



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 539 OF 2017

ERIC TIMOTHY BALONGO.....PLAINTIFF

VERSUS

PAUL SITEYA LOORKIPONY.....DEFENDANT

RULING

What is before Court for determination is the Defendant's Notice of Motion application dated the 26th April, 2019 where he seeks a stay of execution of the Judgement dated 6th March, 2019 and the Decree herein pending outcome of this application. Further, he seeks to set aside the ex parte judgment including consequential orders and for to leave to defend the suit.

The application is premised on the summarized grounds that the Defendant learnt of the matter herein from his advocates who bumped into it on the Kenya Law Reports website. The Applicant was never served with pleadings in this matter despite being engaged in two other suits with the Plaintiff. On 8th July, 2016 in the Nairobi HCCC No. 563 of 2015, the Court granted orders of status quo in respect to land parcel number Kajiado / Kisaju / 10733 hereinafter referred to as the 'suit land' with the said orders remaining in force until May, 2018 when orders of conditional injunction were issued in his favour. He contends that the Chargee in collusion with the Plaintiff in disobedience and contempt of the order sold suit land on 2nd August, 2016. Further, the alleged sale was done fraudulently and illegally as mandatory 40 days' notice to sell was not issued and the said sale was in flagrant breach of duty of care under section 97 of the Land Act including Rule 11 (b) (x) of the Auctioneers Rules 1997 as no valuation was done within one year before the purported auction. The suit is an abuse of the court process as the Plaintiff sought to enforce an illegality as well as fraudulent transaction and obtained judgment secretly without serving the Defendant. The Certificate of Sale emanating from the Auctioneers' is fraudulent and the Plaintiff herein is not an innocent buyer in an auction as no public auction took place; no advertisement was done prior to the purported auction; Plaintiff did not participate in the auction; property was disposed of at gross under sale; there was no indication of reserve price and Plaintiff did not comply with basic conditions of Sale. There is a real threat of the Defendant being evicted from the suit land.

The application is supported by the affidavit of the Defendant PAUL SITEIYA LOORKIPONY where he reiterates his claim above and insists he was never served with any documents. He claims on 8th July, 2016, Lady Justice Nzioka granted status quo order in regard to the suit land and in May 2018 conditional orders of injunction were issued in his favour. He insists that the illegal Sale and transfer demonstrate that the Plaintiff was aware that the Sale was fraudulent as no auction took place nor consideration paid. He insists he was not served as he would have been eager to come and inform the court of the prevailing orders and illegality of the alleged sale. He claims that he has a formidable Defence that raises a serious cause of action as demonstrated in the draft Defence filed herein.

The Plaintiff opposed the application and filed a replying affidavit sworn by ERIC TIMOTHY BALONGO where he denies failing to serve the Defendant. He contends that the Defendant was served with Summons to Enter Appearance by the Court process server John Kimathi Muriuki on 4th April, 2017 as evidenced by the affidavit of service filed herein on 6th June, 2017. He claims the Defendant must have visited his advocate's office after receiving their letter dated the 14th March, 2019 informing him of the entry of the judgment on 6th March, 2019. He avers that as per the grounds of the application it is as if the Applicant is challenging the sale of the suit land to the Plaintiff. Further, that the said grounds challenging the sale to the Plaintiff by public auction are full of falsehood. He states that Lady Justice Nzioka did not invalidate the Charge and found that all the statutory notices were issued to the Plaintiff. Further, that the Judge also noted that there was a Notification of Sale and Advertisement for Sale. He further claims the Judge had noted that the Plaintiff attempted to negotiate the payment of the loan and issued several cheques which were dishonoured on presentation for payment. Further, that at the end of the Ruling, the Judge noted that the Court had earlier issued conditional injunctive orders, which the Applicant failed to comply with and proceeded to dismiss the application. He refers to Kajiado ELC Case No. 212 of 2017 where Vivianne Naipanoi Kuya had sued the Applicant herein who was her husband together with the Plaintiff and Molyn Credit Limited claiming suit land was matrimonial property which had been issued as security without her consent and the husband failed to pay the loan culminating in the property being sold. Further, she sought to set aside the sale but the Court noted she had signed the spousal consent and the application was dismissed. He reiterates that the issue of sale of the suit land, which the Defendant wants to revisit, was conclusively determined by the Judges in the two cases. Further, that this is not the right forum to challenge the Plaintiff's title to the suit land.

I note the Applicant filed a further affidavit on 20th May, 2019 without leave of Court, which fact has been objected to by the Plaintiff. Since the Applicant never sought leave to file the said affidavit, I find that the Respondent will indeed be prejudice and hold the same incompetent

and will proceed to strike it out.

Both the Defendant and the Plaintiff filed their respective submissions that I have considered.

Analysis and Determination

Upon perusal of the materials presented in respect of the application dated 26th April, 2019, the only issue for determination is whether the ex parte judgement entered on the 6th March 2019 should be set aside.

The Defendant has sought to set aside the judgment herein insisting he was not served with summons to enter appearance and further that the interlocutory judgment entered herein was irregular. He contends he has an arguable Defence and insists the sale of the suit land by public auction was illegal as it never took place as he was not served with statutory notices.. In his submissions, he had relied on the cases of **Ngua V Agip (Kenya) Ltd (1981) eKLR; Rosemary Wanjiru Kungu V Directline Assurance Company Limited (2017) eKLR; James Kanyiiita Nderitu & Another V Marios Philotas Ghikas & Another (2016) eKLR; Nyangilo Ochieng & Another V Fanuel B. Ochieng & 2 Others (19960 eKLR; Stephen Boro Gitiha V Nicholas Ruthiru Gatoto & 2 others (2017) eKLR; Michael Gitere & Another V Kenya Commercial Bank Limited (2018) eKLR and William Ntomauta M'ethanga sued as M'mauta Nkari V Baikiamba Kirimania (2017) eKLR** to support his arguments. The Plaintiff has opposed the application and insists the Defendant was duly served. Further, that the Defendant is seeking to introduce the issues of sale, which have been dealt with in other matters. He has relied on the cases of **Rosemary Wanjiru Kungu V Directline Assurance Company Limited (2017) eKLR and Ngua V Agip (Kenya) Ltd (1981) eKLR** to buttress his argument in opposition to the instant application.

Order 10 Rule 11 of the Civil Procedure Rules provides that ; **'where judgement has been entered under this order, the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just.'**

In Patel -vs- E.A. Cargo Handling Services Ltd [1974] EA75 at page 76 C and E the court held as follows:-

'There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgement except that if he does vary the judgement, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.'

The court further held as follows:-

'That where there is a regular judgement as is the case here, the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean a defence that must succeed. It means a 'triable issue' that is on issue which raises a prima facie defence which should go to trial for adjudication'

I note the dispute relating to the suit land has been adjudicated in Nairobi HCCC No. 563 of 2015 and Kajiado ELC Case No. 212 of 2017. In the Nairobi **HCCC No. 563 of 2015 Paul Siteiya Loorkipony & Napoleon Wakuha Murende V Molyn Credit Limited & Regent Auctioneers Limited** where the Plaintiff was not a party, the Court dismissed the Defendant's application for injunction after he failed to pay 50% of the outstanding loan in the set two weeks. In the **Kajiado ELC Case No. 212 of 2017, Vivianne Naipanoi Kuya V Paul Siteiya Loorkipony, Napoleon Wakukha Murende, Molyn Credit Limited and Eric Timothy Balongo**, the Plaintiff therein who is the Defendant's wife claimed the suit land was her matrimonial home which was unlawfully charged by the husband without her consent. The Court proceeded to dismiss the application for injunction noting that the Plaintiff therein indeed signed the spousal consent. In the current suit, whose dispute still revolves around the suit land, the Plaintiff sought for orders of vacant possession of suit land; mesne profit; and eviction orders. It emerged that the Plaintiff had purchased the suit land through public auction and had been issued with a title deed to that effect. Judgment was entered in favour of the Plaintiff on 6th March, 2019 and the now the Defendant has filed the instant application contending that the sale was illegal.

The Defendant claims that he was not served with summons to enter appearance. However, upon perusal of the affidavit of service, sworn by John Kimathi Muriuki dated the 22nd May, 2017 and filed in court on 6th June, 2017, I note the deponent has described that he was accompanied by the Plaintiff to the Defendant's home which is around 2 kilometers from Kisaju Market where they met the wife who informed them the Defendant was nearby. He confirmed that he indeed later met the Defendant, having been introduced to him by the Plaintiff after which he proceeded to serve him with the Plaint together with Summons to enter appearance but he declined to sign the acknowledgment indicating that he would take the documents to his advocate first and seek advise. I note the Defendant has not sought to cross examine the process server. I further note defendant admits his home is near Kisaju market. As a Court, I find the affidavit of service conclusive since it is the Plaintiff who took the process server to the Defendant's home. I have no reason to doubt that the Plaintiff indeed knew the home since this is the land he had purchased at an auction. I find the Defendant's averments that he was shocked of the judgment and denying the postal address in his submissions as misleading since he was sent for a letter dated the 14th March, 2019 through his last known address that is P. O. Box 24 KAJIADO; which address is indicated in the title deed to the suit land and informed of the judgment herein. The Plaintiff has even filed a Certificate of posting to that effect. From my analysis above, I hold that the Defendant was well aware of the various lawsuits in respect of the suit land and in ELC 212 of 2017, the Defendant's wife admitted therein that the suit land had already been sold by public auction. So the Defendant's claim that the Plaintiff colluded with the Chargee to conduct an illegal Sale is false as the same took place in 2016 after Lady Justice G. Nzioka upheld that the statutory notices were properly issued to the Defendant and proceeded to dismiss his applications for injunction to restrain Molyn Credit from selling the suit land through public auction.

The Defendant claimed that the Plaintiff obtained interlocutory judgement and yet this was not a claim for liquidated damages. Order 10, rule 9 provides;

"Subject to rule 4, in all suits not otherwise specifically provided for by this order, where any party served does not appear the

plaintiff may set down the suit for hearing”.

I note the interlocutory judgement was entered on 15th June, 2017 after the Plaintiff failed to enter appearance and filed a Defence after being served with the summons to enter appearance. The matter was set for formal proof on 25th October, 2018 and the matter proceeded for full hearing after which the court entered a regular judgment on 6th March, 2019. I note in the cases of **Ngua V Agip (Kenya) Ltd (1981) eKLR** it envisaged a situation where the Defendant had entered appearance and failed to file a Defence. Further, in the case of **Rosemary Wanjiru Kungu V Directline Assurance Company Limited (2017) eKLR** interlocutory judgement was entered after the Defendant had only filed its Memorandum of Appearance. These two cases differ with the current case where the Defendant failed to enter appearance nor file a defense. In the circumstance, I hold that the judgment herein was regular since the suit had been set down for hearing only after the Defendant had failed to enter appearance as well as file a Defence.

The Defendant has claimed his draft Defence raises triable issues. From a keen perusal of the draft Defence, I note that he is challenging the sale of the suit land claiming no statutory notices were issued to him prior to the Sale. He contends that the Sale took place despite the existence of the status quo Orders issued by Lady Justice Nzioka on the 8th July, 2016. He insists the alleged Sale of the suit land was done fraudulently, illegally and in contempt of orders of the Court. Further, that no public auction took place as no legal process was not adhered to. He disputes the Certificate of Sale issued to the Plaintiff and the notice of eviction issued to him and sought for this suit to be stayed.

Section 99 of the Land Act provides as follows:

(1) This section applies to—

(a) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or

(b) a person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.

(2) A person to whom this section applies—

(a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;

(b) is not obliged to see to the application of the purchase price;

(c) is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

(4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.

Further, in the case of **Bomet Beer Distributors Ltd & Anor. v Kenya Commercial Bank Ltd & 4 Ors (2005) eKLR** Kimaru J held as follows: **“What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished. The only remedy for the chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages.”**

Further in the case of **David Mburu Githere V Jamii Bora Bank Ltd (2017) eKLR** the court favourably cited the Court of Appeal in the case **Riscillah Krobought Grant V Kenya Commercial Bank** where it held that:

“Where a chargee had exercised its statutory power of sale and caused the property to be sold by public auction, the remedy of the chargor was a claim for damages if she would prove that there was improper or irregular exercise of the statutory power of sale.”

In associating myself with these two decisions including the legal provisions cited above as well as my analysis, I find that the issues raised in the Defendant’s Draft Defence are not triable as his major Claim is against the Chargee that sold his land but not directed to the Plaintiff who is the current register owner of the suit land which he purchased through an auction. I opine that the Plaintiff is protected by law as the Defendant only has a remedy to seek for damages against Moly Credit Limited to compensate him in case the auction was not properly done.

It is against the foregoing that I find the application dated the 26th April, 2019 unmerited will dismiss it with costs.

Dated signed and delivered in open court at Kajiado this 5th day of November, 2019

CHRISTINE OCHIENG

JUDGE