



REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT

AT MILIMANI

ELC MISC APP.NO 144 OF 2014

NAIROBI CITY COUNTY.....PLAINTIFF

=VERSUS=

HABIBA ABDUL REHMAN HAWA.....1ST DEFENDANT

MUMTAZ HAWA D/O

ABDUL REHMAN MOHIDIN HAWA.....2ND DEFENDANT

AMINA HAWA D/O

ABDUL REHMAN MOHIDIN HAWA.....3RD DEFENDANT

MOHIDIN S/O

ABDUL REHMAN MOHIDIN HAWA.....4TH DEFENDANT

ATTAIN ADVISORY CONSULTANTS LTD.....PURCHASER/APPLICANT

P.G WAWERU T/A IDEAL AUCTIONEERS.....1ST INTERESTED PARTY

CHIEF LAND REGISTRAR.....2ND INTERESTED PARTY

RULING

Background

1. The proceedings which culminated to the filing of this application can be traced to a suit which was filed by Nairobi City County at the City Court for recovery of rates in respect of LR No.209/403/3 (suit property). The suit property was registered in the names of Habiba Abdul Rehman Hawa, Mumtaz Hawa d/o Abdul Rehman Mohidin Hawa and Mohidin s/o Abdul Rehman Mohidin Hawa as tenants in common in equal shares.
2. The suit at the City court was filed against one of the four co-owners that is Habiba Abdul Rehman Hawa in 2013. Incidentally the said Habiba Abdul Rehman Hawa had died on 5th December 2010. An ex-parte judgement was obtained and the suit property was sold in a public auction on 22nd January 2014. The suit property was purchased by the Applicant herein M/s Attain Advisory Consultants Limited.
3. The Applicant went through the procedures which included having the sale declared absolute by court and when the documents for registration of the suit property were lodged at the Lands Office, the transfer was declined. The Applicant then came back to court and had the other co-owners included in the decree. The suit in the City Court also included the other three co-owners in the decree. The Applicant then went and successfully lodged the transfer at the lands office.
4. When all this was happening, the other three co-owners of the suit property were not aware as they had not been served with any documents. They only became aware when the Applicant attempted to evict the occupants of the suit property which had 8, three bedroom maisonettes and a domestic staff quarter block. It is after the attempts by the Applicant to evict the occupants of the suit property that the

other three co-owners filed an amended notice of motion dated 19th October 2017 which among other orders sought nullification of proceedings which arose from Nairobi City Court Case No.7 of 2013.

5. On 20th December 2017, a consent was filed which compromised the amended notice of motion dated 19th October 2017. This consent set aside the proceedings of Nairobi City Court Case No.7 of 2013. Among the orders in the consent was that any monies paid by the Applicant in purchase of the suit property following the public auction conducted by P G Waweru t/a Ideal Auctioneers was to be refunded back to the Applicant upon satisfactory proof of payment to Nairobi City County. This consent was adopted as an order of the court vide a ruling delivered on 22nd February 2018. The Applicant moved to the Court of Appeal where it unsuccessfully tried to overturn the ruling of 22nd February 2018 adopting the consent as an order of the court.

Applicant's contention

6. The sale having been set aside by the consent filed and the Applicant having failed to set aside the consent setting aside the sale, the Applicant has now moved the court for an order that the Nairobi city County pays a sum of Kshs.19,972,402/= being the balance of the purchase price. The Applicant contends that it paid Kshs.30,000,000/= towards the purchase of the suit property during the auction. Out of this amount, Kshs.10,027,598/= was deposited by the auctioneer in City Court for collection by the Applicant upon cancellation of the sale.

7. The sum of Kshs.19,972,420/= which the Applicant claims is comprised of Kshs.12,920,957/= which was applied to pay rates in respect of the suit property and Kshs.7,051,445 /= being the cost of recovery . The sum of Kshs.7,051,445/= is made of court fees of Kshs.70,535/=, valuation fees of Kshs.980,000/=, Auctioneers fees of Kshs.1,546,800/=, Advocates fees and disbursements of Kshs.1,250,000/= and Kshs.3,204,110 being stamp duty.

Nairobi City County's contention.

8. The Nairobi City County which is one of the Respondents in this application contends that the Applicant's application is premature in that the Applicant has failed to give proof of what it paid to Nairobi City County as per the consent which was recorded on 20th December 2017 and subsequently adopted by the court on 22nd February 2018. The Nairobi City County contends that this court is incapable of verifying the payments which are alleged to have been made to it and that the only way the Applicant can be paid is by providing satisfactory proof of the amounts which it alleges to have paid to enable the county to comply with the Public Finance Management (PFM) Act as well as the County Governments Act.

Mumtaz Hawa, Amina Hawa and Mohidin Abdul Rehman Hawa's contention.

9. The three Respondents contend that the Applicant's application is premature and that the same ought to be stayed pending determination of the amended notice of motion dated 19th October 2017. The three Respondents argue that the consent which was recorded only resolved prayers (a), (b) (c) and (e) of the application and that this court is yet to issue an order compelling the Chief Land Registrar to cancel the registration of the transfer dated 15th July 2014 and the title in favour of the Applicant. They further argue that the issue as to who is to pay costs of the amended notice of motion dated 19th October 2019 is yet to be decided.

Analysis

10. I have considered the Applicant's application as well as the opposition to the same by the Nairobi City County and the three other Respondents. I have also considered the submissions filed by the parties herein. The only issue for determination is whether the court should order that Nairobi City County pays the Applicant a sum of Kshs.19,972,420/= together with interest.

11. The Applicant's application was brought pursuant to the provisions of Order 22 Rule 78 of the Civil Procedure Rules which states as follows:

“Where a sale of immovable property is set aside under rule 75, the purchaser shall be entitled to an order for payment of his purchase-money, with or without interest as the court may direct, against any person to whom it has been paid”.

12. The Application is also brought pursuant to the provisions of Order 25 Rule 5 of the Civil Procedure Rule which provides as follows:

5(1)Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.

(2)The Court, on the application of any party, may make any further order necessary for the implementation and execution of the terms of the decree”.

13. There is no contention that the consent which was recorded on 20th December 2017 and subsequently adopted by court on 22nd February 2018 partially settled the amended notice of motion dated 19th October 2017. By this consent, the sale which was conducted through public auction held on 22nd January 2014 was set aside. Under the provisions of Order 22 Rule 78 of the Civil Procedure Rules, the purchaser is entitled to an order for payment of the purchase money with or without interest against the person whom it has been paid. The purchaser does not have to wait for the rest of the claim to be settled before he moves the court for an order of payment of purchase money.

14. The consent which was entered into is lawful. One of the terms of the consent which is material to this application provided as follows:-

“Any monies paid by Attain Advisory Consultants Limited in purchase of L.R No.209/403/3 situate in the city of Nairobi (Ngong Road) following the public auction conducted by P G Waweru T/A Ideal Auctioneers will be refunded back to Attain Advisory Consultants Limited upon satisfactory proof of payment to the Plaintiff”.

15. The terms of the consent were clear that any monies which were paid by the Applicant were to be refunded upon the Applicant showing satisfactory proof of payment of the same to the Plaintiff. It should not be impossible for the Applicant to prove that it paid purchase money to Nairobi City county. The Applicant alleges to have paid a total of Kshs.30,000,000/= to Ideal Auctioneers . The first payment was for Kshs.7,500,000/= for which the auctioneer issued receipt dated 22nd January 2014. The second payment of Kshs.22,500,000/= was made to the Auctioneer who issued a receipt dated 10th February 2014 .

16. The Applicant states that the Auctioneer paid Kshs.12,920,687/- into Nairobi City County Revenue collection Account No. [xxxx] at Co-operative Bank City Hall Branch through RTGS . This amount was to cover the rates outstanding on the suit property. The Auctioneer goes on to state that he paid court fees of Kshs.70,535/= valuation fees of Kshs.980,000/= , Auctioneers fees of kshs.1,546,000/=, legal fees of Kshs.1,250,000/= and stamp duty of Kshs.3,204,110 making a total of Kshs.7,051,445 / = .

17. The Applicant had prayed for a refund of Kshs.20,472,402/= in the notice of motion under consideration by court. The Applicant sought to amend the figure through its submissions to read 19,972,402/= stating that the figure on the application was as a result of a calculation error. The Applicant is seeking the amount of Kshs.19,972,402 based on the affidavit of P G Waweru of Ideal Auctioneers which the Auctioneer filed in City Court Case No.7 of 2013 when he sought approval of the accounts. This affidavit was sworn on 18th November 2014 . According to this affidavit, the Auctioneer deposited in court Kshs.9,527,958/= having spent Kshs.20,472,402/= out of the purchase money of Kshs.30,000,000/= . These accounts were approved by City Court on 27th November 2014.

18. In the consent which was filed on 20th December 2017 and subsequently adopted as order of the court on 22nd February 2018, the said proceedings were set aside. The effect of this is that no party could use the same as they were null and void. It therefore follows that if the Applicant wanted to be paid any purchase money which it may have paid, it should have provided proof of the same as per the consent. This consent was informed by the fact that the impugned sale was fraudulent. The proceedings leading to the sale were riddled with irregularities which could not be allowed to stand.

19. Under the provisions of Order 22 Rule 78 of the Civil Procedure Rules, the Court is obliged to order for payment of the purchase money to a purchaser where a sale has been set aside. The court can only order for payment if there is prove that purchase money was paid. In the instant case the Applicant has not given any evidence of payment of Kshs.30,000,000/=. There is no evidence whether this money was paid to the Auctioneer through Banker’s Cheque , Cheque , Cash or Bank transfer. The only evidence the Applicant has annexed are two receipts issued by Ideal Auctioneers.

20. The Auctioneer was acting under instructions of Nairobi City County. All the amounts which are alleged to have been disbursed were disbursed by the Auctioneer. If there was payment of Kshs.3,204,110/= for stamp duty, evidence of that payment should have been provided. If there was payment of Kshs.1,250,000/=to the lawyers, evidence of such payment should have been provided. If court fees of Kshs.70,535/- was paid, evidence of that payment should have been provided. If a valuer was paid Kshs.980,000/= , there should have been evidence of that payment. Finally if the auctioneer paid himself kshs.1,546,800/= there should have been evidence of his fees in accordance to scale. There should also have been evidence of deposit of Kshs.9,527,598/= into court for which the Applicant has given credit though there is no evidence that the Applicant has collected the said amount from court or that it is available for its collection now that the sale has been set aside.

21. There is evidence from the proceedings in the court file that both the Auctioneer and the Applicant were aware that the sale and the subsequent transfer of the suit property was being undertaken in an opaque manner. This is why the three Respondents who were affected by the flawed process were never informed of what was happening. This being the case, mere production of receipts from the auctioneer cannot be taken as proof of payment of purchase money. More is required and this is why the consent which was recorded required that refund would only be upon satisfactory proof of payment of the purchase money. This court is not in a position to ascertain that any payment was made without prove of the same.

Disposition.

22. As the Applicant has failed to prove that it paid the Kshs. 30,000,000/= which it alleges to have paid and that the money was expended in the manner in which it is purported to have been expended, there is no basis upon which this court can order payment of either Kshs. 20,472,402/= as contained in the Applicant’s application or the Kshs.19,972,402/= which is being claimed in the submissions. However, I am of the view that the Applicant may have paid some purchase money. Whatever amount that was paid by the Applicant can only be refunded upon the Applicant providing satisfactory proof of the same to the Nairobi City County in accordance with the consent which was adopted as order of the court on 22nd February 2018. Any monies which may be found to have been paid shall not attract any interest because the Applicant was aware that it was engaged in a flawed process as can be seen from the manner in which the registration of the transfer was done without regard to the ownership rights of the three Respondents who were co-owners of the suit property. To this extent, I find that this application was filed prematurely. The same is hereby dismissed with costs to the Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF MARCH 2021

E.O.OBAGA

JUDGE

In the Presence of :-

Mr Wagara for Purchaser /Applicant

Mr Ochieng for 1st to 4th Respondents

Mr Gisemba for Mr Lusi for Plaintiff/Decree holder

Court Assistant: Okumu

E.O.OBAGA

JUDGE