



Ethics & Anti Corruption Commission v Koech & another (Anti-Corruption and Economic Crimes Civil Suit 18 of 2016) [2023] KEHC 838 (KLR) (9 February 2023) (Ruling)

Neutral citation: [2023] KEHC 838 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT 18 OF 2016
EN MAINA, J
FEBRUARY 9, 2023**

BETWEEN

ETHICS & ANTI CORRUPTION COMMISSION PLAINTIFF

AND

DAVY KIPROTICH KOECH 1ST RESPONDENT

DUNSTAN MAGU 2ND RESPONDENT

RULING

1. Before me are two applications both brought by way of Notice of Motion but which this court directed would be heard together.
2. The first application is dated 27th October 2022. The same is brought under Order 22 Rule 79 and Order 51 Rule (1) of the *Civil Procedure Rules* and is an application by the Plaintiff/Decree Holder for a certificate of sale to issue to one Ngugi Samuel Mukora being the highest bidder for property LR Kericho/Municipality Block 4/2 at an auction held on 14th September, 2022. It is also sought that the Deputy Registrar of this court does execute transfer documents for the parcel of land to the said purchaser and that the costs of this application be provided. The application which is supported by the Supporting and further affidavits of Samuel Mutahi Gathogo, Auctioneer, and who is the 1st Interested Party is premised on grounds *inter alia*, that:-

“a) To satisfy the decree issued in favour of the plaintiff/decree holder herein in the sum total of Kshs. 117,200,000, this court issued orders that the parcels of land known as Title Numbers Kericho/Municipality Block 4/2 and Kericho/Municipality Block 4/3, both registered in the name of the 1st defendant/judgment debtor, be re-advertised for sale by public auction and a notification of sale issued for execution.



- b) As a consequence, the judgment debtor was notified and the parcels of land were advertised, in The Standard and Daily Nation newspaper issues of 22nd August, 2022, 23rd August, 2022 and 29th August 2022, respectively, for sale by public auction to take place on 14th September 2022 when the auction proceeded and the following person declared the highest bidder as against parcel of land Title Number Kericho/Municipality Block 4/2.

Parcel number	Reserve Price	Highest Bidder	Bid price
Kericho/ Municipality	105,000,000	Ngugi Samuel Mukorat	105,500,000
Block 4/2	ID. 109XXXX and of Box 2013, Kericho		

- c) The purchaser made deposit of 25% of the purchase price in terms of Order 22 rule 69 of the [Civil Procedure Rules](#).
- d) The bid received for the property met the reserve price set and the highest bidder was declared the purchaser save for parcel of land Title Number Kericho/Municipality Block 4/3 whose bid failed to meet the reserve price.
- e) Having failed to sell the parcel of land Title Number Kericho/Municipality Block 4/3, described above, considering the gross bid received of Kshs. 105,500,000, the decretal sum of Kshs. 117,200,000 is still outstanding by 11,700,000 excluding costs incurred, auctioneers' charges and any outgoings.
- f) In view of the outstanding decretal sum, and with no bid meeting the reserve price set for Title Number Kericho/Municipality Block 4/3, the auctioneer adjourned the sale of this parcel pending further orders of the court.
- g) In the circumstances, it is only fair and just that a certificate of sale be issued to the highest bidder and the sale be declared as absolute as prayed.
- h) Unless the orders sought are granted, the realization of the decree issued herein will be defeated.”
3. The second application is an application by the Defendant/judgment Debtor which is dated 4th November, 2022. In this application the Defendant/Judgment Debtor seeks orders that:-
- “ a) Spent
- b) Pending hearing and determination of this Application and main suit herein, the Honourable court be pleased to issue an order of injunction restraining the Plaintiff, Ngugi Samuel Mukora, the 7th Interested Party herein and



Samwel Mutahi Gathogo T/A Valley Auctioneers, or any other Firm of Auctioneers appointed by the Plaintiff, their agents, servants, employees, assigns or otherwise howsoever from in any way dealing with, disposing of, selling or otherwise interfering with the title of Kericho Municipality Block 4/2 measuring 1.16 HA (hereinafter "the subject property");

- c) Pending hearing and determination of this Application and main suit herein the Honourable Court be pleased to set aside the purported sale which took place on 14th September, 2022 which purported to sell Kericho Municipality Block 4/2 measuring 1.16 HA to Ngugi Samuel Mukora, the above 7th Interested Party/ Respondent;
- d) The Honourable court be pleased to order that licence of Samwel Mutahi Gathogo T/ A Valley Auctioneers be revoked forthwith;
- e) Such further or other consequential orders that the Honourable court may deem just to grant; and
- f) Costs of this application be awarded to the Plaintiffs/ Applicants.”

4. The application dated 4th November 2022 is supported by the affidavit of Dr. Davy Kiprotich Koech and is premised on grounds that:-

- “ 1. The 1st Defendant/ Applicant herein, is the registered owner/ proprietor of all that property known as Kericho/ Municipality Block 4/2 situate in Kericho County.
2. The 1st Interested Party/ Respondent Auctioneer herein, has in collusion with Ngugi Samuel Mukora, the 7th Interested Party/ Respondent purported to have conducted a public auction in respect of the 1st Defendant's all that property known as Kericho/Municipality Block 4/2 without following the law.
3. The impugned auction is a sham/ fraudulent auction with a predetermined intention of divesting the 1st Defendant/ Applicant of his hard earned property herein.
4. Ngugi Samuel Mukora, the 7th Interested Party/ Respondent who was allegedly declared to be the purchaser did not pay 25% of the price at the fall of the hammer or even soon thereafter as provided by the law.
5. The Auctioneer was served with an application for stay filed in Nairobi Court of Appeal in COACAPP -33 022: Dr. Dava Kiprotich Koech vs. Ethics And Anti-Corruption Commission & Others but with lack of candour and respect for court processes the Auctioneer who was seemingly hellbent in holding a public auction at all costs chose to ignore the proceedings and went ahead to conduct a sham auction.
6. The illegality/ irregularity and/or fraud by the Plaintiff and the Auctioneer complained of herein has occasioned substantial injury to the 1st Defendant/ Applicant.



7. The 1st Defendant/ Applicant is apprehensive that unless this application is urgently heard, determined and the orders sought issued, the impugned sale will be declared absolute thereby rendering this application merely academic.
 8. This application has been brought promptly.
 9. It is in the interest of justice that this application be allowed; it is therefore fair and just that this application be heard as a matter of urgency and the orders sought herein granted to vindicate the 1st Defendant/ Applicant's rights and interests over the property.”
5. Both applications are vehemently opposed. The 1st Defendant/Judgment Debtor opposed the Plaintiff's Notice of Motion dated 27th October, 2022 through a replying affidavit sworn by himself on 4th November, 2022 wherein he deposes inter alia, that he is the registered owner of the impugned property and that the title thereto is being illegally held by the Plaintiff; that he is aware of a ruling of this court which is dated 19th May 2022 which dismissed his applications dated 3rd September 2019 and 27th November 2019 and that he has appealed the ruling; that the impugned auction is a sham fraudulent auction with a predetermined intention of divesting him of his hard earned property; that it is a sham as the alleged highest bidder did not pay 25% of the purchase price at the fall of the hammer or even soon thereafter as provided by law; that no valuation of the property was conducted to ascertain their current open market and force sale values in accordance with the law hence there was no factual basis for the reserve price; that the Auctioneer was served with an application for stay filed in the Court of Appeal but he nevertheless proceeded to hold a sham auction; that no auction took place and no bidder met the reserve price; that the 1st Defendant/Judgement Debtor's Advocate on record visited the auctioneer's offices where the sale was to take place but found no auction was ongoing but instead witnessed two gentlemen who were in the office walk out hurriedly; that there is no factual basis for the certificate of sale; that although the consent was for Kshs.200,000,000/- the Plaintiff/Decree Holder has impliedly realized Kshs.222,703,000/- but has not accounted for the extra Ksh.22,703,000 or proposed how the same ought to be treated; that the Plaintiff/Applicant did not issue the Auctioneer with letters of instructions for his (1st Defendant's) perusal prior to the auction; that the property was sold to the purported purchaser at a figure lower than the amount indicated in the notification of sale; that the Auctioneer acted in a manner not befitting his office; that the properties are inherited and are not proceeds of corruption; that the illegality and or fraud by the Auctioneer has occasioned substantial injury and that no prejudice will be suffered by the Plaintiff in comparison to the great injustice he (the 1st Defendant) stands to suffer were his right of access to justice be curtailed and hence the plaintiff's application should be dismissed with costs to himself.
6. In opposition to the 1st Defendant's application dated 4th November, 2022 the Plaintiff/Respondent placed reliance on the replying affidavit of the 1st Interested party, Auctioneer Samuel Mutahi Gathogo, sworn on 18th November, 2022 in which he specifically traverses the averments in the affidavit of the 1st Defendant. He deposes that there was no order of the Court of Appeal staying the auction; that the auction in fact took place; that it took place in his office at 10.15 a.m. whereas Counsel for the 1st Defendant/Applicant arrived in his office at 10.30 a.m.; that instructions to auction the property came from the court and it was not therefore necessary for the 1st Defendant/Respondent to issue him with a letter of instruction; that sale was to the highest bidder, one Samuel Mukora Ngugi, at a bid which surpassed the reserve price and a previous bid at a prior auction of Kshs.52,000,000 whereas market value was Kshs.105,000,000; that the highest bidder in fact paid Kshs.26,375,000 being 25% deposit as evidenced by the RTGS SWIFT copy from DTB Bank; and lastly that no illegality, irregularities and/ or fraud was committed in respect to the auction.



7. The applications were thereafter canvassed by way of written submissions. Those of the plaintiff were filed on 23rd December 2022 and those of the 1st Defendant on 19th December 2022.

Issues for determination

8. Having carefully perused the application, the grounds thereof, the responses thereto, the annexures, rival submissions and the law I am of the view that the following issues present themselves for determination: -
- a) Whether the documents annexed to the affidavit of the 1st Interested Party in the application dated 27th October, 2022 comply with the law in regard to annexures and whether they ought to be considered in determining this application.
 - b) Whether there was a valid auction/or at all of the property described as Kericho/Municipality Block 4/2 on 14th September, 2022.
 - c) Whether the sale ought to be set aside or whether it ought to be declared absolute.
 - d) Whether the auction if any was fraught with illegalities/irregularities as would warrant this court to revoke the licence of Samuel Mutahi Gathogo T/A Valley Auctioneers.
 - e) Who should bear the costs of the application.

Analysis and Determination

Issue (a) Whether the documents annexed to the affidavit of the 1st Interested Party in the application dated 27th October, 2022 comply with the law in regard to annexures and whether they ought to be considered in determining this application.

9. On this issue this court is urged to reject the annexures as they do not comply with Section 19 of the *Statutory Declarations Act*. Counsel for the 1st Defendant/Judgment Debtor argued that they cannot even be saved by Article 159 of the *Constitution*. In so stating Counsel placed reliance on several decisions of the superior court which I have considered carefully and in my view wish to distinguish as the facts and circumstances in those cases were different. In this case the annexures in issue are the list of attendees, the RTGS SWIFT payment form and the certificate of sale. It is my finding that to reject these documents merely on the ground that they are not properly marked as exhibits would go against the precepts of Article 159(2)(d) of the *Constitution*. The procedural deficiency arising from failure to properly mark the exhibits does not in my view go to the substance of the dispute between the parties neither does it give one party more ground as against the other. In other words, it does not affect fair trial of the dispute. It is instructive that the genuineness of the documents was not impeached. Article 159 (2)(d) of the *Constitution* forbids this court to give more emphasis to procedural technicalities at the expense of the merit of the case or real issue in controversy between the parties. It is for that reason that I find that the documents are admissible. The affidavit to which they were annexed was a supplementary affidavit filed in response to the replying affidavit of the 1st Defendant/Judgment Debtor to the Plaintiff's/Decree Holder's application dated 27th October, 2022.

Issue (b) Whether on 14th September, 2022 there was a valid sale and/or at all of Kericho/Municipality Block 4/2.

10. From the record it is apparent and I so find that the 1st Defendant's/Judgment Debtor's properties Kericho/Municipality Block 4/2 and Kericho/Municipality Block 4/3 were earmarked for auction in execution of a decree arising from consent order recorded between the 1st Defendant and the Plaintiff



way back on 18th January 2016 and subsequently adopted as a partial judgment of the court. It is not therefore correct to allege that the properties were advertised for sale by auction because they were corruptly acquired. It is also evident that the 1st Defendant/Judgment Debtor unsuccessfully made several attempts to stop the sale including at the Court of Appeal where his application for stay of execution and stay of this suit was dismissed. (See Ethics and Anti-Corruption Commission v Dr. Davy Kiprotich Koech and Dunstan Magu Court of Appeal Application No. 92 of 2019). It is instructive that the impugned sale was the second attempt at selling the properties a previous sale having failed to attract a bid to match the reserve price. It is also noteworthy that at the time of the impugned sale there was no stay or order prohibiting the auction.

11. In regard to this issue it is not disputed that an auction of the impugned property was scheduled to take place on 14th September 2022. It is however disputed that the auction took place at all. However, upon considering the material placed before this court by the parties I do find it a fact that the auction indeed took place. I am also satisfied that there was no irregularity in the conduct of the auction and that the sale of the property was valid. My findings are supported by the following:-

- (i) That by his own admission Counsel for the 1st Defendant/Applicant went to the Auctioneer's office on the date of the auction and found some people who he however alleges left hurriedly.
- (ii) That the Auctioneer – the 1st interested party - states on oath that Counsel walked into his office a few minutes after the auction had taken place and that he informed him as much.
- (iii) That the Auctioneer – 3rd Interested party did adduce evidence of the people who attended the auction and placed bids – this through a list whose admissibility/propriety as an exhibit I have considered in issue (a).
- (iv) That the Auctioneer has also adduced evidence of payment of the 25% deposit as required of the highest bidder – this as is evidenced by the RTGS SWIT form.
- (v) That the Auctioneers did not require a letter of instruction from the 1st Defendant/Judgment Debtor as his instructions to sell flowed from the decree and warrants for execution drawn by this court.
- (vi) That the auction as conducted as required under Order 22 rules 68 and 69 of the *Civil Procedure Rules* and Section 21 of the *Auctioneers Act* and rules 17 of the *Auctioneers Rules* and that a certificate of sale was issued.
- (vii) That the mere fact of non-payment of the balance of the purchase price by the time of filing this application does not vitiate or void the sale as Order 22 Rule 70 requires that payment be made upon the delivery to the purchaser of an executed conveyance or transfer of the property an event which can only take place upon the sale being made absolute.
- (viii) That non-payment of the balance of the purchase is not of or in itself proof/evidence of fraud and no fraud or illegality has been demonstrated in this case in regard to the publishing or indeed conducting of the sale. That moreover failure to pay the purchase price does not render the sale irregular but only leads to cancellation and a resale of the property.



- (ix) That the property was valued – see the annexed valuation report - and the highest bidder did not go lower than the reserve price.
- (x) That it is not demonstrated that the 1st Defendant sustained substantial injury or at all by the sale.

12. The upshot of the foregoing is that the sale of the property was valid.

Issue (c) – Whether the sale ought to be set aside or whether it ought to be declared absolute

13. Having found that an auction took place and that no fraud or irregularity has been demonstrated to the satisfaction of this court it is the duty of this court to confirm the sale as provided by Order 22 Rule 77(1) of the *Civil Procedure Rules* and by so doing the sale shall become absolute in so far as the interest of the 1st Defendant/Judgment Debtor is concerned. Should there be default in payment of the balance of the purchase price then Order 22 Rule 71 shall apply.

Issue (d) - Whether the auction if any was fraught with illegalities/irregularities as would warrant this court to revoke the licence of Samuel Mutahi Gathogo T/A Valley Auctioneers.

14. The procedure for revocation of Auctioneer’s licences is provided for in Section 18 of the *Auctioneers Act*. The decision whether to revoke or not to revoke a licence is the preserve of the Auctioneers Board and the grounds upon which a licence may be revoked are stated in that Section. Section 24 of the *Act* provides for the manner of lodging complaints against auctioneers and the action that the Board may take upon being satisfied that the complaint has merit. It is trite that where a procedure for doing something is provided for a court of law must encourage parties to exhaust that procedure or mechanism before coming to court. It is my finding that whereas Section 28 of the *Act* provides that this court may order revocation of a licence, that would be in addition to any other penalty for an offence under the Act. In this case this court has not found the Auctioneer guilty of any offence. Clearly therefore as it stands and given the circumstances of this case this court would have no jurisdiction to grant the order for cancellation of the Auctioneer’s licence more so given its findings on issue (b) and (c) above.

Issue (e) Who should bear the costs of the application?

15. Costs follow the event except for good reason the court orders otherwise. In this case I find no reason to depart from the norm and accordingly the 1st Defendant/Judgment Debtor being unsuccessful in both applications shall bear the costs of both applications.

Disposition

- (i) The application by the plaintiff/applicant/respondent is allowed and that of the 1st Defendant/Judgment Debtor is dismissed and the sale by auction conducted on 14th September 2022 is confirmed and made absolute.
- (ii) That the Deputy Registrar of this court shall execute a transfer in accordance with Order 22 Rule 75 of the Civil Procedure Rules.
- (iii) That the 1st Defendant shall bear the costs of both applications.

Orders accordingly.

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 9TH DAY OF FEBRUARY 2023.



E N MAINA
JUDGE

