



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELCA NO. E12 OF 2020

JULIA KAINDA M'MBIJIWE.....APPELLANT

VERSUS

LUKE MURIUNGI MAKATHIMO.....RESPONDENT

(Being an appeal from the Judgment of Hon. T.M. Mwangi (S.P.M.)

delivered on 18th October, 2020, in Meru C.M.'S ELC No. 79OF 2019)

RULING

1. The application before the court seeks restraining orders stopping the intended sale by way of public auction of the appellant's properties; confirmation of existence of status quo since 9.2.2021 and thirdly, declaration that the public auction on 30th August, 2021 against the deceased Julia Kainda M'Mbijiwe was unlawful and of no consequence.
2. The application is supported by an affidavit sworn on 25th August, 2021 by Euncie Karimi Mbijiwe.
3. The grounds in support are that: upon delivery of judgment by the lower court on 15.10.2021 an appeal was preferred but the appellant passed on 4.2.2021; before a legal representative would be enjoined, the decree holder purported to execute through public auction of the deceased properties contrary to law, yet there were existing orders of status quo granted by this court on 9/2/2021.
4. The applicant relies on both oral and written submissions made on 27.9.2021 and dated 27.9.2021. Reliance has been made on ***Bakari Ibrahim –vs- Isa Ibrahim (2016)*** eKLR on implications of no-compliance with **Section 37 (1)** of the **Civil Procedure Act** and ***Maxam Ltd & 2 Others –vs- Heineken East Africa Import Co. Ltd & 2 Others [2017]*** eKLR.
5. On reinstatement and extension of the interim orders; ***Spire Bank Ltd –vs- Gladys Njeri Wainaina & Another [2020]*** eKLR on the proposition that where there is no memorandum of sale produced, it means there was no proof of the existence of a purchase hence the court has powers to set aside the alleged public auction; ***Satwant Singh Dhanjal & 2 Others –vs- Kenya Revenue Authority [2005]*** eKRL on the proposition that title in the goods in an auction passes to the purchaser at an auction in terms of the rules of the auction, whereby the highest bidder pay 25% of the bid price, and the balance within the specific period; ***Joseph Thiga Kariuki suing as the legal representative of the estate of Pauline Wanjiku Thiga (Deceased) –vs- Joseph Kahonoki Njoroge & Another; Sarah Wanjiku Kahonoki (Objector) [2020]*** eKLR on the proposition that the moment a judgment debtor passes on the situation changes and the decree holder can only execute the decree against the administrator of the estate otherwise it would be contrary to **Section 35 of the Law of Succession Act and Order 24 Rule 4 of the Civil Procedure Rules; Athman Omar Zuberi –vs- Mamson Aso Apinde [2012]** eKLR on the proposition that nothing can proceed against a dead party except through substituting him or her by legal representative.
6. The respondents oppose the motion through a replying affidavit by Luke Muriungi Makathimo sworn on 25th September 2021 as well as written submissions dated 15th October 2021.
7. The first ground is that the status quo granted was limited to filing an application for the substitution of the deceased with a legal representative Euncie Mbijiwe for only two months with a condition that Kshs. 1 million security be deposited which lapsed without compliance, and in which there was no application for extension.
8. Secondly the respondents maintain the application is a delaying tactic to deny them a chance to enjoy fruits of the judgement.
9. Thirdly, the respondent maintains stay orders were only served on 1st September 2021 after execution had taken place.

10. Forth is that there was inordinate delay after lapse of the conditional period.

11. Fifth the respondents maintain the application is an afterthought, amount to abuse of the court process given the application dated 12th November 2020 has never been prosecuted and court orders given twice have never been obeyed hence the applicant does not deserve any more discretionary orders.

12. Sixth, the respondents take the view this application is overtaken by events given the demolition occurred, auction took place and an interested party (bidder) has paid his deposit as per the attached cheque.

13. On the issue of execution, the respondents takes the view, execution was done against the legal representative of the estate upon substitution and not the deceased.

14. Lastly the respondents aver the applicant was duly notified of the impending sale by the auctioneer, took no action until the last minute so as to frustrate him yet he has obeyed the decree, demolished his house, refunded monies to third parties as ordered but now he is being once again frustrated by the applicant through endless delaying tactics which this court should not entertain.

15. The respondent further relies on written submissions dated 15.10.2021.

16. Having gone through the rival affidavits, written and oral submissions by the parties, several issues arise for determination:

i. Whether or not there was in existence of orders of status quo.

ii. What was the status quo?

iii. For how long was the status quo to subsist?

iv. When was the deceased estate allowed to be substituted?

v. Was the decree amended to include the legal representative?

vi. If the execution process was undertaken against the deceased or against the legal representative.

vii. If at the time the execution took place, there was in existed any orders of stay or maintenance of status quo.

viii. If the auction sale took place as alleged or at all.

ix. If the auction sale ever took place, was it lawful or not.

17. On 19.12.2020, the applicant came to court under certificate of urgency for stay in which the court gave conditional stay that Kshs. 1 million be deposited within 21 days failure of which it shall lapse with interpartes hearing on 2.2.2021.

18. On 2.2.2021, counsels appeared and the reason given for no-compliance was that the applicant had had an amputation, and a request was made to substitute the amount with a title deed. Further the court was told the respondents had also not demolished the house within 75 days. Directions were given that the hearing be virtually done on 9.2.2021. The court also gave orders of status quo to be maintained.

19. Parties again appeared on 9.2.2021 in which the counsel for the applicant reported his client had died on 4.2.2021 and sought to substitute within 90 days. A request was also made for status quo to be maintained. The court gave a mentioned date for 14.4.2021 so as to substitute the deceased. The court also gave orders of maintenance of status quo. On 14.4.2021 both counsels appeared in which it was confirmed an application for grant ad litem had been filed and a record of appeal served. Parties went before the Deputy Registrar the same day who gave another date 6.5.2021 during which it was confirmed the application for substitution was in the court file as well as a duly filed record of appeal. Parties were given a date by consent of 5.10.2021 for directions.

20. On 30.8.2021 the court confirmed orders of status quo were operational and made in good faith since one of the parties had passed on and certified the application as urgent, allowed prayer 2 a conditional stay to deposit of Kshs. 1 million and gave an interpartes hearing for 27/9/2021.

21. The record shows the applicant complied with the stay orders by depositing Kshs. 1 million on 7.9.2021.

22. Now turning to the 2nd issue, it is not in dispute that the lower court decree was signed by the court on 28.1.2021; where the judgment debtor is described as Julia Kainda M'Mbijiwe. The respondent took out warrants of attachment dated 17th May 2021 in favour of M/s Bealine Kenya Auctioneers bearing the names of judgment debtor as Julia Kainda M'Mbijiwe to dispose of Parcel No's Kibirichia/Kibirichia/5797 & 5798. Receipt copies of searches also indicated the parcels were in the names of the deceased.

23. Further the application for execution of the decree signed by M/s D.M. Nyamu & Co. Advocates, the decree holder declared the information as stated in form No. 14 as true. The notification of sale dated 25.5.2021 also indicates the respondent as Julia Kainda M'Mbijiwe. The same position also obtains in the newspaper advertisement for 16th August, 2021.

24. Given the foregoing records it is quite obvious the respondents took out the execution process while aware the deceased was dead and there were subsisting orders of status quo.

25. Further the application for substitution was never allowed since the same was coming for hearing on 27.9.2021.

26. Again the lower court file does not indicate at all if the respondents ever sought for the substitution of the decree with the legal representative, yet it was disclosed to them on 9.2.2021 that she was deceased.

27. Instead of following the law the respondents proceeded to extract the decree, took out warrants of execution in the name of the deceased, advertised for auction sale of her land and purportedly proceeded to auction the land without at the very least notifying the legal representatives through a notice to show cause why execution should not issue against the estate of the deceased.

28. Given the said missteps, the contents of paragraph 16 of the replying affidavit are not only misleading but also confirms there was a serious attempt by the respondent and his lawyers to steal a march from the applicants and by extension intermeddle with the estate of the deceased.

29. Again issues have been raised as to whether any auction sale took place and whether or not the auctioneer was notified, that there were orders stopping the auction sale. The auctioneer has not expressly sworn an affidavit to confirm or deny those factual issues despite service of the application. The inference is that either he does not wish to respond or there was complicity. He ought to have known the deceased was already dead. The information was relayed as early as 9th February, 2021. The decree was signed on 28.1.2021 but the rest of the documents of execution were signed after the demise of the judgment debtor especially the application for execution to which the law firm on record for the decree holder certified the information as correct.

30. A prohibitory order was also caused to be signed by the Deputy Registrar in which it was clear the deceased was no more yet execution took place without amending the decree and the rest of the execution papers. This was in flagrant disregard of the **Section 37**, of the **Civil Procedure Act**, **Order 24 Rule 4** and **Section 64** of the **Law of Succession Act**.

31. In the premises this court comes to the irresistible conclusion that the application dated 25.8.2021 has merits. The same is allowed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 17TH DAY OF NOVEMBER, 2021

In presence of:

Munene for appellant

Miss Nyamu for respondent

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE