



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 2398 OF 1976

RAPHAEL NJUGUNA MWAURA..... PLAINTIFF

VERSUS

GIKONYO KARIUKI.....1ST DEFENDANT

MICHAEL KARANJA KANIARU2ND DEFENDANT

REGISTAR OF LANDS.....3RD DEFENDANT

CHIEF LAND REGISTRAR 4TH DEFENDANT

JOYCE WANJIKU KARIITHI.....) INTERESTED PARTIES

PETER KAMAU WAKARIITHI)

RULING

Joyce Wanjiku Kariithi and Peter Kamau Wakariithi the administrators and legal representatives of the estate of **Onesmus Kariithi Kamau** (deceased) have by Notice of Motion dated 26 April 2013 applied to be enjoined in this suit on behalf of their deceased father as interested parties. They further seek an order that the 2nd Defendant judgment debtor be ordered to execute transfer of title number **Ndarugu/Gathaite/1071** in their favour failing which the Registrar of the High court be authorized to execute the same. The interested parties further seek an order that the Land Registrar Thika do register the transfer in favour of the interested parties.

The application is premised on the grounds that the court in its judgment rendered on 27/9/1990 ordered the 1st and 2nd Defendants to jointly and severally bear the costs of the suit that were awarded in favour of the plaintiff in the suit. The 2nd Defendant appealed against the judgment but his appeal was dismissed. The 2nd Defendant's property **L.R. NO. Ndaragwa/Gathaite/1071** was attached in execution to recover the costs and that the same was sold by public auction pursuant to an order of the court and that one **Onesmus Kariithi Kamau** (deceased) was declared purchaser at the auction at the price of Kshs.110,000/- and was issued with the certificate of sale. The said **Onesmus Kariithi** died before the transfer of the land was effected to him and the administrators of his estate now wish the transaction completed to enable them to finally administer and distribute the deceased estate.

The 2nd Defendant opposes the application and has sworn a replying affidavit dated 16th July 2013 in opposition thereto. The 2nd Defendant admits the judgment of 27/9/1990 and the fact that costs of the suit were awarded against him and the 1st Defendant. The 2nd Defendant further concedes that his parcel of land **L.R. Ndarugu/Gathaite/1071** was attached and sold to recover costs and that the deceased was the highest bidder at the price of Kshs.110,000/- at the auction.

The 2nd Defendant however contends that the failure by the deceased to enforce his rights after the purchase of the land for a period of over 16 years means that his claim has become time barred and cannot be enforced. The 2nd Defendant asserts that the applicants have by reason of lapse of time lost their right to enforce the claim.

The parties have filed written submissions articulating their respective positions. The interested parties obtained grant of letters of administration to the estate of **Onesmus Kariithi Kamau** (deceased) on 30th May 2012 as per annexure '**PKKI**' and therefore have locus to apply to be enjoined to this suit as the personal legal representatives of **Onesmus Kariithi Kamau** (deceased) the purchaser of the suit property at the public auction and I accordingly grant their request for to be enjoined as interested parties. I also grant the prayer for **M/S Anyoka & Associates** to be allowed to come on record for interested parties.

The parties counsel have canvassed the various issues that arise in their respective submissions. Both counsel have addressed the issue of the legality and validity of the sale conducted on 17/4/1997 and whether or not the applicant has the locus standi to file the application. I have already held that as the personal legal representatives of the deceased, pursuant to the letters of administration issued to them the applicants have locus to step into the shoes of the deceased and hence can lawfully bring an application such as the instant one. As regards the legality and validity of the sale of 17/4/1997 pursuant to which the deceased purchased the 2nd Defendant's property through auction, I observe that the auction sale was court sanctioned and the sale was completed as per the memorandum of sale dated 17th April 1997 and the certificate of sale issued by the Auctioneer dated 17/4/97 annexed to the applicants supporting affidavit marked "**PKK5**" and "**PKK6**" respectively. There is no evidence tendered to show that the memorandum of sale and the certificate of sale were ever set aside for any reason whatsoever.

The 2nd Defendants appeal against the judgment which awarded the costs of the suit that led to the attachment and sale of his parcel of land was rejected by the court of appeal. On the basis of the material and evidence on record.

I find that the deceased **Onesmus Kariithi Kamau** purchased the property **Ndarugu/gathaite/1071** registered in the name of the 2nd Defendant at the auction sale held on 17/4/1997 and to the extent that the sale has never been set aside I hold that the sale was legal and valid. The sale was in execution of the decree to recover the costs awarded to the plaintiff in the suit as against the 1st and 2nd Defendant. A prohibitory order was registered against the title of the land upon the execution being initiated and the same was to remain in force until the suit was finalized. The terms of the same were fulfilled and the deceased applied for and obtained the consent of Land Control Board on 30th April 1998 but as at the time the deceased died on 29/9/2007 he had not procured the registration of transfer of the parcel of land to his name. It is this transfer that the interested parties now want to be finalized as the deceased had become legally entitled to the subject parcel of land by reason of the purchase.

The 2nd Defendant has submitted that applicants have lost the right to this property by reason of delay and argues that the applicants cannot recover the land after the passage of over 12 years from the time the sale to the deceased took place. He argues the applicants are guilty of laches and places reliance on sections 4, 7 and 9 of the Limitation of Actions Act Cap 22 of the laws of Kenya to fortify his submission that the applicants cannot be entitled to the orders that they seek.

The interested parties are not claiming the land from the 2nd Defendant as it were since the process through which the deceased acquired the property was sanctioned by the court. The court having approved the sale and the sale having not been successfully challenged by the 2nd Defendant such that it

was set aside, the court is duty bound to have the transaction completed. The 2nd Defendant ceased to have any interest in the suit property once a bid was accepted at the public auction and the deceased became entitled to have the property transferred to him once he met the terms and conditions of the sale. The 2nd Defendant has raised issue that there was a charge registered against the property and the chargee had not given its consent to the sale and/or was not notified of the sale. The notification of sale issued by the court on 11th November 1996 showed in the schedule of the property that there was a charge in favour of Standard chartered Bank Gatundu Branch and hence there was disclosure and thus the sale was to be subjected to the charge being discharged.

In my view the applicants are not making any claim against the 2nd Defendant and it cannot be said there was a contractual relationship with the 2nd Defendant so that the period of limitation would run so as to bar the execution of any such contract. Having regard to the facts relevant to this application it is my view that the provisions of the Limitation of Actions Act referred to by the 2nd Defendant would have no application. Under section 4 (4) of the Act default by the 2nd Defendant would arise from the date when he is called upon to execute the transfer in favour of the interested parties and he fails to do so. It has been suggested that the 2nd Defendant could be in the position of an adverse possessor such that any right that may have accrued to the deceased person following the purchase would have been extinguished by the continuous and uninterrupted possession of the land by the 2nd Defendant. Nothing could be further from the truth as the doctrine of adverse possession operates against the registered owner who allows an adverse possessor to openly and continuously remain in possession of the land and that possession is not interrupted for a period of more than 12 years.

The 2nd Defendant is still the registered owner of the property and he cannot adversely possess the land against himself. The 2nd Defendant knew the land was sold by an order of the court and he never yielded possession. The deceased was prevented by sufficient cause from completing the transaction and the court is obliged to have the transaction completed by ensuring the transfer documents in respect of the parcel of Land are executed in conformity with the certificate of sale issued in this matter.

In the premises I find the applicants Notice of Motion dated 26th April 2013 to have merit and I grant the same in terms of prayers 1, 2, 3 and 4. The interested party applicants have not been registered as the owners of the subject land and thus the court cannot grant prayer 6 as requested. Upon being registered owners the applicants will be at liberty to file an action for vacant possession in case the 2nd Defendant will not voluntarily vacate the land.

Owing to the history of this matter I will make no order for costs and I direct that each party meets their costs for the application.

Orders accordingly.

Ruling dated and delivered at Nairobi this.....12th.....day of...February.....2014.

J.M. MUTUNGI

JUDGE

In presence of:

..... **PLAINTIFF**

..... **DEFENDANT**