



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Environmental & Land Case 743A of 2012**

**PAUL K. K. BIRECH .....PLAINTIFF**

**VS**

**BARCLAYS BANK OF KENYA LTD & 2 OTHERS.....DEFENDANT**

*(Application seeking orders to enforce a contract and an order of eviction; applicant claiming to have purchased suit land through a public auction held by the 1st and 2nd defendants; suit having been originated by plaintiff contending that the sale was irregular; consent entered between the plaintiff and the 1st and 2nd defendants settling the matter but not factoring in the interests of the purchaser; purchaser now filing application to enforce the sale and evict the plaintiff from the suit land; no pleadings filed by applicant; whether applicant can found an application without having filed pleadings; application struck out with costs).*

**RULING**

**A. INTRODUCTION**

The application before me is the motion dated 4th February 2013 filed by the 3rd defendant. The application is said to be brought under the provisions of Section 1A, 1B and 3A of the Civil Procedure Act and as drawn seeks the following orders:-

1. *That this application be certified urgent and service hereof be dispensed with in the first instance.*
2. *That the plaintiff is hereby evicted from suit parcel of land known as Eldoret Municipality Block 14/1099.*
3. *That the 1st and 2nd defendants be ordered to execute a transfer of the suit parcel in favour of the applicant.*
4. *That this Honourable court be and is hereby pleased to make such order or further orders as it may deem just and expedient.*

The application is founded upon the following grounds :-

- (a) That the applicant was the highest bidder for the suit property in a public auction conducted by the 2nd defendant on 5th August 2011.
- (b) That the applicant had complied with all the conditions precedent by paying the prescribed 25% of the purchase price which the 2nd defendant duly accepted on behalf of the 1st defendant.
- (c) That the plaintiff moved to court to stop the transaction vide an order of injunction before completion of the transaction thereby barring the applicant from clearing the balance of the purchase price.

- (d) That the plaintiff subsequently withdrew the suit against the 1st and 2nd defendants hence there are no orders restraining them from completing the sale by way of execution of a legal transfer as stipulated in the conditions of sale.
- (e) That the plaintiff has nevertheless declined to give vacant possession to facilitate the completion of the transfer.
- (f) That upon withdrawal of the suit against the 1st and 2nd defendants the terms of the sale by auction remain valid as between the applicant and the 2nd defendant.
- (g) That any attempts to unilaterally revoke the sale by the 1st defendant are not made in good faith in view of the fact that the auction was conducted pursuant to the express instruction and authority from its servants or agents.
- (h) That the applicant stands to suffer irreparable loss and damage since he has no recourse in view of the express disclaimer by the 1st defendant contained in the conditions of sale.
- (i) That upon withdrawal of the suit the validity of the sale has not been put to question hence the same remains enforceable.
- (j) That the temporary orders of injunction were in essence directed to the 1st and 2nd defendants and they remain bound by their pleadings and particularly paragraphs 8 and 9 of their statement of defence.
- (k) That it is only fair and just that no person is permitted to unjustly enrich himself by holding the applicant's money for close to two years only to purport to refund the same without any offer of interest and or damages.
- (l) That the Honourable court has the duty and powers to uphold its dignity by protecting all parties before it and not a few parties who opt to collude to the detriment of others.

The application is supported by the affidavit of the applicant Mr. Geoffrey Kirwa Kirongo and it is opposed by the plaintiff. The 1st and 2nd defendants did not file any reply to the application.

Probably a little background on this suit will bring to light the reasons why the applicant is seeking the prayers in this application.

## **B. BACKGROUND**

This suit was commenced by way of a plaint filed on 10 August 2011 through the law firm of M/s Gicheru & Company Advocates. In his plaint, the plaintiff pleaded that sometimes in the year 2003 he obtained a loan of Kshs.3 Million from the 1st defendant (the bank) and he offered his land parcel Eldoret Municipality Block 14/1099 as security. It seems as though there was default and the bank through the 2nd defendant (the auctioneer) put up the property for sale by way of public auction which was conducted on 5th August 2011. The 3rd defendant (applicant) purchased the property at a sum of kshs. 4,200,000/=. The plaintiff in his plaint has pleaded that the sale was fraudulent, illegal and null and void inter alia because there was no statutory notice; that there was a pending case being Eldoret CMCC NO. 891 of 2005 for recovery of the outstanding monies; that no public auction was ever convened; and that the property was sold at a gross under value.

The substantive prayer in the plaint is for an order to set aside the said sale, as being fraudulent and illegal, and for an order of permanent injunction, to restrain the defendants from transferring, taking possession, or otherwise interfering with the suit land.

Simultaneously with the plaint, the plaintiff filed an application for an injunction seeking to restrain the defendants from transferring the suit land to the 3rd defendant, or from taking possession of the suit land, pending the hearing and determination of the suit. Interim orders of stay were granted on the same day by

Azangalala J (as he then was) and a date for the inter partes hearing of the application was set. In the meantime the 1st and 2nd defendants entered appearance through the law firm of M/s Muriu Mungai & Co Advocates and filed replying affidavits to the application of 10 August 2011. The 3rd defendant on his part entered appearance through the law firm of M/s Manani Lilan and filed grounds of opposition to the application of 10 August 2011. The matter never took off for inter partes hearing as scheduled on several dates for one reason or another. At some point the matter did not proceed for the reason that the firm of M/s Manani Lilan sought to withdraw from acting for the 3rd defendant who then proceeded to briefly acted in person before appointing the law firm of M/s Mbugua Atudo & Macharia Advocates in March 2012.

The turning point in the application for injunction, and indeed in this suit, came on 25 July 2012 when a consent was entered in court between the counsel for the plaintiff and counsel for the 1st and 2nd defendants without the 3rd defendant being a party. The consent entered was as follows :-

*By consent between the plaintiff and the 1st and 2nd defendants: - In view of the plaintiff's redemption of the suit property the suit between the plaintiff and the 1st and 2nd defendants is hereby deemed duly withdrawn. Each party to bear its own costs.*

A mention date was then given for 14/11/2012 with interim orders of stay being extended until then. On 14 November 2012 I was seized of this matter for the first time and the parties stated that they were pursuing a settlement. I gave 27/11/2012 for mention to record a settlement and on that day Mr. Atudo for the 3rd defendant categorically stated that there was no possibility of a settlement. I directed the parties to prepare for trial and gave a mention for 5 /2/ 2013 to confirm compliance with pre-trials but on that date the counsels stated that they would wish to have the matter stood over generally. I did stand over the matter generally until the 19 February 2013 when Mr. Obudho, who had filed a Notice to appear alongside Mr. Atudo for the 3rd defendant, appeared before me with the present application. I heard the same on 18 April 2013.

### **C. THE APPLICATION**

The application is supported by the affidavit of the 3rd defendant. In the supporting affidavit, the applicant has deponed that he is a bona fide purchaser for value of the suit land. He has annexed the conditions of sale of the suit land and the memorandum of sale executed on 5 August 2011 between himself and the auctioneer who was acting on behalf of the bank. He has deponed that he paid a 25% deposit, as required by the conditions of sale, with the balance being due within 30 days of the date of sale. He has averred that he could not pay the balance within the 30 days as the plaintiff obtained the injunction that I alluded to above. He has contended that upon withdrawal of the suit against the 1st and 2nd defendants the orders of injunction issued became "unenforceable".

He has further deponed that the memorandum of sale has not been revoked and the auction sale ought to be completed. He has averred that the 1st and 2nd defendant ought to execute a transfer in his favour upon compliance with the conditions of sale. It is also stated that the validity of the sale has not been challenged. He has annexed the Conditions of Sale, the Memorandum of Sale, the order of injunction and the consent order of 25 July 2012. It is for these reasons that he has sought the orders in the subject application.

### **D. RESPONSE OF THE PLAINTIFF**

The plaintiff has responded to this application by filing Grounds of Opposition. The plaintiff in his grounds has averred that the application is incompetent as an eviction order cannot be issued in an interlocutory application; that there is no pleading or prayer in the pleadings to support the orders sought; and that the prayers in the application lack a legal basis and foundation.

### **E. ARGUMENTS OF COUNSEL**

This application was argued before me on 18 April 2013. Mr. Obudho, learned counsel for the applicant,

urged me to allow the subject application. He took me through the application and the supporting affidavit. He asserted that by withdrawing the suit against the 1st and 2nd defendant, the validity of the sale was no longer in issue in this suit. He argued that the sale of the property to the applicant has never been set aside and still stands. He contended that given the scenario, the 1st and 2nd defendants ought to be ordered to transfer the suit land to the applicant, and the plaintiff ought to be evicted from the suit land. He stated that the conditions of sale have a disclaimer in which the applicant cannot sue the bank over the sale, and the applicant's only remedy is to invoke the inherent jurisdiction of the court to enforce the sale.

Mr. Gicheru, learned counsel for the plaintiff, on the other hand argued that the application has no merit as the 3rd defendant has no counterclaim upon which his application may be founded. He argued that there were no pleadings to support the application and therefore the inherent jurisdiction of the court cannot be invoked. He pointed out that the applicant has to date not filed any defence and has no counterclaim to the plaintiff's suit. He also pointed out that the consent entered on 27/7/2012 settled the matter between the plaintiff and the 1st and 2nd defendants and the latter two defendants are therefore no longer parties to this suit. He argued that no orders can be issued against a person who is no longer a party to the suit. He also stated that there is no evidence that the whole purchase price has been paid by the applicant to warrant support to have the property transferred to him.

## **F. DECISION OF COURT**

I have considered the application and the submissions of counsel. There is no question that the genesis of this matter is the auction sale that was held on 5th August 2011 in which the applicant purchased the suit land. There is a dispute as to whether there was really a sale, and it should not be taken that I am making any conclusions on whether or not a sale was held, or to the validity of such sale. The plaintiff filed this suit so that the sale can be set aside. It was his case that the said sale was irregular. However, a consent was entered on 27 July 2012 in which the plaintiff withdrew the suit against the 1st and 2nd defendants on the basis that the two contestants have settled the matter. Counsel for the applicant has argued that the effect of that withdrawal is to have no suit seeking to set aside the sale and therefore the sale of 5 August 2011 must be enforced.

That is not a completely implausible argument. There is actually no case at the moment seeking to nullify or set aside that sale. I have my own difficulties with the consent that was entered into by the plaintiff and the 1st and 2nd defendants. I do not comprehend how the plaintiff could have settled the matter with the 1st and 2nd defendants and still leave the suit subsisting against the 3rd defendant. Even if I am to order the matter to proceed to trial, I do not see a stand-alone cause of action against the 3rd defendant which will not somehow involve the sale by the 1st and 2nd defendant. The 3rd defendant purchased the property from the 1st and 2nd defendants and the consent withdrawing the suit against the 1st and 2nd defendant strictly, in my view, ought to have factored in the interests of the 3rd defendant. The consent no doubt destroyed the whole sub-stratum of the case and I am not sure that there is any cause of action left between the plaintiff and the 3rd defendant distinct from the case that the plaintiff had against the 1st and 2nd defendants. However, the subject of this application is not to interrogate the consent itself and I should probably not dwell too much on it.

Nevertheless, the consent has left the 3rd defendant in a quagmire and it is the reason that he has filed this application seeking to enforce the sale. I agree with Mr. Obudho that the consent of the parties could not have nullified the sale by chargee to the 3rd defendant, as the 3rd defendant was not privy to that consent. However, I have reservations as to the procedure that the 3rd defendant has adopted to enforce the sale through this application. I agree with Mr. Gicheru that the applicant cannot seek the orders herein through a stand-alone application that is not founded on any pleadings. The plaintiff has no pleadings whatsoever that may support his application. He has not filed a defence to this suit and neither does he have a counterclaim.

Mr. Obudho argued that the applicant cannot sue the bank on the contract of sale because of a condition, in the Conditions of Sale, which bar the purchaser from suing the bank on the sale. I have perused the Conditions of Sale and I have not seen any such condition. Even if such exists, it would be repugnant and unenforceable, for parties cannot enter into a contract and by virtue of the same contract, contract that the

contract is not enforceable. That would not make any sense at all and would be contrary to public policy. Contracts are meant to be complied with and enforced in the appropriate forum if there is no compliance. There is no substance in Mr. Obudho's argument that the applicant cannot enforce the contract that was entered into between the applicant and the bank.

That said, such enforcement has to be founded on some sort of pleadings. To allow the application as presented herein would be akin to saying that where a party needs to enforce a contract or needs orders of eviction, all he needs to do is file an application without filing any pleadings. That cannot be so. A party must file pleadings either by way of plaint, defence or counterclaim so as to support an application in a suit. There are no pleadings filed by the applicant in our case and thus the application lacks a foundation.

Mr. Obudho has urged the court to invoke its inherent powers to enforce the sale. I agree with Mr. Gicheru that even the invocation of inherent powers must be founded on some sort of pleadings. To direct otherwise would be tantamount to saying that all that a party needs to do is walk into court, file no pleadings at all and yet beseech the court to invoke its inherent powers to grant him orders. That would be absurd, and that is precisely the position that the applicant finds himself.

I think that if the applicant desires to enforce the sale and have the plaintiff evicted from the suit land, then he needs to either file suit or a counterclaim against all parties against whom he seeks such orders. It is upon the applicant to navigate through the legal maze that this suit and the consent of 27/7/2012 have created and establish the best avenue of agitating his case against the respondents. There is nothing to prevent him from doing so and he cannot allege that he is hamstrung by the law, or by any term of contract between himself and the 1st and 2nd defendants.

With respect to this application and for the reasons that I have set out above, I am of the view that the same is misconceived. I strike it out with costs to the plaintiff.

DATED and DELIVERED THIS 2ND DAY OF MAY 2013

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT & LAND COURT AT ELDORET**

***Delivered in the presence of:***

***Mr. P. Gicheru of Ms Gicheru & Co advocates for the plaintiff/respondent***

***Mr. Y.M. Barasa holding brief for Mr. Obudo of Ms Obudho & Co for the 3rd defendant/applicant***

***N/A for Ms Muriu Mungori & Co for the 1st & 2nd defendants/respondents***