



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL SUIT NUMBER 722 OF 1994**

**KIPSIGIS TUGEN FARM ENTERPRISES .....PLAINTIFF/APPELLANT**

**VERSUS**

**STEPHEN NGERECHI .....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**DAVID K. KORIR.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**AND**

**DANIEL NYAMBATI NYABUTO.....INTERESTED PARTY**

**RULING**

1. There are two applications filed by the Interested Party for the court's determination.
2. By its application dated **3<sup>rd</sup> April 2014**, the interested party sought the following orders:-
  - (1) ----
  - (2) *That the court issue an order confirming the sale of the property **Nakuru Municipality Block 24/1879** to the interested party and the sale be declared absolute.*
  - (3) *That a certificate of sale do issue to the interested party Daniel Nyambati Nyabuto.*
  - (4) *That the 1<sup>st</sup> Defendant/Judgment Debtor and/or his tenants be compelled to deliver vacant possession of the property by putting the Interested Party in possession and in default the first Defendant/Judgment Debtor and/or his tenants be evicted from the property.*
3. The second application is dated **30<sup>th</sup> September 2014** and is brought under the provisions of **Section 1A, 1B 3 and 3A of the Civil Procedure Act**. The interested party seeks:
  - (1) *That the court be pleased to confirm **JAMES MUIGAI** as the gent to collect rent to the suit property know as **Nakuru Municipality Block 24/1879**.*
  - (2) *That costs of this application be borne by the first Defendant.*

The two applications are very closely related, and shall be dealt with simultaneously.

4. The applications are strenuously objected to by the first defendant. The second respondent has no interest in the applications. The parties opted to file written submissions.

5. The first Defendant and Respondent in both applications raised two grounds of objections.

(1) *That the interested party having not been party in the main suit, and having joined the matter long after the case was decided, at executions stage, ought to have filed a separate suit to urge his interested in the suit property as a bona fide purchaser in a public auction where the suit property was sold in execution of court decree. It is his submission that the orders sought in both applications cannot be granted on application but through a substantive suit. It is his further submission that the appropriate suit ought to be the Environment and Land Court.*

(2) *That first Defendant objects to the hearing of the applications on issue of lack of Jurisdiction by the High Court, and submits that the court that has the necessary jurisdiction is the Environmental and Land Court. He has urged the court to dismiss both applications.*

6. This court will address itself in the matter of jurisdiction, as without jurisdiction the court cannot take a step forward.

It is trite that jurisdiction is everything that without it, a court has no power to make a step. It ought to down tools as anything done without jurisdiction is a nullity. See the “**Lillian S”-Owners of Motor Vessels “LillianS” -vs- Caltex Oil Ltd (1989) e KLR** and **Samuel Kamau Macharia and Another -vs- KCB (2012) e KLR** among other decisions.

#### 7. **Submissions by the first defendant on jurisdiction**

Mr. Karanja Mbugua Advocate for the first defendant/respondent felt strongly that the issues raised by the interested party in the applications under review cannot be in a “part-heard” case as he was not a party to the main suit, that he came in the suit at execution stage and circumstances stated above, where he bought the suit propriety in a public auction in execution of a valid decree of the High Court in this case. Citing the **Constitution Article 165(5)**, it is his submission that the High Court has no jurisdiction on matters reserved for the **Environment and Land Court by Article 162(2) and the Environment and Land Act No.12A Sections 13(d) and 13(e) of the Act**. Being aware of the Practice Directions issued by the Hon. The Chief Justice that part heard Land Cases by the High Court ought to be continued and concluded in the High Court, it is his submissions that the Hon. The Chief Justice, by the said practice and direction notes cannot give jurisdiction to the High Court in disregard to the express constitutional provisions. He cited the case **Karisa Chengo, Jefferson Kalama Kengha and Kitsao Charo Ngati -vs- Republic, Criminal Appeal Nos. 44, 45, and 76 of 2014 [2015] e KLR** where the Honourable Judges of Appeal at Malindi rendered themselves thus:

***“It is therefore clear that the High Court cannot deal with matters under Section 13 of the Environment and Land Act.”***

8. On the Honourable The Chief Justice's Practice and Direction notes issued from time to time, it was his submission that the Chief Justice has violated the Constitution by conferring power to the High Court Judges to hear land matters. He therefore concluded that this court is without jurisdiction to determine the two applications under review.

9. The applicant and interested party did not tender any submissions on this very important matter on jurisdiction.

This court is aware that the **Malindi Karisa Chengo Case(Supra)** appeal is pending determination in the Supreme Court.

However, in the Supreme Court case **Samuel Kamau Macharia and Another -vs- Kenya Commercial Bank Ltd (2012) e KLR – Application No. 2 of 2011.**

The Honourable Judges stated:

*“A court's jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second Respondent in his submissions that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter for without jurisdiction, the court cannot entertain any proceedings. Where the constitution exhaustively provides for the jurisdiction for a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovations.*

10. The applicant seeks an order for confirmation of a sale of land and a certificate of sale, collection of rent and/or eviction of the tenants all premised upon **Section 48 of the Civil Procedure Act** that states:

*“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 the sale becomes absolute.”*

**Sections 78, 79, 80 and 81** are relevant as they state the procedure that a purchaser under the above circumstances ought to take to have vesting orders of the property to him.

11. This court poses to ask itself. What is the cause of action in the matter before the court?

The plaintiff filed a suit against the defendants on the 2<sup>nd</sup> November, 1994 who were directors of the plaintiff company. It was alleged that during their term in office as directors, they misappropriated the company funds. The plaintiff urged the court to order a refund of Kshs.1,296,064/= by the first Defendant and Kshs.568,400/= by the second defendant.

After the trial, the court found in favour of the plaintiff and entered judgment against the two defendants as prayed.

The first defendant had difficulties in the repayment of the sum of Kshs.1,296,064/= that prompted the plaintiff as decree holder to take out execution proceedings under **Order 22 of the Civil Procedure Rules**. The Decree holder opted to exercise this right of execution by attachment and sale of any property of the judgment debtor under **Section 38 of the Civil Procedure Act**.

12. By consent of both the decree holder and the judgment debtor, the sale by public auction was stopped in the first instance upon terms that the decree holder was unable to fulfill. Eventually the property, subject of this suit was sold in a public auction to recover the decretal sum.

In his ruling, dated the 28<sup>th</sup> February 2014, Justice Emukule found the sale to have been lawful and declined to set aside the auction conducted on the 11<sup>th</sup> July 2012 whereby the interested party was declared the purchaser.

13. Do execution proceedings by way of attachment and sale of immovable property under the provisions of **Section 44-48 of the Civil Procedure Act and Order 22 Rule 79-81 of the Civil Procedure Rules** fall under the jurisdiction of the Environment and Land Court or in the High Court?

In my considered view, the case is premised upon a commercial transaction (See plaint). The

property was sold in execution of the decree arising from the commercial transaction governed by the Civil Procedure Rules. It was never a matter of a dispute involving any land transaction, in the use, occupation of, and title to land.

**Section 44 of the Civil Procedure Act** provides that all property belonging to a judgment debtor is liable for attachment and sale in execution of a degree.

**Section 48 of the Act** provides that:

*“Where immovable property is sold in execution of decree and the sale has become absolute the property shall be deemed to have vested in the purchaser from the time when the sale becomes absolute.”*

14. The provisions of **Order 22 Rules 79-81** of the **Civil Procedure Rules 2010**, sets down the procedure to be followed once the immovable property has been sold in execution of the decree to finally vesting the property to the purchaser by a court order.

For the above reasons, this court finds that the first Respondent's submissions that this court has no jurisdiction to determine the application misplaced. If it was intended that sale of properties in execution of decrees were under the Environment and Land Court, the drafters of the Constitution as well as the Environment and Land Act would have expressly stated so.

15. It was a further submission by the first defendant that the interested party ought to have filed a fresh suit to enforce the orders he is seeking, that such orders cannot be granted on an application but after a full hearing in the land court. This court has already declared that it has jurisdiction over the matter.

The interested party ably submitted that the execution proceeding were ordered in this case after parties exhausted the legal mechanism as provided under the **Civil Procedure Rules**.

16. There is no dispute as to ownership of the property. In **Ochieng' Onyango, Kibet and Ohanga Advocates -vs- Adopt a Light Ltd (2010) e KLR, Koome, J** (as she then was) held the view that filing separate suit to enforce execution would prolong the proceeding and there were no justifiable reasons to do so as it should not only subject parties to unnecessary expenses. This was a matter of Advocate-client costs and she ordered that the certificate of costs be made a judgment of the court in the same case.

17. In the present suit the court is of the view that the order sought, being execution orders, are better dealt within this substantive case. There would be no reason to put the interested party to further expense by filing a fresh suit only to produce the certificate of sale of the property and the declaration that the sale is absolute, for the court to grant the same orders.

**Order 1A, and 1B of the Civil Procedure Act**, together with **Article 159(2) (b) of the Constitution** advocates for the expeditious and affordable disposal of cases without delay upon procedural technicalities.

18. In **Sheikh Mohamed Bashir -vs- United Africa Co. Kenya (1959) 1 EA 706**, the Court of Appeal in reference to the **Civil Procedure Rules- Order 22 Rules 76-81**, stated that the court must make an order confirming the sale of a property if no application is made under any of the three preceding rules. There is no pending applications made under **Orders 22 Rule 75** to set aside the sale as the same was heard and dismissed by the court on the 28<sup>th</sup> April 2014.

19. Consequently, this court is satisfied that the orders sought by the interested party are merited and that this court has the necessary jurisdiction to hear and determine the two applications.

The upshot is that the applications dated 3<sup>rd</sup> April 2014 and 30<sup>th</sup> September 2014 by the interested party are granted. The sale of the property known as **Nakuru Municipality Block 24/1879** is declared absolute and a certificate of sale is hereby issued to Daniel Nyambati Nyabuto, the Interested party.

20. It is further ordered that James Muigai, is the duly appointed agent by the interested party for purposes of collecting rent from the tenants in the suit property.

21. A further order is issued that the first Respondent, Stephen Ngerechi do deliver vacant possession of **Nakuru Municipality Block 24/1879** to the interested party Daniel Nyambati Nyabuto forthwith and in default, the said Stephen Ngerechi together with the tenants therein be evicted from the suit property, upon reasonable eviction notice being given to the said tenants.

22. The costs of this application shall be borne by the first Defendant and payable to the interested party.

It is so ordered.

**Dated, signed and delivered in open court this 5<sup>th</sup> day of May 2016**

**JANET MULWA**

**JUDGE**