



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC. CASE NO. 3 OF 2021 (OS)

IN THE MATTER OF EVICTION PROCEEDINGS

MURSAL HAJJ ALI.....APPLICANT

VERSUS

STANLEY MAINA MACHARIA.....RESPONDENT

RULING

What is before court for determination is the Applicant's Originating Summons dated 24th March, 2021 brought pursuant to Order 22 Rule 80; Order 37 Rule 3; Order 40 Rule 1 of the Civil Procedure Rules as well as Section 99 of the Land Act. The Applicant seeks the following orders:

1. Spent
2. That this Court do issue eviction orders against the Respondent being that they are trespassing on the Applicant's land and delivery of vacant possession thereof of LR No. KAJIADO/KITENGELA/41040 and LR No. KAJIADO/KITENGELA/41044 to the Applicant.
3. That pending the hearing of this application, this Honourable Court be pleased to issue a Permanent Injunctive Order restraining the Respondents by themselves, servants, employees, agents or any other persons acting under his instructions or his interests from entering, remaining, trespassing or in any other manner interfering with all that parcel of land known as LR No. KAJIADO/KITENGELA/41040 measuring approximately 0.044 hectares and LR No. KAJIADO/KITENGELA/41044.
4. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an injunctive order restraining the Respondents by themselves, servants, employees, agents or any other persons acting under their instructions or their interests from entering, interfering with the Applicant's entry, occupation and possession, otherwise dealing, entering, remaining, trespassing or in any other manner interfering with all that parcel of land known as LR No. KAJIADO/KITENGELA/ 41040 and LR No. KAJIADO/KITENGELA/41044.
5. That Officer in Charge of Police Station in Ongata Rongai area do provide security to ensure that the order (2) hereinabove is complied with.
6. That the cost of this application be provided for.
7. That the Court do make such orders or further orders as it may deem fair and just.

The application is premised on the grounds on the face of it and the supporting affidavit of MURSAL HAJJ ALI where deposes that he is the registered proprietor of land parcel numbers LR No. KAJIADO/KITENGELA/41040 and LR No. KAJIADO/KITENGELA/41044, hereinafter referred to as the 'suit lands'. He explains that the Respondent and the former Chargee, Springboard Capital Limited entered into a Charge Agreement dated 12th November, 2015 in which the Respondent charged the suit lands. Further, under the said Charge Agreement which was registered on 18th November, 2015, the Chargee advanced the Respondent Kshs. 1,000,000/= while on 23rd January, 2018 the Respondent further charged the suit lands to the Chargee that advanced him Kshs. 750,000/=. He claims the Respondent defaulted in making the scheduled repayments of the amounts advanced to him. He avers that on 4th December, 2020, he read an advertisement in the Daily Nation Newspaper that the suit lands were to be sold by public auction on 22nd December, 2020 by messrs Carnelian Enterprises Auctioneers. Further, that he attended the auction at the Auctioneer's office located at Popman House 3rd Floor Room 317 where he emerged as the highest bidder after bidding Kshs. 2,400,000/=. He contends that he paid the full purchase price to the former Chargee of the properties that proceeded to register the transfer of the suit lands in his favour, which registration took place on 19th February, 2021. He is desirous of taking possession of the suit lands but the Respondent has refused to vacate the same and continues to occupy them unlawfully.

The Respondent opposed the application and filed a Notice of Preliminary Objection and Grounds of Opposition as well as a Replying affidavit where he contends that the Applicant's approach to the Court over the present cause of action is defective and without due adherence to lawful procedure under Civil Procedure Rules 2010; the originating summons is grossly defective and the prayers sought cannot be granted; the originating summons should be struck out; the Respondent has instituted civil proceedings at the Ngong Principal Magistrate's Court challenging the auction of 22nd December, 2020, the exercise which constitutes the present cause; the auction on 22nd December, 2020 was tainted with non material disclosure; the present proceedings should await the outcome of the Ngong's Principal Magistrate Court or else the outcome of the said cause will be rendered nugatory; and the Applicant is a party to the proceedings at the Ngong Principal Magistrates Court. In his affidavit, the Respondent contends that the Applicant seeks to evict him from the twin premises of LR Kajjado/ Kitengela/41040 wherein his dwelling house, matrimonial including family home is situated. He avers that he has challenged the auction in Ngong's Principal Magistrate Court and obtained interim orders against the Applicant including Springboard Capital Limited.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Originating Summons dated 24th March, 2021 including the respective affidavits, Notice of Preliminary Objection and Grounds of Opposition as well as rivaling submissions, the following are the issues for determination:

- Whether the Applicant is the owner of the suit lands.
- Whether the Respondent should be evicted from the suit lands.
- Who should bear the costs of the suit.

I will deal with all these issues jointly.

The Applicant in his submissions reiterates his averments in the instant application and avers that he is entitled to vacant possession of the suit lands. Further, that the Respondents should be evicted therefrom. He insists his application is compliant with the Civil Procedure Rules and the Respondent's Preliminary Objection including supporting affidavit are not merited. To support his averments, he has relied on the following decisions: **Bomet Beer Distributors Ltd V Kenya Commercial Bank Limited & 4 others (2005) eKLR; Michael Matu V Martin Luther King Andati (2017) eKLR; Simon Njoroge Mburu V Consolidated Bank of Kenya Ltd (2014) eKLR; Eric Timothy Balongo V Paul Siteya Loorkipony (2019) eKLR; Cooperative Merchant Bank Ltd V George Fredrick Wekesa Civil Appeal No. 54 of 1999; Abdullahi Sheikh Ahmed V Manderu County Government (2019) eKLR; Kenya Ports Authority V Kenya Power & Lighting Co. Limited (2012) eKLR; Mukhisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd (1969); Civil Application No. 26 of 2018 Gideon Sitelu Nkonchellah V Julius Lekakeny Ole Sunkuli & 2 others (2018) eKLR and Margaret Nyiha Gatambia & 2 Others V Peninah Ngechi Njaaga & 3 Others (2019) eKLR.**

The Respondent in his submissions reiterated his averments in the supporting affidavit, Notice of Preliminary Objection and Grounds of Opposition. He insists there was no existing Contract of Sale of land between the Applicant and himself so as to raise an issue for determination by the court involving Order 22 Rule 80 and Order 37 Rule 3 of the Civil Procedure Rules. Further, circumstances surrounding the present cause of action do not demand for the application of Section 99 of the Land Act. He avers that issues raised in the originating summons can only be canvassed by way of a Plaint and the High Court has no jurisdiction to hear the present application. Further, there is no continuous suit over the suit land between the Applicant and Respondent to warrant a direct order of eviction.

In the instant case, the Applicant purchased the suit lands which were initially owned by the Respondent through a public auction. The Respondent has declined to grant vacant possession of the said lands insisting the said public auction was irregularly done. Further, that his family and matrimonial home is situated thereon. The Respondent argues that the originating summons is grossly defective and the prayers sought cannot be granted as he has instituted civil proceedings at the Ngong Principal Magistrate's Court challenging the auction of 22nd December, 2020 as it was tainted with non-material disclosure. Further, that the present proceedings should await the outcome of the Ngong's Principal Magistrate Court or else the outcome of the said cause will be rendered nugatory. The Respondent avers that the instant application has been brought under the wrong provisions of the law and hence should be dismissed.

On the issue of technicality raised by the Respondent that the Applicant did not adhere to the proper legal procedure to institute these proceedings, I will refer to Section 19(1) of the Environment and Land Court Act which stipulates that **'in any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure and shall not be strictly bound by rules of evidence.**

While Article 159 (2) (d) of the Constitution states that **'in exercising judicial authority, the courts and tribunals shall be guided by the following principles(d) justice shall be administered without undue regard to procedural technicalities.'**

Further, Order 22 Rule 80 of the Civil Procedure Rules provides that: **'Where the immovable property sold is in the occupancy of the judgment-debtor, or of some person on his behalf, or of some person claiming under a title created by the judgment debtor subsequently to the attachment of such property, and a certificate in respect thereof has been granted under rule 79, the court shall, on the application of the purchaser, order delivery to be made by putting such purchaser, or any person whom he may appoint to receive delivery on his behalf, in possession of the property, and, if need be, by removing any person who refuses to vacate the same.'**

While Order 37 Rule 3 of the Civil Procedure Rules stipulates thus: **'A vendor or purchaser of immovable property or their representatives respectively may, at any time or times, take out an originating summons returnable before the judge sitting in chambers, for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale (not being a question affecting the existence**

or validity of the contract’

In the case of **Republic Vs. District Land Registrar, Uasin Gishu & Anor (2014) eKLR** where Justice Ochieng held that ..’ **to my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2) (d)in exercising Judicial Authority, the courts ‘in exercising judicial authority, the courts and tribunals shall be guided by the following principles(d) justice shall be administered without undue regard to procedural technicalities.’**

See also the case of **Abdullahi Sheikh Ahmed V Mandera County Government (2019) eKLR**.

It is against the foregoing while relying on the legal provisions cited above and associating myself with the quoted decision that I hold that the proceedings herein are valid as the Applicant relied on the proper legal procedures to seek the aforementioned orders.

As to whether the Respondent should deliver vacant possession of the suit lands or be evicted therefrom. In this instance, the Respondent has declined to grant vacant possession of suit lands to the Applicant who had purchased it from an auction.

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 unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.

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.”**

While in the case of **Michael Matu v Martin Luther King Andati [2017] eKLR**, the Court while dealing with a matter similar to this instant one, which was lodged through an Originating Summons granted orders of eviction.

See also the case of **Eric Timothy Balongo V Paul Siteya Loorkipony (2019) eKLR** where this Court granted eviction orders against a former Chargor who had declined to move from the suit land when the said land had been purchased by the Plaintiff in an auction.

It is against the foregoing while relying on the legal provisions cited above, and associating myself with the cited authorities that I find the Applicant cannot hold a claim against the Respondent as he purchased the suit lands from an auction and is protected by law. The Respondent’s only remedy lies against the Chargee who sold the suit lands, to compensate him in damages in case the auction was improperly done.

Further, from the averments in the respective affidavits, it is evident the Applicant is the current registered proprietor of the suit lands. I wish to make reference to Section 26(1) of the Land Registration Act which provides as follows:

‘The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except -

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.’

While Section 24(a) of the Land Registration Act stipulates as follows: ‘subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....?’

Further, Section 98 (4) of the Land Act states that upon registration of the land or lease sold and transferred by the chargee, the interest of the chargee shall pass to and vest in the purchaser free of all liability on account of the charge. I opine that even though the Respondent was the previous owner of the suit lands, once the said lands were sold to the Applicant, he lost his entitlement to them.

In the case of **WILLY KIPSONGOK MOROGO v ALBERT K. MOROGO (2017) eKLR** the Court held as follows: ‘**the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the Land Registration Act.**’

From the legal provisions cited above while associating myself with the quoted decision, I hold that since the Applicant is the absolute proprietor of the suit lands which he purchased through a public auction, he is entitled to all rights and privileges belonging or appurtenant thereto and hence entitled to protection of the law as envisaged in Sections 24, 25 and 26 of the Land Registration Act. Further, I find that the Respondent should grant the Applicant vacant possession of the suit lands or else be evicted therefrom.

On who should bear the costs of the suit.

Since the Applicant has been inconvenienced with the Respondent’s defiance to move from the suit lands, I find that he is entitled to costs.

It is against the foregoing that I find that the instant application merited and will allow it. I will proceed to make the following orders:

a) An eviction order be and is hereby issued against the Respondent directing him to deliver vacant possession thereof of LR No. KAJIADO/KITENGELA/ 41040 and LR No. KAJIADO/KITENGELA/41044 to the Applicant, within Ninety (90) days from the date hereof.

b) An order of injunction be and is hereby issued restraining the Respondents by themselves, servants, employees, agents or any other persons acting under their instructions or their interests from entering, interfering with the Applicant’s entry, occupation and possession, otherwise dealing, entering, remaining, trespassing or in any other manner interfering with all that parcel of land known as LR No. KAJIADO/KITENGELA/41040 and LR No. KAJIADO/KITENGELA/41044.

c) The Officer in Charge of Police Station in Ongata Rongai area do provide security to ensure that the order (a) and (b) hereinabove is complied with.

d) The Applicant is granted costs of this application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 4TH DAY OF OCTOBER, 2021

CHRISTINE OCHIENG

JUDGE