



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 82 OF 1997

IRENE NGOMBO MSHINGO (Deceased) substituted by
SUSAN MAUREEN NYAMBURA PLAINTIFF

V E R S U S

- 1. MIRIAM KEDONGO**
- 2. SALIM MOHAMED SAID**
- 3. SALEH SALIM**
- 4. HEMED SALIM**
- 5. FUAD SALIM**
- 6. REUBEN**
- 7. REBECCA DEFENDANTS**

RULING

INTRODUCTION

1. It is the Notice of Motion dated 7th December 2011 which is the subject of this Ruling. That application is filed by **SAADA AMRAN ABUBAKAR** and **MOHAMED ABUBAKAR HAJI** who describe themselves as Interested Parties. By that application they seek the following prayers-
 - **THAT Applicants MESSRS. SAAD AMRAN ABUBAKAR AND MOHAMED ABUBAKAR HAJI be granted leave to make an application in this matter.**
 - **THAT the sale of the house on Plot Number 49 Sec. II Mombasa Mainland North, the property of SAADA AMRAN ABUBAKAR and MOHAMED ABUBAKAR HAJI in**

purported execution of the decree in this matter be set aside, on the ground of irregularity.

- **THAT in the alternative the court be pleased to review and set aside the entire execution process and particularly the order permitting execution by attachment and sale of the interested parties' house without land built on Plot Number 49 Sec. II Mainland North.**
- **THAT an injunction be issued against the purchaser, his servants and or agents to restrain the same from evicting the interested parties (Applicants) their agents and or servants from the House on Plot Number 49 Sec. II Mainland North pending the hearing and determination of this application."**

BACKGROUND

2. The original Plaintiff IRENE NGOMBO MSHINGO brought this action against the Defendants claiming purchaser's right and mesne profits of Swahili house without land situated on Plot No. 804 Section II Mainland North Kisauni Mombasa. Judgment was entered for the original Plaintiff on 26th July 2000. By that judgment the 1st Defendant was ordered to hand over the above stated house and further was ordered to pay mesne profits.
3. The original Plaintiff was not paid the mesne profits and costs and she therefore sought to recover these by execution by seeking the attachment and sale of the 1st Defendant's Swahili house without land situated on Plot No. 49 Section II Mainland North Mombasa.
4. Warrants of attachment dated 28th February 2002 were issued to Tip Top Auctioneers.
5. A Notice of Objection of that Attachment of the Swahili house on Plot No. 49/Sec II/MN was filed by VERA KHADUNYI, COOKY ALIVIZA and LINDA JAHENDA under the then Order 22 Rule 53 but now Order 22 Rule 51 of the Civil Procedure Rules, 2010.
6. The above Objectors filed yet another Notice of Objection of Attachment and sale of Swahili house on Plot No. 49/Sec II/MN by a Notice of Objection dated 27th September 2007. They filed a Chamber Summons dated 19th October 2007 in support of that Objection but the Chamber Summons was dismissed on 9th October 2008. They had alleged in that application by their affidavit in support that they were the absolute owners of the Swahili house on Plot 49.
7. Execution thereafter proceeded and by an order of 21st June 2010 this Court granted security to the Court's Bailiff to enable the eviction of those in occupation of Plot No. 49.
8. By the affidavit of Sammy Muli Mutua T/A Work-No-Words Auctioneers dated 21st April 2010 it was stated that Warrants of Attachment were issued on 14th April 2009 and those warrants were served on the 1st Defendant on 11th May 2009 giving her seven (7) days Notice to attach her Swahili house on Plot No. 49. That the 1st Defendant did not object to the sale and accordingly the Auctioneer advertised the sale of the house in the Standard Newspaper of 26th June 2009 informing the public of the auction of that house on 4th July 2009. That the auction took place on that date and the house was sold to the highest bidder KABERIA MUNYOTA. That purchaser was on that day issued with the Certificate of Sale.

THE APPLICATION

9. The Notice of Motion dated 7th December 2011 is supported by the affidavit of SAAD AMRAN on her behalf and on behalf of her husband MOHAMED ABUBAKAR. They describe themselves as Interested Parties. In that affidavit Saada deponed as follows-
 - **THAT I and my husband 2nd Interested Party/Applicant herein are the absolute owners of the Swahili type house without land built on Plot No. 49 Section II**

Mainland North, and the judgment debtors have no sellable interest in the said house.

- **THAT by written sale agreement dated 3rd December 2007 I and my husband, we purchased a Swahili type house built on Plot No. 49 Sec. II situated at Kisauni Bakarani in Mombasa from M/s VERA KHADUNYI KEDOGO, COOKY ALIVISTA KEDONGO AND LINDA JAHENDA at the agreed consideration of Kshs. 550,000/- which we paid in full and final settlement annexed hereto is a certified copy of the sale agreement marked “SAA-1”.**
- **THAT I learnt about the execution process in this case on 16th August 2010 when the purchaser one KABERIA MENYOTA accompanied by two Police Officers came to my house and threatened to evict me and my family from my matrimonial home on Plot 49 Sec. II Mainland North.**
- **THAT when I demanded to know the reason behind our eviction, the said purchaser MR. KABERIA MENYOTA informed me that he bought the house through an auction which was conducted by the auctioneers M/s WORK who were acting under the order of the Court issued at Mombasa in HCCC No. 82 of 1997 he also gave me a copy of the proclamation dated 11th May 2009 and a letter dated 6th August 2009 addressed to all occupants of the house without land formerly owned by Miriam Kedogo at Kisauni giving them Notice to vacate a certified copy of the said letter is annexed hereto and marked “SAA-2”**
- **THAT my house was not the subject matter of this case and or neither I and my husband were parties to these proceedings until the incident of 16th August 2010.**

10. In response to the above depositions Susan Maureen Nyambura the Plaintiff who substituted the deceased original Plaintiff, and Kaberia Menyota, by their affidavits dated 14th June 2012 and 6th September 2010 respectively stated that-

- **The purported sale to the Interested Parties of the Swahili house on Plot No. 49 was a ploy to defeat the execution;**
- **That it was a ploy because the said sale took place when the Objectors were objecting to the attachment and sale of that house;**
- **That it was a ploy because the three Objectors are the children of the 1st Defendant;**
- **That the Plaintiff had followed the correct procedure of attachment and sale;**
- **That by a suit dated 23rd September 2009 being Mombasa CMCC No. 2604 of 2009 Cooky Aliviza Kedogo and Linda Jahenda Kedogo sued Kaberia Menyoto claiming ownership of Swahili house on Plot No. 49 and seeking permanent injunction to stop Menyota from evicting their tenants residing at the house on Plot No. 49.**

ANALYSIS

11. The one and only issue requiring determination in this matter is whether the Interested Parties have shown a basis for this Court to set aside the execution herein by attachment and sale of the house on Plot No. 49.

12. On the facts before the Court I find that the Interested Parties have failed to lay down such a basis. In that regard I wholly agree with the submissions made on behalf of the Plaintiff and the purchaser that the Interested Parties should have pursued the Objectors who wrongly sold the house on Plot No. 49 to them. The three Objectors first filed their objection to attachment and sale of the house on Plot No. 49, as far back as December 2001. They therefore knew even as at 2007, when they purportedly sold the house to the Interested Parties that the house was the subject of

attachment by the orders of the Court in this case. Further in the plaint filed before the Chief Magistrate Court Mombasa Case No. 2604 of 2009, only Cooky Aliviza Kedogo and Linda Jahenda Kedogo alleged they were the owners of the house on Plot No. 49. That plaint which was supported by the verifying affidavit of Cooky Aliviza did not state that the house was also co-owned by Vera Khadunyi Kedogo. There needed to be an explanation why in the alleged agreement of sale dated 3rd December 2007, allegedly relating to the sale of the house to the Interested Parties all the three Objectors were reflected as the Vendors.

13. I also find there is discrepancy between the signature of Saada as seen in the affidavit in support of the application dated 7th December 2011 and the signature of Saada in the alleged sale agreement dated 3rd December 2007. The two signatures even though meant to be of Saada are far from being similar and it puts to question the validity of that sale agreement.

14. It is clear that the 1st Defendant Miriam Kedongo is the mother of the three Objectors. The Interested Party, Saada, by her affidavit dated 7th December 2011 stated that house at Plot No. 49 was formally owned by the 1st Defendant. The question therefore, that begs an answer is, when did the 1st Defendant transfer the house to her children the three Objectors. And if indeed she did transfer, was it done with a view to defeat the execution in this case?

15. The Interested Parties raised various issues relating to sale by the Auctioneer of the house to which I respond by stating that even if the Interested Parties are right, such issues are not sufficient to vitiate the sale. This is what Order 22 Rule 65 of the Civil Procedure Rules provide. That Rule is in the following terms-

“65. No irregularity in publishing or conducting the sale of movable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation, or (if such person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery.”

16. I hasten however to state the Auctioneer Sammy Muli by his affidavit dated 21st April and filed on 23rd April 2010 set out clearly the procedure followed in auctioning the house on Plot No. 49. There were no irregularities in that procedure.

17. In the end the Notice of Motion dated 7th December 2011 is without merit and is dismissed with costs which are awarded to Kaberia Menyota. In the interest of justice I order Kaberia Menyota to give seven (7) days written Notice to those in occupation of Swahili house on Plot No. 49/Sec II/MN to give vacant possession failing which an eviction order is hereby issued against all those who are in possession of house on Plot No. 49 Sec. II Mombasa Mainland. The nearest Police Station to that property shall be present during such eviction to ensure the maintenance of Law and Order.

DATED and DELIVERED at MOMBASA this 15TH day of MAY, 2014.

MARY KASANGO

JUDGE