



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 453 OF 2017

(Formerly Machakos ELC 35 of 2015)

ROSEMARY WAMBUI MAKOKHA.....PLAINTIFF

VERSUS

GEOFFREY KARANU RWENJI & OTHERS.....DEFENDANT

RULING

By a Notice of Motion dated the 20th February, 2018, brought pursuant to sections 1A, 3, 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules, the Plaintiff seeks for following orders:

- a) THAT the County Secretary of the County Government of Kajiado be and is hereby directed to transfer PLOT No. 193/ RESIDENTIAL – ONGATA RONGAI T. CENTRE (the Property) from GEOFFREY KARANU RWENJI to CHRISTIAN COMMUNITY CALVARY MINISTRY.
- b) THAT the costs of this application be provided for.

The application is premised on the grounds that the PLOT No. 193/ RESIDENTIAL – ONGATA RONGAI T. CENTRE hereinafter referred to as ‘ the suit land’ was originally owned by JAMES MAKOKHA (deceased) but the Defendant managed to dupe the defunct OL KEJUADO COUNTY COUNCIL to transfer the same to him. The Plaintiff herein who is the widow of the deceased successfully sued the Defendant and obtained an order of the Court to sell the suit land by public auction on 4th December, 2017, to CHRISTIAN COMMUNITY CALVARY MINISTRY. The only way the purchaser can obtain possession and ownership of the property is for the Court to order the County Secretary of the County Government of Kajiado, to transfer the suit land to CHRISTIAN COMMUNITY CALVARY MINISTRY.

The application is supported by the affidavit of LIVINGSTONE MAINA OMBETE who is an Advocate in conduct of this matter on behalf of the Plaintiff who reiterates the Plaintiff’s claim.

The application is opposed by the Defendant GEOFFREY KARANU RWENJI who filed a replying affidavit where deposes that the Plaintiff had initially filed Machakos ELC No. 35 of 2015 relating to the suit land, in which she sought among other prayers, the rectification of the transfer of the said suit land to him as well as injunctive orders. He claims on 30th November, 2015, they entered into a consent with the Plaintiff, that judgement would be entered in her favour in the sum of Kshs. 4,000, 000/= and he would pay the decretal sum as follows: Kshs. 4,00, 000 within 14 days of filing the consent; Kshs. 900,000/= on or before 31st March, 2016; Kshs. 900,000/= on or before 30th June, 2016; Kshs. 900,000/= on or before 30th September, 2016; and Kshs. 900, 000/ = or on before 31st December, 2016. He contends that he has made several payments to the Plaintiff leaving an outstanding balance of Kshs. 3, 320, 000/=. He denies being served with any order directing that the suit land was to be sold by public auction and insists that the Plaintiff’s interest was only confined to recovery of money owed under the Decree. He further denies being aware that the suit land was sold by public auction and avers that if indeed there was a Sale then the same is irregular as there was no public notice nor advertisement as required by law. He reiterates that the Plaintiff recovered the outstanding decretal sum of Kshs. 3, 320,000/= from the proceeds of the sale and is still holding Kshs. 1, 880, 000/= which ought to be released to him less the auctioneer’s taxed costs.

Both parties filed their submissions that I have considered.

Analysis and Determination

Upon perusal of the instant application including the supporting and replying affidavits as well as considering the submissions herein, the only issue for determination is whether the County Secretary for Kajiado County Government should effect the transfer of the suit land to CHRISTIAN COMMUNITY CALVARY MINISTRY.

The Plaintiff submitted that the Defendant failed to pay the decretal amount herein and this culminated in the suit land being sold by public auction for Kshs. 5, 200,000/= on 4th December, 2017, with CHRISTIAN COMMUNITY CALVARY MINISTRY emerging as the highest bidder. The Plaintiff contends that the Defendant was well aware of the consequence of default. The Plaintiff argues that the issue raised by the Defendant on monies held by herself, should be canvassed through a substantive application against her. She reiterates that since the Defendant has not challenged the sale of the suit land and has no dispute with the purchaser, the Court should direct the County Secretary to effect the transfer of the suit land to the purchaser. It is further the Plaintiff's contention that the Defendant has continued to receive rent from the suit land since January, 2018 which should be received by the purchaser and demands that the said rent should be paid to the purchaser until the Defendant grants vacant possession of the suit land.

The Defendant submitted that since the consent order was not varied or set aside, the Plaintiff is only entitled to recovery of money under the decree. He relied on the case of Philip Achoki Ndubi Vs to buttress his argument.

Order 22 rule 26 of the Civil Procedure Rules provides as follows: **'Subject to the provisions of section 38 of the Act, every decree for the payment of money, including a decree for the payment of money as an alternative to some other relief, may be executed by the detention in prison of the judgment-debtor, or by the attachment and sale of his property, or by both.'**

I note the Defendant has not disputed the fact that he was yet to settle the decretal amount despite promising to do so. He insists the procedure was not adhered to before the auction took place. I note the Plaintiff/ Decreeholder extracted the Decree; applied for an execution order on 2nd September, 2016 in respect of plot No. 193/ Residential – Ongata Rongai which is the suit land herein. From the Court Record, there was a Warrant of Sale of Property in Execution of Decree for Money dated the 22nd September, 2016, issued to Jovan H. Kariuki t/a Moran Auctioneers. The same Warrant of Attachment was also issued to Base Auctioneers on 23rd December, 2016 and reissued to Base Auctioneers on 14th November, 2017 after the same Warrant had been extended. Vide a letter dated the 22nd January, 2018, Base Auctioneers returned the Warrants of Attachment duly executed, to court. They stated that they had served the Defendant with a 45 day redemption notice, advertised the Sale of the Suit Land vide Daily Nation on 18th November, 2017 and held the public auction on 4th December, 2017 where Christian Calvary Ministry emerged the highest bidder, at a bid of Kshs. 5. 2 million. They further stated the said decretal sum was held by the instructing advocate. I am highlighting this to demonstrate that the decreeholder adhered to the legal process of selling the suit land after the Defendant had failed to pay the monies owed so as to honour the Decree.

Rule 21 of the Auctioneers Rules provides that: Auction sales

(1) The date, time and place of every sale by auction shall be advertised in the prescribed manner and such sale shall take place on the date, at the time and at the place so advertised.'

In the current scenario the Auctioneer undertook the Auction and returned the Warrants to Court duly executed. I note the Defendant never applied to have the warrants of attachment set aside nor dispute the auction. He is only raising the issues of lack of service at this juncture when the suit land has been auctioned and passed to a third party who paid the full purchase price. In his replying affidavit the Defendant admits that the auction took place and he is seeking to be paid the balance of the proceeds less the auctioneers' charges. If he is seeking the balance of the proceeds of the sale, then he cannot make a turnaround and decline to transfer the suit land to the third party that purchased the same at an auction.

In the case of **McManus Vs Fortesque (1907)**, it was held that an auction is complete at the fall of the hammer.

Further in the book ' Dart's Treatise on the Law and Practice Relating to Vendors and Purchasers of Real Estate by J H Dart at Section 2, he avers as follows: **' On receipt of instructions for a sale the auctioneer becomes the agent of the vendor. His appointment as agent need be in no particular form, and may be verbal (a) and the vendor may by his subsequent conduct be estopped as against the purchaser from denying the authority of the auctioneer. (b) The auctioneer becomes the agent of the purchaser on the fall of the hammer. (c) although only for certain purposes, hence the fact that the vendor is his own auctioneer, forms no objection to the validity of the contract, though the purchaser has no notice of the fact. '**

In relying on the authority quoted above as well as the citation from "Dart's Treatise on the Law and Practice Relating to Vendors and Purchasers of Real Estate", I find that the auction indeed took place and the property passed to the third party. I note it was the duty of the auctioneer and the decree holder to ensure the suit land is transferred to the purchaser. In the current application the decree holder 's lawyer who holds the purchase price are seeking the court's intervention to ensure suit land is transferred to CHRISTIAN COMMUNITY CALVARY MINISTRY. Since I have held that the auction indeed took place, I will allow the instant application and further order that the balance of the purchase price less the auctioneers', courts and lawyers charges should be paid to the defendant.

I will proceed to make the following orders:

1. THAT the County Secretary of the County Government of Kajiado be and is hereby directed to transfer PLOT No. 193/ RESIDENTIAL – ONGATA RONGAI T. CENTRE (the Property) from GEOFFREY KARANU RWENJI to CHRISTIAN COMMUNITY CALVARY MINISTRY.
2. The balance of the purchase price less the auctioneers', and lawyers charges should be paid to the defendant.
3. The costs of this application is to the Applicant

Dated signed and delivered in open court at Kajiado this 25th day of February, 2019.

CHRISTINE OCHIENG

JUDGE