



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL CASE NO. 80 OF 2012**

**SOLOMON NGARI GATOTO**

**JOHN PETER NDUNGU.....APPLICANTS**

**VERSUS**

**DANIEL NDIRITU WACHIRA.....RESPONDENT**

**RULING**

**Introduction**

1. This application dated 10<sup>th</sup> April 2020, under Section 3A, 1A & 1B, 63 (e) of the Civil Procedure Act and **Order 22 Rules 77 and 79, Order 23 Rule 10 of the Civil Procedure Rules** seeks for orders of confirmation of sale by public auction conducted by Hippo Auctioneer General Merchant in respect of Plot Nos. 31B Ndunyu Market measuring 0.0304 acres and 14 Ndunyu Market measuring 0.0605 acres pursuant to a court judgment. The application further seeks issuance of a certificate of sale in respect of Plot Nos. 31B Ndunyu Market to Gerald Kingori Muga and 14 Ndunyu Market to Solomon Kiragu Muchiri as the bona fide purchasers and that the County Executive in charge of Land Department, Nyeri County, do effect the said changes in their register.

2. In opposition of the said application, the respondent filed a Replying Affidavit dated 26<sup>th</sup> November and filed in court on 30<sup>th</sup> November 2020. Additionally, the respondent filed a Preliminary Objection dated 15<sup>th</sup> January 2021.

**The Applicants' Case**

3. It is the applicants' case that judgement was delivered on 14<sup>th</sup> March 2014 in which the court ordered that the Plot Nos. 14 and 31B Ndunyu Market be sold by public auction and the proceeds be shared amongst the applicants and the respondent. Notably, the sale of the plots was conducted by public auction by Hippo Auctioneer General Merchant on 23<sup>rd</sup> December and 23<sup>rd</sup> May 2019 respectively.

4. As such, the sale ought to be made absolute and a certificate of sale issued in respect of the Plot Nos. 14 and 31B Ndunyu market.

5. The applicants contend that no prejudice will be suffered if the said sale is made absolute. Further that it is in the interests of justice that the County Executive Nyeri county, effect the said changes in their register.

## **The Respondent's Case**

6. It is the respondent's case that the application is incompetent, misconceived and bad in law in that all the plot owners are registered with County Government of Nyeri as per the order of Chief Magistrate's Court at Nyeri award case No. 69 of 2000 who have not been made parties in the suit herein and the decree dated 19<sup>th</sup> August 2014. Further that the personal representatives of Wachira Kinyua and Esther Nyakihui Wachira (deceased) have been omitted in the plaint and the decree in HCCC No. 80 of 2012 and also on the certificate of sale dated 23<sup>rd</sup> December 2010 making the plaint, decree and certificate of costs null and void. Additionally, HCCC No. 80 of 2012 is defective in that Daniel Nderitu Wachira is not the registered owner of Plot Nos. 14 and 31B Ndunyu Market and neither is the administrator or personal representative of Wachira Kinyua.

7. Moreover, Wachira Kinyua or his personal representatives ought to be joined as a defendants herein, but none of them have been as legal representatives of the deceased.

8. The respondent contends that the certificate of sale dated 22<sup>nd</sup> November 2019 and 23<sup>rd</sup> November 2019 are defective and a nullity as they purport to dispose of properties of deceased persons who are not a party to the suit CMCC No. 80 of 2012 and HCCC No. 80 of 2012. Therefore, the suit herein ought to be struck out or stayed pending the appointment of the personal representatives of Wachira Kinyua and Esther Nyakihui who should be given leave to defend this suit. Despite the respondent being a son to Wachira Kinyua, he is not an administrator nor a personal representative and hence cannot be sued on behalf of the deceased's estate.

9. The respondent contends that the order made in award No. 69/2000 by W. K. Korir on 10<sup>th</sup> November 2000 be declared a nullity since the District Disputes Land Tribunal had no jurisdiction to make the award. In saying so, the respondent relies on the cases of **ELC Appeal No. 7 of 2017 Kerugoya Margaret Wangechi Kahoya vs Winfred Esther Wangari Mutugi; Samuel Kamau Macharia & Another vs Kenya Commercial Bank & 2 Others (2012) eKLR and Mateo Githua Ngurukie vs Hon. Attorney General & 5 Others.**

10. Parties hereby disposed of the application by way of written submissions. A summary of their rival submissions is as follows:-

## **The Applicants' Submissions**

11. The applicants submit that the respondent in his replying affidavit raised issues that were already addressed by the court in its judgment, however the respondent has never appealed against the said judgment yet the properties have already been sold by public auction. Thus, the respondent is trying to re-open the case through his replying affidavit. The applicants rely on the case of **ELC Case No. 290 of 2017 (Formerly Kisii ELC Case No. 96 of 2016 Grace Adhiambo Ogaga (suing as the legal representative of the Estate of Turufena Kemunto Ogaga) vs William Ochieng Ogaga & 3 Others [2018] eKLR.** The applicants contend that the application herein is res judicata by dint of section 7 of the Civil Procedure Act and thus the court herein has no jurisdiction to entertain such a matter. The applicants further relied on the case of **Abdallah vs Building Centre (K) Limited & 4 Others (2014) eKLR and Philip Muchiri Mugo vs Mbeu Kithakwa [2015] eKLR.** Moreover, the applicants contend that the preliminary objection herein is unmerited and ought to be dismissed with costs. Relying on the case of **Mapema Holdings Limited vs Thika Diaries Limited & 4 Others [2020] eKLR.**

12. It is noteworthy that the submissions by the applicants are contradictory and do not seem to be relevant or arguing their case herein.

## **The Respondent's Submissions**

13. The respondent submits that in the matter herein, Wachira Kinyua (deceased) is the owner of Plot Nos. 14 and 31B Ndunyu Market and since succession has not taken place in respect of his estate, the suit

herein is a nullity since the applicants have sued the wrong party who is not an administrator the estate of the deceased. Further, the respondent contends that he is a mere intermeddler and not an administrator and thus the suit herein is a nullity. Moreover, the interests of the estate and co-owner Esther Nyakihui (deceased) has not been taken into consideration in the suit or judgment.

14. The respondent further contends that the judgment herein in which the said properties were instructed to be sold by public auction and the benefits shared amongst the parties herein, ought to be set aside or appealed against.

15. The respondent further submits that the applicants herein have no locus standi to commence the suit herein as their registration as co-owners arose from an elders award adopted by the Chief Magistrate court in Nyeri award case no. 69 of 2000 which is a nullity as well. The respondent relies on the cases of **ELC Appeal No. 7 of 2017 Margaret Wangechi Kahoya vs Winfred Esther Wangari Mutugi; Samuel Kamau Macharia & Another vs Kenya Commercial Bank & 2 Others (2012) eKLR and Mateo Githua Ngurukie vs Hon. Attorney General & 5 Others Nyeri High Court Suit No. 206 of 1999.**

16. The respondent concludes his submissions by urging this Honourable Court to decline approving the Certificate of Sale by Hippo Auctioneers General Merchants.

### **Issues for determination**

17. After careful analysis, we humbly submit that the main issue for determination is:

a) Whether the application is merited.

### **The Law**

#### **Whether the application is merited.**

18. **Section 48 of the Civil Procedure Act** provides:-

**Where immovable property is sold in execution of a decree and the sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.**

19. **Order 22 Rule 77(1) of the Civil Procedure Rules** provide that:-

**Where no application is made under Rule 74, 75 or 76, or where such application is made and disallowed, the court shall make an order confirming the sale, and thereupon the sale shall become absolute in so far as the interest of the judgment debtor in the property sold is concerned.**

20. On perusal of the record, it is not in doubt that a sale was conducted by public auction on 23<sup>rd</sup> December 2019. The 1<sup>st</sup> applicant paid Kshs. 2,200,000/- and the 2<sup>nd</sup> applicant paid Kshs. 1,200,000/-. The Memorandums of Sale was annexed to the application. A Certificate of Sale was each issued to the applicants by Hippo Auctioneers General Merchants dated 22<sup>nd</sup> November 2019 and 23<sup>rd</sup> December 2019 respectively.

21. The respondent on the other hand did not file any application challenging the said sale or setting aside the certificate of sale. Instead he has raised a preliminary objection arguing that the entire proceedings are a nullity and that though the property was owned by Wachira Kinyua and Esther Nyakihui, no legal representative has been appointed to represent those interests.

22. Considering there is no application before this court challenging the sale nor an application to set aside the certificate of sale, and that the preliminary objection lacks merit, I am of the opinion that the application dated 10/4/2020 be allowed. As such, the sale herein conducted by public auction on 23<sup>rd</sup>

December 2019 is declared absolute.

23. Contrary to the arguments of the respondent, on appointment of personal representatives in respect of the estate of the deceased proprietors of the suit land in this case HCCC No. 80 of 2012, I note from the record that some appointment was made. Joseph Waitiki Gatoto was appointed representative in the estate of his mother Esther Nyakihui Wachira who was the wife of the original defendant herein Wachira Kinyua on 01/10/2001. Judgement in this case was delivered on 14/03/2014. The plaintiffs now the applicants in this case testified as to the ownership of the cases before the court having stepped in to take the place of the deceased parents.

24. On perusal of the judgement of Ombwayo J. he entered judgement in favour of the three plaintiffs and ordered that plots No. 14 and 31B Ndunyu Market are owned jointly by the plaintiffs and the deceased defendant Wachira Kinyua and Esther Nyakihui Wachira also deceased. The court further also ordered that the plots be sold by public auction and the proceeds shared by the parties.

25. The parties in this application stepped in to represent their deceased parents and the plots were sold by Hippo Auctioneers on 23/05/2019 and 23/12/2019 and proceeds shared by the respective parties or their representatives as shown by the record.

26. The Land Disputes Tribunal award filed in court on 10/02/2000 and adopted as judgement of the Chief Magistrate court in CMCC Award Case No. 69 of 2000 on 1<sup>st</sup> December 2000 has not been challenged in a court of law as null and void. However, it is trite law that Land Disputes Tribunal had no jurisdiction to determine issues of ownership of land.

27. None of the parties appealed the judgement of ELC court in this matter and it is therefore still valid. The auctioneer and the parties executed the orders of the court on the sale and on sharing the proceeds. The sale having taken place and certificates and memorandums of sale having been duly filed. The law provides that an application to confirm the sale be filed and orders be issued in the event that none of the parties has challenged the sale.

28. The said sale by public auction was never challenged and the respondent has not shown any sufficient cause to oppose this application.

29. I find the preliminary objection not merited and dismiss it accordingly.

30. The application dated 10<sup>th</sup> April, 2020 is in my view merited and I hereby allow it as prayed. The sale by public auction conducted on 23/05/2019 and 23/12/2019 is hereby declared absolute and certificates of sale be issued in respect of plots No. 31B and No. 14 Ndunyu Market . The respective purchasers Gerald Kingori Muga for plot No. 31B and Solomon Kiragu Muchiri for plot No. 14 both situated in Ndunyu market be registered proprietors.

31. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 3<sup>RD</sup> DAY OF JUNE, 2021.**

**F. MUCHEMI**

**JUDGE**

**Ruling delivered through video link this 3<sup>rd</sup> day of JUNE 2021**