



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
JUDICIAL REVIEW NO. 9 OF 2013
IN THE MATTER OF KERUGOYA PMCC NO. 77 OF 2003

AND

IN THE MATTER OF CIVIL PROCEDURE ACT AND CIVIL PROCEDURE RULES

AND

IN THE MATTER OF AUCTIONEERS ACT

AND

**IN THE MATTER OF AN APPLCIATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
ORDERS OF CERTIORARI AND PROHIBITION UNDER ORDER 53 OF THE CIVIL
PROCEDURE RULES**

REPUBLIC
..... APPLICANT

VERSUS

**THE SENIOR RESIDENT MAGISTRATE KERUGOYA LAW
COURTS1ST RESPONDENT**

EPHRAIM WAMBU

MIANO 2ND RESPONDENT

JAMES MUNDIA

ISAACK 3RD
RESPONDENT

ANASTACIA WANJIRU

KARANI 4TH RESPONDENT

PENINAH KANUTHU

WANJOHI 5TH RESPONDENT

**NANCY WANJIRU WARUINGI T/A PROVIDENCE
AUCTIONEERS6TH RESPONDENT**

JUDGMENT

On 31st July 2006 Lady Justice Khaminwa granted JULIA MUTHONI MUNDIA the Ex-parte applicant herein leave to bring these Judicial Review proceedings and made the following orders:-

1. ***That leave is granted to the exparte applicant to apply for orders of certiorari and prohibition against the Senior Resident Magistrate sitting in Kerugoya Civil Case No. 77 of 2003 quashing the certificate of sale of land No. KIINE/KIANGAI/1658 dated the 27th April 2006 and to prohibit the respondent from proceeding with the said civil suit any further on the strength of the aforesaid certificate of sale and order for delivery to the certified purchasers.***
2. ***That the grant of this leave do operate as stay of further proceedings in Kerugoya P.M.C.C No. 77 of 2003 until the hearing and final determination of the substantive Notice of Motion to be filed herein***
3. ***That the substantive Notice of Motion be filed within 21 days.***

Following the granting of that leave, the substantive Notice of Motion was filed on 21st August 2006 seeking the following orders:-

1. ***That an order of certiorari do issue against the Senior Resident Magistrate Court sitting at Kerugoya Civil Case No. 77 of 2003 quashing the certificate of sale of land parcel No. KIINE/KIANGAI/1658 dated 27th April 2006 and the orders for delivery to the certified purchaser of the said parcel dated 27th April 2006 and to prohibit the Senior Resident Magistrate from proceeding with the said Civil Suit any further on the strength of the aforesaid certificate of sale and order for delivery of possession to the certified purchasers.***
2. ***That an order for prohibition do issue (sic) sitting at Kerugoya Civil Case No. 77 of 2003.***
3. ***That the costs of this application be borne by the interested parties.***

The Notice of Motion was grounded upon the supporting affidavit of the Ex-parte applicant JULIA MUTHONI MUNDIA and founded on the grounds that:-

- a. ***The public auction of the land parcel No. KIINE/KIANGAI/1658 was done irregularly and without notice to the applicant***
- b. ***The auction was carried (sic) irregularly in that the applicant's caution of the land was still subsisting***
- c. ***The lower Court acted in excess of its powers in authorizing sale of land by public auction before giving the cautioner any opportunity to be heard***
- d. ***The applicant stands to loss (sic) half share of land parcel No. KIINE/KIANGAI/1658 unless the orders sought are granted***
- e. ***The applicant is in exclusive possession of the suit land and has extensively developed the same since 1980.***

In her supporting affidavit, the Ex-parte applicant reiterated the contents of her earlier verifying affidavit in which she had deponed, inter alia, that she is married to JAMES MUNDIA ISAACK the 3rd respondent herein and that since marriage, they have lived on land parcel No. KIINE/KIANGAI/1658 but the 3rd respondent abandoned them and moved to Karatina. That on 20th July 2006, she was served with certificate of sale dated 27th April 2006 ordering her to deliver vacant possession of the said property to one ANASTACIA WANJIRU KARANI and PENINAH KANUTHU WANJOHI the 4th and 5th respondents herein by an officer of Providence Auctioneers who are the 6th respondent. That prior to that date, she had no notice that the land would be auctioned and she is baffled as to how the same was sold yet she had placed a caution on it and it was wrong for the same to be sold yet she is entitled to half share thereof and the rules of natural justice were violated hence this application.

The application was opposed and on behalf of the 1st respondent, it was argued by Ms Chimau the Litigation Counsel in the Attorney General's Chamber that the 1st respondent acted within the law and that Judicial Review cannot be turned into an appeal.

On his part, the 3rd respondent simply stated that apart from the applicant, all the other parties were strangers to him adding that the matter proceeded while he was in prison.

In her replying affidavit, the 4th respondent ANASTACIA WANJIRU KARANI deponed that she and the 5th respondent PENINAH KANUTHU WANJOHI purchased the said property at a public auction after the Court had issued a certificate of sale. She added further that although the Ex-parte applicant had filed objection proceedings in Kerugoya Civil Case No. 77 of 2003, the same was dismissed including also Kerugoya Civil Case No. 198 of 2005 in which the ex-parte applicant and her sons were claiming the determination of a trust.

When the matter came up before me on 9th September 2013, both the ex-parte applicant and counsels for the 1st respondent and the 2nd, 4th, 5th and 6th respondents addressed me.

I have considered the application, the replying affidavit of the 3rd respondent and the submissions.

This Judicial Review application seeks the remedies of certiorari and prohibition which I have reproduced above. Judicial Review is concerned with the decision making process and not with the merits of the decision itself. It deals with the legality of decisions of bodies or persons whose decisions are susceptible to review. While certiorari is used to bring up into the High Court the decision of some inferior tribunal or authority in order that it may be investigated, prohibition lies primarily to prohibit an inferior tribunal or authority from doing something in excess of its jurisdiction. Therefore, while certiorari looks to the past, prohibition looks to the future. The Ex-parte applicant's application has to be considered within those principles.

What is the exparte applicant's complaint?

Firstly, she complains that the public Auction of land parcel No. KIINE/KIANGAI/1658 was done without notice to her and was therefore in violation of the rules of natural justice. But both Ms Chimau for the 1st respondent and Mr. Munene for the 2nd, 4th, 5th and 6th respondents disagreed and have submitted that the ex-parte applicant was infact aware about the sale and filed objections but did not prosecute them. The parties did not avail the proceedings in Kerugoya Civil Case No. 77 of 2003 in which the order to sell KIINE/KIANGAI/1658 was issued but I nonetheless called for the file to acquit myself with the proceedings therein. That case involved the 2nd respondent EPHRAIM WAMBU MIANO as plaintiff suing the 3rd respondent JAMES MUNDIA ISAACK as defendant for specific performance with regard to the sale of KIINE/KIANGAI/1658 or refund of the purchase price of Ksh. 321,400/=. Judgment was entered for the plaintiff (2nd respondent herein) after the defence was struck out in a ruling delivered by Lucy W. Gitari Principal Magistrate on 27th June 2003 and on 16th July 2003, an application was made to sell the property KIINE/KIANGAI/1658 belonging to the defendant (3rd respondent herein) in satisfaction of the decree. The application was allowed and two other parties MARY MBERE and LOISE NJERI filed notice of objection to the sale. They are not parties herein. What is of interest in this matter is that the Ex-parte applicant through the firm of Wahome Gikonye Advocate did also file a Notice of Objection to the attachment of KIINE/KIANGAI/1658 claiming an equitable interest therein. That Notice of Objection was filed on 8th June 2005 and having been served with the same, the plaintiff (2nd respondent herein) filed a Notice of Intention to proceed with attachment as provided for under the then ***Order XXI Rule 54 of the Civil Procedure Rules***. That notice which was dated 15th June

2005 was served both on the Ex-parte applicant personally at her Kiangai Village home and also on her advocate Mr. Gikonyo on 16th June 2005. This is as per the affidavit of service filed in Court on 11th July 2005. It is clear that the ex-parte applicant did not prosecute her objection and on 17th February 2006, the land KIINE/KIANGAI/1658 was sold to the 4th and 5th respondents herein and an order was subsequently issued on 27th April 2006 authorizing the 6th respondent to put the said purchasers in possession. A certificate of sale was issued to the 4th and 5th respondents on 8th May 2006 and the 3rd respondent who was the defendant in Kerugoya Civil Case No. 77 of 2003 was notified vide letter dated 8th May 2006 to vacate the property KIINE/KIANGAI/1658 and give vacant possession to the purchasers i.e. 4th and 5th respondents herein. There is nothing to suggest that any appeal was ever filed against the judgment in Kerugoya Civil Case No. 77 of 2003 or any of the orders issued therein.

Given that sequence of events, it is difficult to up-hold the Ex-parte applicant's contention that rules of natural justice were not followed nor can the 1st respondent be faulted for sanctioning the sale of KIINE/KIANGAI/1658 and neither can the Auctioneers 6th respondent's conduct be impeached on account of any illegality or for want of any jurisdiction. It is clear from the record that both the ex-parte applicant and her lawyer on record did not do anything to protect whatever interest she had in the property even after they were served with the Notice of Intention to proceed with attachment and execution under **Order XXI Rule 54 of the Civil Procedure Rules**. Her advocate may have let her down but she too had notice of the intended attachment and did nothing. She is clearly the author of her own misfortune. There is nothing to warrant quashing the decision of the 1st respondent herein in relation to the sale of KIINE/KIANGAI/1658. The remedy of certiorari is not available to the Ex-parte applicant notwithstanding the fact that this Court sympathizes with her. She seems to have been placed in this unfortunate position by her husband the 3rd respondent herein who not only sold part of KIINE/KIANGAI/1658 to the 2nd respondent but also entered into lease agreement with two other parties over the same property. However, the 1st respondent acted within the law and it was the applicant herein who failed to exercise her right as provided by law.

Secondly, with regard to the order of prohibition, there are no grounds upon which this Court can issue an order prohibiting the Senior Resident Magistrate's Court Kerugoya from proceeding with Civil Case No. 77 of 2003. Having already found that the subordinate Court properly issued the certificate of sale, there would be no basis upon which this Court can order such prohibition. Prohibitions lies to prohibit an inferior tribunal from doing something in excess of its jurisdiction and there is no evidence placed before me to suggest that the Senior Resident Magistrate in Kerugoya Civil Case No. 77 of 2003 is acting in excess of jurisdiction. That prayer is accordingly dismissed.

Ultimately, the applicant's Notice of Motion dated 18th August 2006 and filed herein on 21st August 2006 is dismissed. Each party to meet their own costs.

B.N. OLAO

JUDGE

3RD OCTOBER, 2013

3/10/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Applicant absent

4th & 5th Respondents present

Attorney General for 1st respondent absent

Mr. Munene for respondent absent

COURT: Judgment delivered this 3rd day of October 2013.

B.N. OLAO

JUDGE

3RD OCTOBER, 2013