



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 483 OF 2015

PATRICK KIMATHI MUCHENA.....APPLICANT

VERSUS

MICHAEL MWASA KILONZO.....RESPONDENT

RULING

1. The application dated 21st June 2016 was filed by the Client, **MICHAEL MWASA KILONZO**. The respondent is the Advocate, **PATRICK KIMATHI MUCHENA T/A ARIMI KIMATHI & Co. ADVOCATES**.
2. The first relief sought is that the firm of **J. OGADA & Co. ADVOCATES** be granted leave to come on record in place of **ONGEGU & ASSOCIATES ADVOCATES**.
3. The second relief was for the interim stay of execution of the Vesting Orders which were granted on 9th June 2016.
4. Thirdly, the client asked for a review of the Vesting Order, which would vest the suit property in the purchaser, **JULIUS CHUMBI WAITIKI**. The suit property is **L.R. No. 337/1500 ATHI RIVER**.
5. The primary reason advanced by the client for seeking a review of the Vesting Order was that the public auction at which the property was sold, was illegal and unprocedural for non-compliance with mandatory provisions of the law.
6. The client submitted that the sale resulting from the alleged illegal and unprocedural public auction was invalid.
7. The specific requirement which was flouted was identified as Order 22 Rule 57 of the Civil Procedure Rules, which provides as follows;

“1) Where any property is ordered to be sold by public auction in execution of a decree, the court shall cause public notice and advertisement of the intended sale to be given in such manner as the court may direct.

2) Such public notice shall be drawn up after notice to the decree-holder and judgement-debtor, and shall state the time and place of sale, and specify as fairly and accurately as possible –

a) the property to be sold;

b) any encumbrance to which the property is liable;

c) the amount for recovery of which the sale is ordered;

and;

d) every other thing which the court considers material for a purchaser to know in order to judge the nature and value of the property:

provided that notice to the judgement-debtor may be dispensed with, or substituted service thereof ordered, for reasons to be recorded by the court?.

8. The client stated that he was never served with a notice prior to the sale. That omission is what the client contends as constituting an irregularity.

9. The second aspect constituting an irregularity is the auctioneer's failure to serve the notice and advertisements stipulated by Rules 15, 16 and 17 of the Auctioneers Rules.

10. Rule 15 (d) requires the auctioneer to give in writing, to the owner of the property a notice of not less than 45 days within which time the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction.

11. Rule 16 spells out the particulars which are to be contained in the advertisement by the auctioneer. In this case, the client did not specify the specification which was not complied with.

12. Rule 17 stipulates how the auctioneer is required to conduct the public auction.

13. The client did not specify the particular requirement which the auctioneer did not adhere to.

14. However, on the basis of the non-service of the requisite notices, the client submitted that the sale was invalid.

15. And because the client perceives the auction to have been invalid, he submitted that the court should not have granted the Vesting Order. That is the reason why the client asked the court to review the Vesting Order.

16. In answer to the application, the advocate faulted the client for failing to make reference to the consent order which had been recorded between the client and the advocate. It was his position that the 2 parties had agreed to the sale of the suit property, in the event that the client was in default.

17. As the client was in default, the advocate submitted that it was proper for the advocate to take steps to have the suit property sold by public auction.

18. Secondly, the advocate noted that the application was seeking the review of the Vesting Order, without asking that the said Vesting Order be set aside.

19. Thirdly, the complaints raised by the client were all directed at the auctioneer who conducted the sale. However, the client had failed to enjoin the auctioneer to the application.

20. In any event, as far as the advocate was concerned, the application had not met the rules governing review. The reason for that submission was that the advocate saw nothing new being raised by the client.

21. The advocate accused the client of coming to court with unclean hands, considering that the client was seeking a review of the Vesting Order whilst being aware that he had not paid the decretal amounts.

22. Finally, the advocate informed the court that he had received the full decretal amount from the auctioneer, and that the excess had been deposited in court.

23. The purchaser also opposed the application. The first point made was that, although the client had sought the setting aside of the Vesting Order, the said client had failed to give reasons to warrant such an order.

24. In any event, the purchaser submitted that the client had not demonstrated that he had become aware of some new facts, after the court had granted the Vesting Order. In the absence of any such new facts, the purchaser submitted that the client had not met the requirements for review, as set out in Order 45 of the Civil Procedure Rules.

25. The purchaser pointed out that pursuant to Section 48 of the Civil Procedure Act, the property vested on the purchaser at the fall of the hammer.

26. In this case, the purchaser added that he was an innocent purchaser for value.

27. Noting that the client had alluded to fraud, the purchaser observed that the client had not enjoined to the application, the auctioneer against whom the allegations of fraud appear to have been made.

28. In any event, the purchaser said that the client had not asked the court to set aside the sale.

29. And if he wanted to seek the setting aside of the sale, the purchaser noted that the client should have deposited 10% of the purchase price, as provided for by Order 22 Rule 74.

30. It is to be noted that when any person whose interests are affected by the sale of an immovable property, in the execution of a decree, Order 22 Rule 75 permits him to seek the setting aside of such sale if there was a;

“material irregularity or fraud in publishing or conducting it?.

31. Under Rule 75, there is no requirement that the applicant should deposit 10% of the purchase price.

32. The purchaser price acknowledged that the client had alluded to fraud in this case. Therefore, by implication, it may be deemed that the client had in mind Rule 75. However, the client has not sought an order to set aside the sale. He has only asked for a review of the Vesting Order.

33. But the client nonetheless urged the court to refuse to give comfort to an illegality. It is his submission that an illegality cannot be cured by anything.

34. I appreciate the fact that the client was not seeking to disown or side-step the consent order pursuant to which the advocate was enabled to have the suit property auctioned if the client had defaulted.

35. The client acknowledges default, but blamed it on the advocate’s failure to play his part. The advocate was supposed to have lifted the prohibitory order which he had had registered against the title. It is after the prohibitory order was lifted that the client would have been able to obtain a loan facility from the bank, which he would have utilized to settle the advocate’s negotiated fees.

36. Although the client was blaming the advocate, I have noted that the client did acknowledge that he did not comply with the agreed time-lines. His explanation for not complying was that he had been indisposed.

37. Whilst the reason for his non-compliance may be legitimate, the bottom-line is that it is the said non-compliance which triggered the sale by public auction.

38. In his reply to the respondents’ submissions, the client submitted that it would be unfair to order him

to give access to the Government Valuer to access the suit property for the purposes of valuation. He believes that the question as to whether or not the Government Valuer should be allowed access into the property, should only be made after the court has determined the issue concerning the legality of the sale.

39. I find that the client was now asking the court to determine a matter which he did not raise in his application. The application was only for the review of the Vesting Order. There is no application before me, seeking the setting aside of the sale.

40. In conclusion, I find that the client has not met the requirements under Order 45 Rule 1 of the Civil Procedure Rules. He has not demonstrated the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made.

41. The client has also not demonstrated any mistake or error apparent on the face of the record, to warrant a review.

42. And, finally, the client has not demonstrated the presence of any other sufficient reason that would warrant the review of the Vesting Order.

43. Accordingly, the application dated 21st June 2016, in so far as it is in relation to the request for the review of the vesting order, is dismissed. The respondents are awarded the costs of the said application.

DATED, SIGNED and DELIVERED at NAIROBI this 24th day of January 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Odongo for Ogada for the Applicant

Kimathi for the Decree-Holder/ Respondent

Maondo for the Purchaser

Collins Odhiambo – Court clerk.