



**Mogaka & 2 others v Bank of Africa Limited; Joseph T. O Nyachoti t/
a Minmax Auctioneers & 2 others (Interested Parties) (Civil Case
2 of 2018) [2024] KEHC 5962 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5962 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL CASE 2 OF 2018
PN GICHOHI, J
MAY 23, 2024**

BETWEEN

ZABLON NYAMARI MOGAKA 1ST APPLICANT

ESTHER KEMUMA MOGAKA 2ND APPLICANT

OURU POWER LIMITED 3RD APPLICANT

AND

BANK OF AFRICA LIMITED RESPONDENT

AND

**JOSEPH T. O NYACHOTI T/A MINMAX AUCTIONEERS ... INTERESTED
PARTY**

JOSIAH ACHIKA MAYIEKA INTERESTED PARTY

BENARD NYARANGI GUTO INTERESTED PARTY

RULING

1. By a Notice of Motion an application dated 12/8/2022, the applicants seek Orders that:
 1. spent
 2. spent
 3. spent
 4. Pending the hearing and determination of the application, the defendant/ respondent and interested party herein whether by themselves, their servants, employees, agents and/or any persons claiming through them be restrained from alienating, transferring,



mortgaging, disposing of or interfering with the plaintiffs/ applicants peaceful enjoyment, rights of ownership and possession or otherwise dealing with any portion or interest thereof by whatever manner in respect of Plot Nos. Kisii Municipality/BlockII/3,4,5&6, Kisii Town, L.R.No.central Kitutu/Daraja Mbili/2101 and L.R No. Kisii Municipality/BlockIII/358&359, Kisii Town.

5. In the alternative, status quo as regards ownership and possession of the suit properties herein, to wit, Plot Nos. Kisii Municipality/BlockII/3,4,5&6, Kisii Town, L.R.no.central Kitutu/Daraja Mbili/2101 and L.R No. Kisii Municipality/BlockIII/358&359, Kisii Town be maintained pending the hearing and determination of this application
 6. Pending the hearing and determination of this application, the interested party herein be compelled by an order of this Honourable Court to furnish the plaintiffs with or file herein the true returns and/ or details of the impugned public auction including but not limited to Bid bonds, proof of payment of monies paid towards the auction herein, memorandums of sale for the other six (6) suit properties, current valuation reports for each property, a statement, at the very least, stating what was the reserve price for each of the suit properties and if no sale happened what were the circumstances.
 7. A declaration that the sale over and in respect of Plot Nos. Kisii Municipality/Bloc KIII/3,4,5&6, Kisii Town, L.R. No. Central Kitutu/Daraja Mbili/2101 and L.R No. Kisii Municipality/Bloc KIII/358&359, Kisii Town purportedly carried out on 18/7/22 was fraudulent and nullity ab initio.
 8. A declaration that the defendant and interested party herein were obliged to comply with all the relevant provisions of the law including but not limited to the *Auctioneers Act*, 1996 and the Auctioneers Rules, 1997 (as amended) and the Conditions of sale as advertised.
 9. The Officer Commanding Station (OCS) Kisii Central Police Station do assist with the enforcement of the orders granted herein and ensure compliance and that peace prevails.
 10. The cost of this application be jointly borne by the defendant and the interested party herein
 11. Any other or further relief this Honourable Court may deem fair and just to grant Suo motu.
2. The main grounds on the face of the application and the Supporting Affidavits sworn by Zablon Nyamari Mogaka Elisha Okero Ombui and Robert Oliech Onyango are that:-
- a. The auction carried out by the interested party (being a former employee of the Respondent) and Respondent on 18/07/2022 pursuant to the judgement and decree dated 20/05/2019 was botched, illegal, unlawful and utterly fraudulent.
 - b. The auction was a sham as it was not only not attended by any bidder but also none of the conditions of sale set out by the Interested Party Auctioneer in this advertisement was met and therefore no public auction could be carried out as advertised.
 - c. The Interested party Auctioneer has since filed incomplete returns and /or details of the auction but has failed to furnish the rest despite efforts made by the Applicant to be furnished.
 - d. The Interested Party Auctioneer and the Respondent have already sold some of the properties registered in the names of the 1st and 2nd Applicants.
 - e. The Applicants are likely to be dispossessed of their property and there be greatly prejudiced if the orders sought are not granted unlike the Respondent and the interested parties.



3. The Respondent has opposed that application through a Replying Affidavit sworn on 26/9/2022 by Charles Waiyaki in his capacity as Senior Recoveries Officer of the Respondent who terms the instant application frivolous, vexatious and an abuse of the court process.
4. He depones that the Respondent extracted a decree and instructed the Interested Party to execute against the Applicants and, the properties were valued to ascertain their market value and a report dated 15/5/2022 was prepared.
5. He further depones that Interested Party extracted and registered prohibitory orders in relation to the subject properties to prevent the Applicants from disposing and/ or transferring the properties in the course of the execution proceedings which orders were discharged upon the successful sale of the suit properties. That the charged properties alone cannot satisfy the decretal sum of Kshs. 424,127,692/=.
6. The application is further opposed by the Interested Party Joseph Nyachoti T/A Minmax Auctioneers (hereinafter referred "Auctioneer") vide a Replying Affidavit dated 19/09/2022 supporting the averments by the Respondent. He depones that on 24/05/2022, he served a 45 days Notification of Sale upon the judgement debtors after confirming status of the ownership of properties listed in the schedule of warrants of sale and advertised for the public auction which sale was scheduled to take place on 18/7/2022 at Kisii Post office at 10:30 am.
7. Further, he depones that the Applicants failed to redeem the properties offered for sale by paying decreed sum and auctioneers' costs and therefore , the public auction went on as scheduled and that he executed the auction lawfully as prescribed by provisions of the Civil Procedure Act and laid down Auctioneers Rules, 1997. He urged the Court to dismiss the application herein and with costs arguing that the Orders sought therein would adversely affect the bidders not before court and to whom he issued Memorandum of Sale.
8. The application is further opposed by Benard Nyarangi Guto (2nd Interested Party) in his Replying Affidavit sworn on 11/05/2023 where he depones that he attended the public auction as advertised. He paid Kshs. 3,000,000/= by a banker's cheque to secure a bid number and when the Auctioneer announced the commencement of the auction, he (2nd Interested Party) bid Kshs. 10,050,000/= and was declared the successful bidder.
9. He was required to comply with the conditions set forth for the conduct of the auction in terms of payment of 25% of the bid price by way of a banker's cheque. He therefore acquired a loan from the bank and was able to purchase the suit property LR. No. Kisii Municipality/BlockIII/358 within the stipulated period and issued with a copy of the Memorandum of Sale. He maintained that he was an innocent purchaser for value.
10. He states that he is till repaying the loan yet he cannot peacefully enjoy ownership of the property.
11. In his Supplementary Affidavit dated 17/02/2023, Zablon Nyamari Mogaka reiterates the Applicants' position as stated in their earlier affidavits. He depones that going by the value of the properties being Kisii Municipality/BlockII/3, 4,5 and 6 Kisii Town, the same are capable of offsetting the outstanding balance and/or the decretal sum herein and therefore there was no need to sell suit properties just because they belonged to 1st and 2nd Plaintiffs who are directors of the 3rd Plaintiff.
12. He maintained that they were never served with Warrants of Attachment on sale of immovable property at all whether directly or through any person acting as their agent and put the Defendant and interested party to strict proof. He stated that having worked for him (Zablon Nyamari Mogaka), nothing would have stopped the interested party to serve him through email or WhatsApp. He



therefore states that in absence of certificate of service, it is only fair to have the persons who purportedly effected service attend Court for cross examination.

13. He deponed that from the Defendant's /Respondent's Replying Affidavit , there was outright admissions that indeed no sale of the suit properties occurred in the auction except for the two properties that were illegally sold. That there was no compliance with Rule 15 (b) (c) and (d) of the Auctioneer's' Rules.
14. In response to the Auctioneer's Replying Affidavit, he maintained that no evidence was provided to prove monies paid by the purported purchasers be it the Kshs. 3,000,000/= refundable deposit of 25 % of the purported purchase price with 14 days in accordance with the Conditions of Sale set by the Auctioneer himself.
15. He maintained that the mere issuance of the Memorandum of sale by Auctioneer does not entitle the purported purchaser's possession and ownership documents to the suit properties in the circumstances herein.

Submissions

16. In submissions dated 27/02/2023, Counsel for the Applicants emphasised the contents of their application and the Affidavits in Support. He maintained that the impugned public auction was and/or is a sham, illegal, unlawful, fraudulent and nullity ab initio. He further submitted that the record shows that indeed the said auctioneer's returns and/or details of the auction have been filed without:
 - i. Bid bonds.
 - ii. Proof of payment of monies paid, be it towards the Kshs. 3,000,000/= refundable deposit, 25% of the purchase price by close of the auction day or the balance of the purchase price within 14 days.
 - iii. Memorandum of Sale for the other six suit properties.
 - iv. Current true valuation reports for each property.
 - v. A statement at the very least, stating what was the reserve price for each of the suit properties and if no sale happened what were the circumstances e.t.c.
17. Counsel urged this court to grant the reliefs sought by the Applicants and award them costs too.
18. In his Submissions dated 03/ 03/2023, Counsel for the Respondent submitted that the auction conducted on 18/7/2022 was above board and disapproved allegations by the applicant as frivolous. He submitted that no evidence was availed to substantiate the allegations that the participants in the auction of 18/7/2023 were fake and that he Interested Party was conflicted .
19. Further, he submits that the auction conducted on 18/7/2022 was carried out pursuant to a decree of this Court and therefore, the Respondent was not only bound to sell the charged properties but also had liberty to go after all assets owned by the Applicants as it did here, in bid to settle the decree. In support of that argument, Counsel relies on Section 44 of the *Civil Procedure Act*.
20. That the applicant's allegation on failure to conduct valuation prior to the sale is farfetched in that the respondent caused valuation to be conducted on the subject properties before they could be sold on auction. That a bundle of valuation reports dated 23rd, 24th and 25th May,2022 prepared by Kenstate Valuers Limited have been produced as annexures.



21. While citing the case of *Kawamambanjo Limited & another v National Bank of Kenya Limited & another* [2020]eKLR, counsel submitted that the Auctioneer complied with the Auctioneer Rules. Further, that the applicants were duly served with the Notification of Sale and Redemption Notice dated 24/5/2022 which their agent Robert Oliech declined to sign. That a cursory look at the said Notice, it indicated that the value of each property was to be subjected to the auction in full compliance with the aforementioned provisions but the Applicants failed to redeem the properties and they were consequently advertised for sale.
22. Further, he submits that the property in L.R No. Kisii Municipality/Block III/358 & 359 passed to the new purchasers at the fall of the hammer and therefore the Applicants cannot lay claim to the two properties as their interest were completely extinguished at the fall of the hammer and in the circumstances, they cannot prevent the transfer of the properties. He submits that the only recourse available is a suit for damages. On this issue, Counsel relies on the Court of Appeal decision in *Etradae Ltd & another v Thrift Estates Ltd & 2 others* [2019]eKLR and further, the case of *Consolidated Bank of Kenya Limited & another v Katherine K. Mbiti & another* [2009]eKLR.
23. The Auctioneer Interested Party, also filed his submission dated 10/03/2023 maintaining the contents of his affidavit. While citing the case of *David Isoe Ayub vs I& M Bank Limited & another; Kipsosion Rerimoi Kipkorir (Interested Party)* [2020]eKLR, he submitted that he was guided by the valuation report provided by the Respondent herein and that he followed all the relevant laws and rules while conducting the public auction on 18/7/2022 and therefore, he did not in any way infringe or violate the Applicants' rights. That at the fall of the hammer, the rights of the plaintiff/ applicants in the suit properties ceased to exist and the same were transferred successful bidders who are not party to this suit.
24. Only the Respondent orally opted to highlight its submissions through his Counsel. He maintained the Respondent's position and response to each and every allegation against the Interested Party / Auctioneer and submitted that the auction carried out on 18/07/2013 was above board and in strict adherence to the provisions of the law. That no wrong was done by the Respondent or Auctioneer.
25. He submitted that pursuant to Section 99 of the *Land Act*, the prayer for nullification is not available as the right was extinguished by the fall of the hammer. While relying on the authorities cited in the Respondent's submissions, Counsel submits that in the circumstances, the remedy lay in suing for damages.

Determination

26. From the application, the affidavits by parties and the submissions herein, it is not in dispute that the Applicants did secure loan facilities with the Respondent and that there was default in their loan repayment obligations. That indeed there is a judgment and decree in favour of the Respondent as against the Applicants herein. That the Applicants continued in default causing the Respondent to proceed with execution against the Applicants.
27. It is through that process that the impugned auction was allegedly carried out and which led to the disputed sale of some of the Applicants properties which they say were not charged to secure the loan facilities.
28. From the foregoing the main issue for determination is whether the impugned auction was carried out in accordance with the law so as to pass title of the suit properties sold to the purported purchasers.
29. The bone of contention is that the Applicants were not served with warrants of attachment and Notification of Sale. Section 96 (2) & (3) of the *Land Act*, 2012 provides inter alia as follows:



- (2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.
- (3) A copy of the notice to sell served in accordance with subsection (2) shall be served on; -
- (a) the Commission, if the charged land is public land;
 - (b) the holder of the land out of which the lease has been granted, if the charged land is a lease;
 - (c) a spouse of the chargor who had given the consent;
 - (e) any lessee and sublessee of the charged land or of any buildings on the charged land;
 - (f) any person who is a co-owner with the chargor;
 - (g) any other chargee of money secured by a charge.
30. There is no evidence of service of such notices. Further Rule 15 of the Auctioneer's Rules, 1997 which provides as follows:
- “Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property –
- a) Record the court warrant or letter of instruction in the register.
 - b) Prepare a notification of sale in the form prescribed in Sale form 4 set out in the Second Schedule indicating the value of each property to be sold
 - c) Locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;
 - d) Give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction; and
 - e) On expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.
31. A perusal of the Notification of Sale of Immovable Property issued by the Auctioneer shows that it is dated 24/05/2022. It is addressed to the Applicants herein. However, it is not duly signed by the Applicants. There is no evidence that the Applicants who allegedly reside outside the country were served with a copy of the requisite notices personally including through electronic means.
32. The Notification was allegedly received by the Judgment/Debtor's agent one Oliech but he declined to sign. It is not disclosed who Oliech is and the alleged witness did not participate in this application.
33. However, it is too late in the day for the 1st Applicant to seek to have the person who received service called to this Court for purposes of being cross examined. That should have been done at the earliest opportunity, that is before or during directions.
34. From the above analysis, it is clear that the notices were not properly served to the Applicants herein, further assuming the alleged agent was duly appointed by the applicants there is no certificate to the



effect that the agent refused to sign the notification as envisaged under rule 15 of the Auctioneers Rules,1997.

35. The Applicants continued indebtedness, the banks' right to sell the charged property to recover the outstanding sum had crystalized. It is therefore correct that the Respondent had followed the right process of recovering the said sum by engaging the Auctioneer and conducted a valuation over the suit properties in compliance with the Land Act and pursuant to a court decree to sell the charged properties. The Respondent was also had liberty to go after all the assets owned by the applicants in bid to settle the decree.
36. In doing so, the Auctioneer owed a duty of care to the Applicants. Indeed , Section 97 of the Land Act providest that :-
- “ 1. A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.
 2. A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.”
37. However, the valuation as per the record were completed on 25/5/2022 and the Notification of Sale of the property was allegedly served to the applicant's agent the day before being the 24/5/2022 and no explanation was given for the same yet he owed a duty of care to the Applicants.
38. That would appear to be a breach of care on his part . However , despite the lack of evidence to show service and the doubts on the Applicants as to whether any payments made towards the said purchases at the auction, there is no reason for this Court to doubt that the auction did take place as scheduled. There is no doubt also that the Applicants' right to the said titles was extinguished by the fall of the harmer.
39. In the circumstances, this Court is guided by the Court of Appeal decision in Etradae Ltd & another (supra) where the Court cited the holding by Kimaru J (as he then was) in Bonet Beer Distributors Limited & another-v-Kenya Commercial Bank Limited & 4 others [2005]eKLR that the chargor 's equity of redemption expires at the fall of the harmer. Further , Kimaru J expressed himself thus;-
- “In the present case the chargee in exercise of its power of sale under a charge sold the properties in a public auction. The plaintiffs are now complaining that the sale was irregular....if a party is aggrieved by the way the sale was conducted, by public auction, he can only seek to be awarded damages.”
40. Further, the Court of Appeal went ahead with approval of the holding in Kiur & another vs Standard Chartered Bank & another No. 2 [2002] KLR where High Court held:
- “The law itself provides that any injury to a chargor by way of irregular exercise of the power of sale by a chargee or auctioneer, shall be compensated by an award of damages. (See Section 77(3) Registered Land act and Section 26 (1) Auctioneers Act).”
41. Consequently, and guided by the numerous decisions on the issue, this Court is satisfied that the if aggrieved by the said auction, the Applicants' remedy lies in damages only. In conclusion:-



1. The application dated 12/08/2022 be and is hereby dismissed.
2. Each party to bear his own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 23RD DAY OF MAY, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Angwenyi for the Plaintiffs/Applicants

Mr. Kang'o for the Defendant/Respondent

Josephat Nyachoti /Auctioneer /Interested Party

Josiah Achika / 1st Interested Party

Ms Karera for Barnard Nyarangi Guto/ 2nd Interested Party

Ruto / Aphline - Court Assistant

