round, ICDC has only to start the process all over again and carry it out correctly for the suit premises to be properly sold. The process would probably only take a little over six months.

I would also comment to Counsel that it may be necessary to amend the plaint to include a prayer for rectification of the Register if the present auction purchaser wishes to give up on this particular transaction.

The costs of this Plaintiff and of the 2nd Defendant in relation to these applications are to be borne by the 1st Defendant.

Delivered and dated this 27th day of June, 2000.

P.J.S. HEWETT

JUDGE