



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC CIVIL SUIT NO: 85 OF 2011

JACINTA WANZA MAKENZI.....PLAINTIFF

VERSUS

MUHATIA PALA AUCTIONEERS.....1ST DEFENDANT

MARSEN KELLI.....2ND DEFENDANT

KELVIN MUTINDA KELLI.....3RD DEFENDANT

SYVIA MWENDE KELLI.....4TH DEFENDANT

RULING

This ruling is delivered in the defendant's/respondent preliminary objection dated 31st October 2011 challenging the plaintiff's suit in its entirety.

The plaintiff filed this suit under a plaint dated 1st March 2011, filed simultaneously with a Notice of Motion of the same date. She prays that the court declares that the sale by public auction, and any subsequent transfer of **L.R. No. Nairobi/Block 77/20** on 25th February 2011 by the 1st respondent on the instructions of the 2nd, 3rd and 4th respondents, without her involvement, was illegal, fraudulent and to that extent null and void.

She also prays that an order be made nullifying the said sale and that a permanent injunction do issue, restraining the respondents, their agents or servants from selling, transferring or disposing or in any manner dealing with the said property.

The plaintiff also seeks general and special damages based on the current valuation of the said property with interest thereon from the date of the sale. The Notice of Motion seeks restraining orders to stop the respondents from evicting the plaintiff/applicant from the suit property of interfering with the quiet possession and occupation thereof, pending the hearing of the suit, and a mandatory order directing the respondents to rescind the sale of 25th February 2011. It is premised on the grounds that the 1st respondent is not a licensed auctioneer, failed to give the requisite 45 days Notice under the Auctioneers Rules, or to advertise the auction. The applicant complains also that the property was not valued to ascertain its market value and was sold at an undervalue. Also that the 2nd, 3rd and 4th respondents did not involve her when arranging the sale, despite her being a co-administrator of the estate to which the suit property belonged.

The 1st defendant/respondent filed a replying affidavit sworn on 18th March 2011 in which he explained

that he conducted the auction pursuant to an order of the court dated 22nd November 2010 issued in the **Succession Cause No. 293 of 2004** and that the same was conducted according to law and the governing procedures. He depones that he sold the property to the highest bidder after placing an advertisement of the same in the Star Newspaper and with due notice to the plaintiff/applicant. He also relied on information that the property had been duly valued. To support his depositions the 1st defendant/respondent produced copies of the following documents as exhibits.

1. **Court order dated 16th November 2010,**
2. **Letter of instructions dated 23rd November 2010,**
3. **His auctioneers licences for the years 2010 and 2011,**
4. **Certificate of confirmation of grant dated 1.4.2009**
5. **A notification of sale dated 24.11.2010 bearing an endorsement to prove service on the plaintiff applicant on 24th November 2010.**
6. **The Newspaper advertisement**
7. **Bid receipts**
8. **Certificate of sale to highest bidder**
9. **Valuation reports by Lloyd Masika Ltd and Clayton Valuers Ltd.**
10. **The auctioneers letter dated 3rd March 2010 forwarding the deposit paid by the highest bidder and the relevant receipts.**

The 1st defendant/respondent also produced a copy of the plaintiff/applicant's summons dated 21st February 2011 seeking a stay of the auction, to prove that the later had due notice of the same. The applicant further filed a Notice of Motion dated 6th September 2011 seeking similar orders as were sought in the Notice of Motion of 1st March 2012. In both applications she stated that she was prepared to buy the interest of her co-administrator and co-beneficiaries having due recognition of the Confirmed Grant, wherein it was ordered, inter alia, that the suit property

“.....be registered and transferred into the joint names of Jacinta Wanza Makenzi(plaintiff/applicant) and Kevin Mutinda Kelli to hold in trust for themselves and other beneficiaries namely, Sylvia Mwendu Kelli and Peter Mutinda Munyao in equal shares”

The application, having been brought under certificate of urgency during vacation, the court made an order for the maintenance of status quo ***“of the threatened sale”***, pending inter parties hearing on 6th September 2011. On 5th October 2011 the plaintiff/applicant obtained an order for substituted service. The matter was fixed for hearing on 12th October 2011 but taken out of the hearing list for the day. On 13th October 2011 the plaintiff/applicant obtained orders, again under certificate of urgency, that the two applications dated 1st March 2011 and 6th September 2011 be heard on 26th October 2011. The status quo order was extended to the hearing date.

On 26th October 2011, all served parties attended and a consent recorded to wit; that a preliminary objection raised by the defendant be heard first and a certain beneficiary be joined as an interested party to oppose the application. Directions were taken by consent that the matter do proceed by way of written submissions, which were duly filed and have been carefully considered herein.

The defendant/respondents object to the entire suit and the plaintiff/applicants' injunction applications on

the following grounds:-

- 1. That the suit is an abuse of the court process in view of fact that there is pending in court High Court Succession Cause No. 293 of 2004 in which the order for sale of the suit property was issued.**
- 2. The suit is *res-judicata* in view of the fact that the issues raised were canvassed in High Court Succession Cause No. 293 of 2004 and a ruling delivered by the court on 5th August 2011.**

The plaintiff's co-administrator Kelvin Muhinda Kelli (3rd defendant/respondent) filed a replying affidavit in response to the plaintiff/applicants' injunction application, in which he has outlined the non disputed facts, showing the sequence of events preceding the filing of the suit and pending applications. Further he has deponed that considering those facts, the suit is an abuse of the court for reasons that the issues raised therein are *res judicata*.

Written submissions were filed in regard to the defendant's preliminary objection. In her submissions, the plaintiff concedes that orders were made by the court, firstly, declaring that the suit property was estate property and ordering that it be registered in joint names of herself and the 3rd defendant as trustees for the rest of the beneficiaries; secondly, that the same be sold and the proceeds of sale be shared between the beneficiaries, as per the Certificate of Confirmation of Grant dated 1st April 2009, which orders were reinforced by the court on 5th August 2011 when dismissing the plaintiff's injunction application dated 21st February 2011. In his ruling of 5th August 2011 the Honourable Mr. Justice Kimaru gave an overview of the entire proceedings herein, considered the orders previously made by the court and leading to the challenged sale. In the hope that the same may bring an end to this protracted battle over the suit property, I find it necessary to quote the final part of the said ruling which reads as follows:-

“Can this court restrain the objectors (defendants) from giving effect to the order of this court granting them permission to sell the property to enable the proceeds therefrom to be distributed as provided for in the certificate of confirmation of grant? I do not think so. The sooner the petitioner realizes that the suit property is not hers but the property of the beneficiaries named in the certificate of confirmation of grant the better. The petitioner cannot frustrate the process of distributing the suit property to the beneficiaries of the estate of the deceased (which incidentally includes herself) by filing a multiplicity of applications before this court.”

Clearly from the above, the suit and application herein are *res judicata*. It matters not that the ruling stated herein above was in the Succession Cause. It is a ruling of a competent court within the meaning of the *res judicata* principle which is explained in Osborn's Concise Law Dictionary, *inter alia*, as follows:-

“A judicial decision is conclusive until reversed and its verity cannot be contradicted. Res Judicata presupposes that there are two opposing parties, that there is a definite issue between them, that there is a competent tribunal competent to decide the issue, and that within its competence, the tribunal has done so...”

In light of the above and upon perusal of the record itself and considering all the documentation presented before me, I find nothing in the plaintiff's submission to persuade the court that the suit herein is not *res judicata*. I find the same to be so and accordingly uphold the preliminary objection. Consequently, the plaintiff's suit, which is in the circumstances, a gross abuse of the process of the court is hereby dismissed with costs to the defendants.

DATED, SIGNED and DELVIERED at NAIROBI this 1st DAY OF March 2012.

M.G. MUGO
JUDGE

In the presence of :

Mr. Odawa for the applicants.

Mr. Wandata holding brief for Mr. Mutua for the respondents.

Mr. Odara holding brief for Mr. Kiptoo for interested party .