



**Kathurima v Credit Bank Kenya PLC; Gikonyo t/a Garam Auctioneers
& 2 others (Proposed Interested Parties) (Civil Suit E074 of 2023)
[2025] KEHC 3142 (KLR) (Commercial and Tax) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3142 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E074 OF 2023
PM MULWA, J
MARCH 13, 2025**

BETWEEN

HARRY MUTUMA KATHURIMA PLAINTIFF

AND

CREDIT BANK KENYA PLC DEFENDANT

AND

**JOSEPH GIKONYO T/A GARAM AUCTIONEERS PROPOSED
INTERESTED PARTY**

HITESH MORJARIA PROPOSED INTERESTED PARTY

VIJAY MORJARIA PROPOSED INTERESTED PARTY

RULING

1. The application before me is the plaintiff's Notice of Motion dated 9th August 2024 seeking the following orders:
 - i. Spent...
 - ii. The court be pleased to join the 1st, 2nd and 3rd proposed interested parties as parties to the suit.
 - iii. That the court do grant a stay of the intended completion of a sale purported to emanate from the unlawful and/or unprocedural auction conducted on 5th June 2024, payment of the balance of the purchase price, transfer and/or any other dealings on LR No. Nairobi/Block 91/272, by the defendant and the proposed interested parties, their agents and/or servants, pending the hearing and determination of this application inter partes.



- iv. That the court does set aside and rescind the sale purported to emanate from the unlawful and/or unprocedural auction conducted on 5th June 2024, payment of the balance of the purchase price, transfer and/or any other dealings on LR No. Nairobi/Block 91/272, by the defendant and the proposed interested parties, their agents and/or servants, pending hearing and determination of the suit.
 - v. That costs of the suit be in the cause.
2. The application is supported by the plaintiff's affidavit sworn on 19th August 2024. His case is that he was the registered owner of the suit property against which he had executed a charge to secure a financing facility, that on 28th May 2024 he stumbled upon a notice that the suit property was to be auctioned on 5th June 2024, and that the auction eventually took place as scheduled but was conducted fraudulently, on the basis of a fraudulent evaluation report and fraudulent and unscrupulous accounting methods.
 3. The plaintiff contended that the public auction conducted on 5th June 2024 was a sham and a gimmick and the entire process ran afoul of the fundamental provisions governing a chargee's statutory power of sale.
 4. In opposing the application, the defendant filed the replying affidavit sworn on 26th August 2024 by its Head of Legal Department Francis Wainaina, wherein he avers that the application is res judicata and sub judice; that the court is functus officio and hence has no jurisdiction to hear and determine the plaintiff's application and that there being no formal application to join the intended third parties, the orders sought cannot be issued. The defendant also filed grounds of opposition dated 11th September 2024.
 5. Though not yet joined, the 1st proposed interested party filed a response through the affidavit of Joseph Gikonyo sworn on 26th August 2024 and averred that the public auction was conducted in accordance with the legal requirements. The 2nd and 3rd proposed intended parties did not participate in the application.
 6. The application was canvassed by way of written submissions which both the plaintiff and the defendant filed dated 11th September 2024 and 18th November 2024 respectively.

Analysis and determination

7. I must state from the onset that other than being listed as proposed interested parties, no formal application was filed or pursued to join them as parties in the suit. Further, during the pendency of the matter, the court heard that the transfer of the suit property was completed. That meant that prayer nos. 2 and 3 of the plaintiff's application were overtaken by events and therefore rendered spent.
8. The residue of the application before the court therefore is one for setting aside and rescinding the sale purported to emanate from the unlawful and/or unprocedural auction conducted on 5th June 2024 in respect of LR No. Nairobi/Block 91/272. I have considered the motion, the affidavits and the submissions by parties. The issue for determination is whether the application is merited.
9. The plaintiff challenges the propriety of the auction which was conducted on 5th June 2024 by the proposed 1st intended party on the instructions of the defendant. He submits that the exercise was a gimmick stage-managed to hoodwink everyone to belief there was a clean process yet only the 2nd and 3rd proposed interested parties presented a joint bid with employees of the defendant being attendants. He further submitted that the suit property was undervalued which thereafter led to some fraudulent accounting.



10. It was submitted for the defendant that the sale by public auction sought to be set aside and/or rescinded was conducted in accordance with all the relevant legal requirements. That indeed the plaintiff was served with all the requisite statutory notices. And further that the issue of service or otherwise of the statutory notices was the subject of earlier applications in this matter and which the court had dealt with.
11. Further, the defendant contends that the plaintiff failed to provide any material evidence to demonstrate any fraudulent auction, fraudulent valuation report and fraudulent accounting.
12. It has been contended by the defendant that the court has no jurisdiction to hear and determine the instant application; firstly, because the same is res judicata having been fully heard and determined by Hon. Mwita, J. on 8th March 2023, secondly that the court is functus officio having fully heard and determined all the issues vide court orders issued on 6th March 2023, and thirdly that the application is sub judice given that the issues are substantially similar to those raised in his application dated 29th May 2023.
13. For res judicata to be invoked in a civil matter the following elements must be demonstrated, that is; there is a former judgment or order which was final; the judgment or order was on merit; the judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and there must be between the first and the second action identical parties, subject matter and cause of action (see *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* [2021] KESC 39 KLR).
14. I have had the chance to make reference to the entire set of pleadings herein. What comes out clearly is that there have been a number of applications which basically seek to restrain or otherwise set aside any crystallized action by the defendant in respect of the suit property. Of notable concern is the application dated 24th of February 2023 which among other holders sought an injunctive relief against the defendant pending redemption by the plaintiff of a charge over the suit property.
15. It is averred that the said application was argued and the prayer of injunction granted on condition that the defendant was to be paid Kshs. 50 million within a period of 60 days failing which the injunction shall stand set aside. The plaintiff having failed to comply with the conditional orders, the defendant went ahead to exercise its statutory power of sale culminating in the sale of the suit property to the 1st proposed interested party, hence the instant application.
16. Notably, the plaintiff filed a litany of other applications, that is those dated 29th May 2023, 9th August 2024 and 4th September 2024 all of which the court either dismissed or declined to grant the sought orders.
17. All these applications have had a common thread, to injunct action by the defendant. I am inclined to agree with the defendant that the conduct by the plaintiff is both vexatious and frivolous, the end goal being to stop the sale and transfer of the charged property. In view of the clear orders of the court issued on 6th March 2023, and given the court's decision to reject the plaintiff's request for an injunction on 5th July 2023 I conclude that the instant application bears elements of abuse of the court process.
18. The 1st proposed interested party participated in the public auction and emerged as the highest bidder. He is thus protected by Section 99 of the *Land Act*. In *Joyce Wairimu Karanja v James Mburu Ngure & Another* KBU HCCA No. 118 of 2017 [2018] eKLR, Ngugi J (as he then was), held that:

“(30) This section seems quite clear that a purchaser of property sold in the exercise of a chargee's statutory power of sale is protected even in cases where the person



had actual notice that the chargee had not properly realized that statutory power of sale in terms of procedure...The point is that the appellant is then inoculated by section 99 from any action to recover the suit property...”

19. I am not convinced the plaintiff has established a prima facie case since upon default of a clear condition in the court orders of 6th March 2023, the defendant was entitled to exercise its statutory power of sale.
20. The property has already been sold and the Court will refrain from interfering with the defendant’s right of statutory power of sale. The statute contemplates damages in instances where the applicant demonstrates the sale was irregular.
21. In conclusion, and without belabouring the matter further, I find that the plaintiff’s Notice of Motion dated 9th August 2024 is without merit and is dismissed with costs.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF MARCH 2025.

PETER M. MULWA

JUDGE

In the presence of:

Mr. Musungu for Plaintiff/applicant

Mr. Mugisha for Defendant

Court Assistant: Carlos

