



**Kamau v Muchai & another (Environment & Land Case
206 of 2018) [2023] KEELC 16211 (KLR) (13 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16211 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 206 OF 2018**

**JG KEMEI, J
MARCH 13, 2023**

BETWEEN

MARGARET NGINA KAMAU PLAINTIFF

AND

CHRISTOPHER KARANJA MUCHAI 1ST DEFENDANT

MARGARET NJERI KARANJA 2ND DEFENDANT

RULING

1. Before me are two Motions; the Plaintiffs Motion dated the May 9, 2022 and the 1st and 2nd Respondents Motion dated the October 12, 2022. I shall examine them in turns but first the background of the case.
2. The Plaintiff filed suit against the Defendants on the December 16, 2014 seeking orders inter alia the sum of Kshs 10,670,000/- together with interest and the cost of the suit.
3. The Defendants denied the Plaintiff's suit and sought to put them on strict proof.
4. Upon hearing the suit on merit, the Court delivered Judgement in favour of the Plaintiff against the Defendants as prayed.
5. Armed with a Judgement in her favour Margaret Ngina Kamau, the Applicant took steps to execute the Judgement by way of auction of the suit land registered in the name of the Respondents. She avers that the said land was sold by way of public auction on the April 8, 2022 hence the current application seeking vesting orders in favour of the successful bidder in the said auction.

The Applicant's/Plaintiff's Motion dated the May 9, 2022

6. The Applicant moved this Court vide a Motion dated the May 9, 2022 brought under Order 40 Rule 70 (sic) of the [Civil Procedure Rules](#) seeking orders that the sale of Ruiru/Ruiru EAST Block 2/7442



in Kimbo by Geoffrey Kangethe trading as Kangethe Enterprises Auctioneers on the April 8, 2022 to Julius Kinuthia Mwangi of PO Box 7311-00100 Thika be declared as vested in the said Julius Kinuthia Mwangi.

7. The application is premised on the grounds annexed thereto and the Supporting Affidavit of the Geoffrey Kangethe sworn on the May 9, 2022. The deponent avers that he is a duly licensed auctioneer under the Auctioneers Act and trading in the name and style of Kangethe Enterprises Auctioneers. That on receipt of instructions from the Court to sell the suit land by way of public auction, he duly served the 1st Respondent (Judgment Debtors) with a notification of sale. The 1st Respondent accepted service but refused to append his signature. That he also affixed the copy of the said notification of sale at a conspicuous place on the suit land. On the March 26, 2022 he placed an advertisement for sale of the suit land by public auction in the Standard Newspaper, a copy of which is annexed and marked B. That upon being instructed by the decree holder that no payment had been made by or on behalf of the Respondents, he conducted the public auction as advertised and Julius Kinuthia Mwangi emerged as the highest bidder at the sum of Kshs 13,500,000/-. He accepted the bid and declared him the successful bidder. The purchaser has confirmed that he has paid the full purchase as exhibited by the bank details marked D.
8. The 1st Respondent vide his Replying Affidavit sworn on the May 11, 2022 avows that he commissioned an agent namely John Nderitu Waigwa for the purpose of selling the suit land. That the said agent sought prospective purchasers one of whom was Julius Kinuthia Mwangi. He and Mwangi could not agree on the purchase price as he was offering a price below the market. That by the time Mwangi contacted him, the auction had taken place and that Mwangi was not aware that there was a sale by public auction that was underway. That after the April 8, 2022 Mwangi continued to introduce to him prospective buyers who also gave a low offer.
9. The 1st Respondent is convinced that the purported auction did not take place on the April 8, 2022 as alleged as he was present at the auction yard and nothing took place. Secondly, that if a sale took place the same was procedural, irregular and in breach of the law and ought to be rescinded. Thirdly the deponent took fault with the date of the advertisement of the auction - that the auctioneer gave the date of the advert as the March 26, 2022 while the Applicant gave the March 24, 2022 in her Affidavit sworn on the May 4, 2022. Fourthly, the notification of sale served upon him referred to parcel 5374 instead of parcel 7442. That the Applicant never rectified the land reference numbers furthering an irregularity that the Court should frown on. In addition, if there was a rectification of the same, he was not served. Fifthly, the auctioneer has not demonstrated any money trail with respect to the payment of the deposit allegedly by the successful bidder as it has not been annexed. Sixthly the warrants were never returned by the auctioneer on or before the April 14, 2022 to the Court as is the procedure in law.
10. The 1st Respondent's agent one John Nderitu Waigwa in support of the Respondent's case sworn on May 11, 2022 deponed inter alia that the said Julius Kinuthia Mwangi could not have purchased the land as he informed him way after the April 8, 2022 and that even then he was unable to raise the purchase price demanded by the Respondents.
11. In a further Affidavit sworn on the June 14, 2022 the 1st Respondent urged that the sale was irregular unprocedural and in breach of the law. He further faulted the sale on a number of grounds; that the notification of sale was irregular; the valuation report lacks vital information to wit, the date of the inspection, the valuer did not disclose how the valuer identified the property and its location, the acreage, the environs and the neighborhood so as to arrive at the comparable and current market conditions; lastly that the valuation does not meet the threshold of the market price.



12. Further that the Applicant did not value the property prior to its alleged sale and if the same was done it was unprocedural and irregular as it does not reflect the market value of the land. He urged the Court to reject the application for vesting orders.
13. The Applicant filed written submissions which I have read and considered.
14. The Respondents failed to file any written submissions with respect to the application.

The Respondent's Motion dated the October 12, 2022

15. The Motion is brought under section 1A, 1B, 3, & 3A of the *Civil Procedure Act*, Order 40 Rule 1 & Order 51 Rule 1 of the Civil Procedure Rules and Article 159 of the *Constitution* of Kenya. The Applicants sought orders that the Court issue orders for the Respondents to deposit the decretal amount of Kshs 12,371,267 in Court.
16. The application is premised on the grounds that; the Judgment was delivered in favour of the Applicant; the Applicant communicated to the Respondents her intention to dispose the property to settle the decretal amount; the Applicant has frustrated their efforts to dispose of the property by placing a restriction on the land; the Respondents have now secured the entire decretal sum and is willing to deposit the same in Court.
17. Further the Respondents aver that the alleged sale by public auction did not take place and that the suit land is yet to be vested on the purported purchaser. That this being an emotive matter damages are inadequate compensation in the event the sale was irregular.
18. The application is supported by the Supporting Affidavit of the 1st Respondent sworn on the October 12, 2002. The 1st Respondent reiterated the contents of the grounds and added that it is in the interest of justice that he be allowed to deposit the decretal amount.
19. The application is not opposed by the Applicant. Despite directions on the filing of written submissions I have noted that neither party complied with the directions of the Court. That said I shall proceed to determine the application based on what is before me.

Analysis and determination

20. I shall determine the application of the Respondent's Motion dated the October 12, 2022 first and depending on the outcome deal with the Applicant's application set out above.
21. The key issues for determination arising from the two applications are; whether the Respondents should be allowed to deposit the decretal amounts in the sum of Kshs 12,371,267/-; whether the vesting orders should be granted and who meets the cost of the applications.
22. The Respondents have challenged the sale of the property on several grounds which I have set out above. The burden of proof is always upon the person who alleges that a fact exists. He has the onus to prove that fact.
23. The Respondents have averred that the auction did not take place, no deposit was paid, the notification of sale was based on the wrong property and if the same was rectified, were not served, the property was sold at undervaluation and the valuation report fell below the threshold of a valid valuation. That the successful bidder only got to know about the property from the 1st Respondent way after the April 8, 2022 and it is not possible that he purchased the suit land at all.
24. I have perused the record and find that the decree was issued on the February 4, 2021 following the delivery of Judgment on the January 21, 2021.



25. On the February 8, 2022 a notification of sale under Form 28D was issued for the sale of parcel 5374 by the decree holder. On the March 7, 2022 the Applicant's Counsel sought to rectify the parcel number on the notification of sale to parcel 7442 leading to the rectification and reissuance of the said notification of sale. It is clear from the record that parcel 5374 was the mother title of 7442.
26. There is unchallenged evidence on record that the sale was conducted on the April 8, 2022 by way of public auction that took place between 10.30 am and ended at 1.00 pm. The successful bidder as per the certificate of sale was Julius Kinuthia Mwangi and the successful bid was Kshs 13.5 Million. The memorandum of sale is dated the April 8, 2022. The advertisement and the notification of sale clearly show that the property to be sold was parcel 7442 and not parcel 5374 as alleged by the Respondents. The whole of Kshs 13.5 Million was paid as evidenced by the memorandum of sale and the bank deposit dated the May 5, 2022, monies paid into the auctioneers account.
27. In the absence of evidence to the contrary the Court finds that the sale was regular and there is nothing to fault the same. The allegation of undervaluation was not supported seeing that the Respondents did not annex any valuation report nor lead evidence to show that the property was capable of fetching a higher value than the sum of Kshs 13.5 million.
28. I find that the Respondents had notice of the notification of sale and the best opportune time to deposit the monies was before the auction date of April 8, 2022. Their action of securing the property may be noble but has come too late in the day when the property has changed hands at the fall of the hammer. Absent any reasons to fault the sale, the horse has bolted.
29. I find the application has been overtaken by events. It is dismissed.
30. With respect with the 2nd issue, having held that the Respondents have not proven any irregularities on the sale of the property, I find that there is nothing to stop the Court from issuing the vesting orders.
31. The application dated the May 9, 2022 be and is hereby allowed.
32. Final orders; -
 - a. The application dated the May 9, 2022 is allowed.
 - b. The application dated the October 12, 2022 is without merit. It is hereby dismissed.
 - c. Each party to bear their own costs.
33. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 13TH DAY OF MARCH, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Kangiri for Plaintiff

Ms. Musyoka for 1st and 2nd Defendants

Court Assistants – Esther / Kevin

