



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**MISC APPLICATION NO. 38 OF 2016**

**ARTHUR GITONGA RIMBERE.....APPLICANT**

**VERSUS**

**STANLEY GITUMA RUKARIA.....PLAINTIFF**

**PATRICK KOOME M'IKIUGU.....DEFENDANT**

**RULING**

1. The miscellaneous application dated 20.5.2016 seeks the following orders:

- (i) That this honourable court be pleased to sign certificate of sale for the applicant/purchaser and lift prohibitory order registered against L.R Nyaki/Nkabune/1095.
- (ii) That the Honourable court be pleased to authorize and empower the Executive Officer of this court to sign all the necessary documents/forms to facilitate the transfer of land Title Nyaki/Nkabune/1095 to the applicant/purchaser.
- (iii) That this Honourable court be pleased to order the district land registrar Imenti North, Meru County to dispense with the production of the original title deed for L.R No. Nyaki/Nkabune/1095, the defendant's copy of identity card, pin number and passport size photographs to facilitate the transfer of L.R No. Nyaki/Nkabune/1095 to the applicant/purchaser.
- (iv) That this Honourable court be pleased to issue such further orders as may be necessary for the ends of justice.

2. The grounds in support of the application are that;

- (i) The suit is finalized.
- (ii) The purchaser/applicant bought land title No. Nyaki/Nkabune/1095 in a public auction and certificate of sale is in the court file.
- (iii) That the defendant/J-Debtor is not willing to execute the transfer forms and other relevant documents to facilitate the transfer of the land to the purchaser.
- (iv) That litigation should come to an end.
- (v) It is fair and just for the orders to be issued as prayed.

3. The applicant has sworn two affidavits one filed on 26.10.2018 and another filed on 20.5.2016 where he has deponed that the plaintiff/DH holder obtained judgment against defendant/JD for Kshs.180,000/= with interest and costs and that on 22.5.2015 plaintiff/DH holder was issued with decree and certificate of costs for total Kshs.289,539. Subsequently thereafter, the plaintiff/DH applied for execution by attachment of defendant/JD parcel L.R No. Nyaki/Nkabune/1095 which was attached. On 23.11.2015 notification of sale and notice of redemption were issued (see annexure AGR 3 (a) & (b)). The sale by auction was advertised in the nation newspaper on 13.2.2016 for sale to take place on 29.2.2016. The applicant attended the said auction on 29.2.2016, held by Japhet Nkonge auctioneers and successfully bid to buy that land for Kshs.700,000/= of which he paid Kshs.200,000/= at the fall of hammer. The balance was paid on 29.3.2016 and he was issued with memo of sale.

4. The applicant avers that the defendant's claim that he was not aware of the C.M.C civil case no. 101 of 2014, is an afterthought because if so, he would have applied in that court to set aside judgment and sale of his land from 2016 when he was served with the application herein.

5. The plaintiff in Meru CMCC No. 101/2014 has also sworn an affidavit filed on 22.8.2018 to support the purchaser's averments. There in, he has deponed that he was the decree holder in case no. C.M.C.C 101/2014, whereby the defendant judgment debtor had cheated him to buy somebody else's land and he paid Ksh. 250,000/= as part of purchase price. The plaintiff/decreed holder avers that when he discovered the land did not belong to the defendant/Judgment debtor, he sought for a refund but this did not materialize hence the filing of the case Meru CMC No. 101/2014, where defendant was ordered to pay him a total of Kshs.307,795 being decretal amount, interest and costs. The plaintiff/decreed holder avers that the defendant was unable to pay him and he attached his parcel LR No. Nyaki/Nkabune/1096 which was later auctioned by Japhet R. Nkonge Auctioneers and he was paid his money and the land was bought by Arthur Gitonga Rimbere the applicant.

6. The defendant in Meru CMCC No. 101/2014 has opposed the application vide his replying affidavit filed on 15.10.2018 where he has deponed that he was the defendant/debtor judgment and that he sold land parcel No. Nyaki/Nkabune/618 which was approximately three acres to the plaintiff/decreed holder at a consideration of Kshs.900,000/= but plaintiff only managed to raise Kshs.250,000/= of the same and he breached the agreement. That the plaintiff/decreed holder later claimed for a refund of the amount prayed which he verbally agreed with the plaintiff/decreed holder to refund his money after the sale of land parcel no. Nyaki/Nkabune/618. The defendant deponed that he paid the plaintiff a sum of Kshs.70,000/= after he had sold half an acre from land parcel No. Nyaki/Nkabune/618 for Kshs. 150,000/= to which the plaintiff was a witness. That land parcel No. Nyaki/Nkabune/618 was subsequently subdivided into parcel 1094 and 1095 whereby parcel 1094 was transferred to the third party purchaser.

7. Defendant further avers that they had an understanding with the plaintiff/decreed holder that he would sell land parcel no. Nyaki/Nkabune/1095 and pay him the remaining amount that he owed him and that on searching for a prospective buyer he found out that the plaintiff had placed a caution on the suit land thus impeding his efforts to sell it off. Defendant claims that he never knew of the applicant herein, he only met him in court. He also avers that he didn't know when the suit land was sold and he was not served with the pleadings in civil case no. 104/2014.

8. I have considered all the arguments raised herein and the submissions. The gist of the matter is that the land of the respondent (defendant/judgment debtor) was sold via a public auction due to litigation in Meru CM CC No. 104/2014. The said judgment debtor avers that he was not aware of that suit, as well as the public auction.

9. The question is, when did the defendant learn about the Meru CM case No. 104/2014? Now that he is aware of the case, has he taken any steps to have the said judgment set aside?

10. I have seen the annexures to the affidavit of the applicant/purchaser (filed on 26.10.2018) and they reveal the steps that were followed by the auctioneer to sell the land.

11. The defendant has not sought for any orders to declare the nullification of the sale of this land. Defendant is actually trying to raise the defence which he ought to have tendered before the trial court. This is however not the forum to raise the defence.

12. I find that the application dated 20.5.2016 is merited. However, I am not able to see what the applicant is referring to as the certificate of sale in this court file. Applicant is however at liberty to avail the same to be signed by the Deputy Registrar of this court. The application is allowed but with no orders as to costs.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 20<sup>TH</sup> MARCH, 2019**

**IN THE PRESENCE OF:-**

C/A: Kananu

Ojiambo holding brief for C. Otieno for defendant

Maheri holding brief for applicant

Plaintiff

Defendant

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**