



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 502 OF 2013

SAMMY NDUNGU MUNGAI.....PLAINTIFF

VERSUS

DANIEL MACUA NDONGA.....1ST DEFENDANT

NAKURU DISTRICT LAND REGISTRAR.....2ND DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....3RD DEFENDANT

RULING

1. Judgment was delivered in this matter on 30th April 2019 as follows:

a) The plaintiff's prayer for an order of specific performance requiring the 1st defendant to avail all transfer documents in relation to the suit property is dismissed.

b) Judgment is entered for the plaintiff against the 1st defendant for KShs 5 million plus interest to be calculated at court rates from the date of filing this suit until 20th April 2016 and at 35% per annum from 21st April 2016 until payment in full.

c) Since the plaintiff and 1st defendant have each had a measure of success in their respective claims against each other, I order that each of them bears own costs.

d) The plaintiff to release to the 1st defendant the original title documents for Nakuru Municipality Block 6/134 upon payment in full of the amounts ordered above.

e) The plaintiff's claim against the 2nd and 3rd defendants is dismissed with costs.

2. The 1st defendant later filed Notice of Motion dated 17th September 2019, the subject of this ruling. The following orders are sought in the application:

1. *Spent*

2. *Spent*

3. *That this honourable court be pleased to set aside the orders issued on 3rd September 2019.*

4. *That costs of this application be in the cause.*

3. The application is supported by a supporting affidavit and a further supporting affidavit, both sworn by Josphat Munyua Kariuki, counsel on record for the 1st defendant. He deposed that he was not served in respect of the proceedings of 3rd September 2019, that the suit property is valued at KShs 80 million and that the reserve price of KShs 22,250,000 is an undervaluation. He deposed in the further supporting affidavit that the suit property is valued at KShs 55 million and annexed a valuation report to that effect.

4. The plaintiff opposed the application through his replying affidavit sworn on 24th September 2019. He deposed that the 1st defendant's advocates were physically served with mention notice in respect of the proceedings of 3rd September 2019 as well as through email. He added that on 3rd September 2019 his advocates called the 1st defendant's advocates and reminded them of the fact that the matter was

coming up that morning for settlement of terms of sale and that even after the orders were made his advocates wrote to the 1st defendant's advocates and updated them about the orders made. He annexed a copy of an affidavit of service sworn by Dorcas Okita, mention notice dated 26th July 2019, emails sent on 26th July 2019 and 4th September 2019, letters from plaintiff's advocates to the 1st defendant's advocates dated 26th July 2019 and 3rd September 2019.

5. Counsels for the 1st defendant and the plaintiff also made oral submissions. The 2nd and 3rd defendants neither responded to the application nor participated in its hearing. I have carefully considered the application, the affidavits and the submissions.

6. Following delivery of the judgment herein, the plaintiff obtained warrants of attachment requiring the 1st defendant to pay a decretal sum of KShs 13,608,218. The orders that the applicant refers to were made by the Deputy Registrar on 3rd September 2019 to pave way for sale by public auction of the suit property herein to recover the decretal sum. The orders state as follows:

1) THAT the property known as Nakuru Municipality block 6/134 shall be sold by public auction and that the said auction shall be advertised in a newspaper of National Circulation.

2) THAT the said property shall be sold at the reserved price of KShs. 20,250,000/= as per the valuation report by Prime Valuers.

3) THAT the proceeds of the sale shall be used to settle the decretal sum and auctioneers charges and or there be any balance the same shall be deposited in court in the name of the Judgement Debtor.

7. Were the 1st defendant's advocates served with notice in respect of the proceedings of 3rd September 2019? I am persuaded that they were indeed served. The said advocates have not denied that the email address jmkariuki.mmc@gmail.com which was used is theirs. I note that the same address is the one that the said firm uses in this matter as one of its addresses of service. They have equally not denied receipt through email of mention notice dated 26th July 2019 and letter from plaintiff's advocates dated 26th July 2019. Both documents made it abundantly clear that the matter was scheduled for fixing of terms of sale on 3rd September 2019. Further, I accept the plaintiff's version that his advocates called the 1st defendant's advocates on phone on 3rd September 2019 and reminded him that the matter was coming up that morning for fixing of terms of sale. If anything, paragraph 2 of the supporting affidavit is a confirmation that the phone call was made. Having received that communication, counsel for the 1st defendant was under a duty to demonstrate what efforts were made to attend court or to get someone to hold their brief. No such efforts have been demonstrated. I am therefore satisfied that the 1st defendant's advocates were duly served with notice in respect of the proceedings of 3rd September 2019.

8. The 1st defendant also contends that the reserve price of KShs 20,250,000 is an undervaluation. Having been duly served, it is too late in the day to raise that kind of an argument. He should have attended before the deputy registrar with the appropriate material to argue his case. I note that in the present application, the 1st defendant initially claimed that the suit property is valued at KShs 80 million. He later revised that figure downwards to KShs 55 million. The change in his own figures is considerable. I take into account that the valuation submitted by the 1st defendant is that of a judgment debtor and that it is in his interest to push up the reserve price either with a view to frustrating the impending sale. He can simply avoid the sale by paying the decretal sum right away.

9. In any case I have found above that the 1st defendant's advocates were duly served with notice in respect of the proceedings of 3rd September 2019. There is no basis upon which to disturb the orders made on that date.

10. In view of the foregoing, Notice of Motion dated 17th September 2019 is dismissed with costs to the plaintiff.

Dated, signed and delivered in open court at Nakuru this 6th day of November 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the 1st defendant /applicant

Ms Ambani holding brief for Mr Matiri for the plaintiff /respondent

No appearance for the 2nd and 3rd defendants/respondents

Court Assistants: Beatrice & Lotkomo