



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 64 OF 2021

DILIPKUMAR N M SHAH.....1ST PLAINTIFF

NAYNABEN D N M SHAH.....2ND PLAINTIFF

VERSUS

LELCHAND DEVSHI SHAH.....1ST DEFENDANT

AMEET LALCHAND SHAH.....2ND DEFENDANT

AND

SHAH REKHAVANTI PANKAJ.....APPLICANT

RULING

(Application for joinder as interested party; plaintiffs having purchased the suit property in a public auction and now suing for the eviction of the original owners from the property; applicant having filed a separate suit claiming that he intended to purchase the property at the auction but was informed that the sale would not take place only to learn later that the sale actually took place; applicant thus suing the chargee and the auctioneer alleging a fraudulent sale; cause of action of applicant vis-à-vis cause of action of the plaintiffs; held that the applicant's cause of action is different from the cause of action of the plaintiffs and thus he is not a necessary party to the suit; immaterial to the applicant, and his suit remains unaffected, irrespective of who remains in possession of the suit premises; application dismissed)

1. The application before me is that dated 12 May 2021 filed by one Shah Rekhavanti Pakaj. He seeks the following orders :-

(i) Spent (orders to be heard on priority).

(ii) That the applicant Shah Rekhavanti Pakaj be joined to this suit as interested party.

(iii) That the current proceedings be stayed pending hearing of an application for stay pending appeal filed by the interested party in E3 of 2020 in Mombasa Commercial Court, contesting the sale by auction where the plaintiffs "allegedly" purchased the property LR No. MN/I/1185 CR No. 10161.

(iv) That a temporary injunction be issued restraining the plaintiffs from dealing or taking possession of LR No. MN/I/1185 CR No. 10161 pending inter partes hearing of this application and the application for stay filed in E3 of 2020.

(v) That the court to issue such further orders as it may deem fair and just.

(vi) That costs of this application be provided for.

2. The application is opposed.

3. To put matters into perspective, this suit was commenced through an Originating Summons which was filed on 6 April 2021. The applicants (whom for ease of reference and to avoid confusion with the applicant herein, I will refer to as the plaintiffs) averred that they purchased the land Subdivision No. 1185/I/MN CR No. 10161 (the suit land) in a public auction for the sum of Kshs. 65,400,000/=. They paid the money to the chargee, Bank of Baroda, and the chargee executed a transfer in their names. The transfer was registered and they got

the title deed in their name. It is mentioned that the 1st defendant was the previous registered proprietor and chargor and that the 2nd defendant is his son. The plaintiffs filed suit against them for failing to vacate the house. In the case, they more or less seek vacant possession and an order of permanent injunction to restrain the defendants from the suit land.

4. The defendants filed a replying affidavit opposing the Originating Summons. They inter alia pleaded that the plaintiffs purchased the suit property at a flawed auction inter alia because the requisite statutory notices had not been issued and other irregularities in the manner of sale. It is averred that they had filed suit, being ELC No. 106 of 2020, to stop the auction, and he was given a conditional stay of sale subject to the deposit of Kshs. 10,000,000/=. He concedes that he could not raise this money within the time given and the auction proceeded.

5. Contemporaneously with the replying affidavit, this application was filed. I have already set out the prayers above. The application is based on grounds inter alia that the applicant was interested in participating in the auction and sent a representative on 27 August 2020 to the public auction. He was however informed that the auction was stopped owing to the court case. On 4 September 2020, he inquired when the auction will take place again but was told that the property was sold at 6pm on 27 August 2020. He feels aggrieved by what he believes is deception and obvious favouritism. He avers that he filed suit, being E3 of 2020, to stop the transfer of the property and filed an application for injunction which was however dismissed. He states that he has since appealed the decision and that there is an injunction order issued stopping any dealings with the property pending hearing and determination of the application for stay that he has filed. He thus believes that it will be prudent to stay the proceedings herein pending the ruling which was slated for 16 July 2021.

6. The plaintiff has opposed the application by filing Grounds of Opposition. Inter alia, it is averred that the applicant has not demonstrated his stake or interest in this suit and how his suit or appeal will be rendered nugatory if the case herein proceeds.

7. Both counsel filed written submissions which I have considered. In his submissions, counsel for the applicant submitted that the suit E3 of 2020 was filed alleging that the auction was flawed. He submitted that the plaintiffs may not therefore have good title. He submitted that if the court does not allow the applicant to state her case, the court may issue an order that will severely prejudice her. Counsel referred me to various authorities which I have considered.

8. For the plaintiffs, counsel submitted that the applicant does not wish to join the case to litigate on the issues but to halt the litigation to enable him advance his interest in another forum. He submitted that the parties in this case are not the parties in the case E3 of 2020 which is against the chargee and the auctioneer who conducted the sale.

9. I have considered all the above.

10. This is an application by a person who seeks to be joined to this suit as interested party. There is no specific provision in the Rules that address joinder of a person as interested party but courts generally use the utility of Order 1 Rule 10 (2) to admit persons into suits as interested party. That provision of the law is drawn as follows :-

(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

11. From the above, it will be seen that the court has wide discretion to admit a person as a party to the suit whether as plaintiff or defendant. The court is also at liberty to join a person to the suit if "his presence before court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit." In the case of *Francis Karioko Muruatetu & Another vs Republic & 5 Others*, the Supreme Court stated inter alia that "an interested party may not frame its own fresh issues or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether new issue to be introduced before the Court."

12. I am guided by the above principles.

13. The case filed by the plaintiffs is one seeking vacant possession of the suit premises. The plaintiffs are the registered proprietors of the suit property having purchased it in a public auction and the same has been transferred to them. The applicant wants to join the proceedings on the basis that the auction was unprocedural and that he has filed suit challenging the sale. He avers to have filed an injunction which was dismissed but he wants to appeal to the Court of Appeal.

14. In my view, I do not see how the applicant can seek to stop the action by the plaintiffs seeking to remove the defendants from the disputed property because he has another action challenging the auction sale. Whether or not the defendants are removed from the suit premises does not affect his case seeking to nullify the auction sale. Assuming that the plaintiffs succeed, how does the applicant suffer if the plaintiffs take possession of the suit property? I do not see how he is affected, whether it is the plaintiffs or defendants on the suit property. His cause of action, where he seeks to nullify the auction sale, is also very different from the cause of action herein, which is nothing more than a case for vacant possession. He can pursue his case to its logical conclusion, but I do not see how he can be allowed to barge into a case between the buyer and the previous owner. That is a dispute that does not concern him at all.

15. For the above reasons, I am not persuaded to allow this application. It is hereby dismissed with costs to the plaintiffs.

16. Orders accordingly.

DATED AND DELIVERED THIS 3RD DAY OF FEBRUARY 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA.