



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

HCC NO. 409 OF 1999

ROSEMARY WAMUYU WACHIRA.....PLAINTIFF

VERSUS

FRANCIS NDEGWA.....1ST DEFENDANT

GEORGE ODHIAMBO.....2ND DEFENDANT

GRACE WANJIKU KIMANI.....3RD DEFENDANT

PETER IRUNGU.....4TH DEFENDANT

AND

MICHAEL KINYANJUI KARANJA.....INTERESTED PARTY

RULING

1. This ruling is in respect of two applications: Interested Party's Notice of Motion dated 1st December 2015 and plaintiff's Notice of Motion dated 28th February 2018. In Notice of Motion dated 1st December 2015 the Interested Party seeks an order that the prohibition registered against LR No. Subukia/Subukia Block 13/50 (Kianwe) be removed while in Notice of Motion dated 28th February 2018 the plaintiff seeks orders that a sale by public auction which took place on 20th July 2009 be nullified or set aside and that the 4th defendant be directed to account for and pay rent 'since 1999 to date' as directed by the judgment.

2. Notice of Motion dated 1st December 2015 is supported by an affidavit sworn by the interested party. He deposed that he purchased the parcel of land known as LR No. Subukia/Subukia Block 13/50 (Kianwe) on 20th January 2009 at a public auction ordered by the court. Following orders made by the court on 11th February 2011, the deputy registrar of the court signed transfer forms to facilitate transfer of the land to him. When he went to register the transfer, the land registrar advised him that there exists a prohibition that was registered against the title following an order made by the court on 21st May 2008. He therefore seeks removal of the prohibition to enable him proceed with registration. I have perused the record and I have not seen any replying affidavit of grounds of opposition in respect the application.

3. The plaintiff seems to have responded to the interested party's aforesaid application by filing Notice of Motion dated 28th February 2018 which is supported by an affidavit sworn by herself. She deposed that she obtained orders of stay of execution on 20th January 2009 and that the orders were served upon the auctioneers that very morning. She annexed a copy of an affidavit of service sworn by Manuel Sakayo Markey. As such the sale that ensued is a nullity. She further deposed that the defendants have been collecting rent from the suit property without accounting for it as ordered in the judgment.

4. The 1st defendant opposed Notice of Motion dated 28th February 2018 through Grounds of Opposition filed on 4th April 2018. He took the position that the application had been filed after inordinate delay and that it had been overtaken by events. On his part, the 4th defendant swore a replying affidavit on 17th April 2018 in which he deposed that although he was a tenant on the suit premises, he vacated immediately upon delivery of judgment in this matter on 8th March 2005 and that the prayer that he accounts for rent is misplaced.

5. The interested party responded to Notice of Motion dated 28th February 2018 through his replying affidavit filed on 19th April 2018. He deposed that the auction had taken place by the time the orders of stay were issued and that the court vacated the orders on 3rd February 2009 after counsel for the plaintiff confirmed that the sale had taken place. He further deposed that the present application has been filed 9 years after the sale and that no explanation has been offered for the delay.

6. The applications were heard by way of written submissions. The plaintiff filed submissions on 27th March 2018 and further submissions on 5th June 2018. The interested party filed submissions on 24th July 2018 while the 1st and 4th defendants filed submissions on 23rd May 2018. I have considered the applications, the affidavits, grounds of opposition and the submissions.

7. I will deal with Notice of Motion dated 28th February 2018 first. The record herein shows that judgment was delivered in this matter on 8th March 2005 by Muga Apondi J. The plaintiff's case against the 1st and 2nd defendants was dismissed with costs while judgment was entered in favour of the 1st defendant as particularised in the said judgment. Subsequently, decree was issued. Costs against the plaintiff were taxed at KShs 191,440. In execution of the decree on the costs, the suit property was sold at a public auction on 20th January 2009 to the interested party. The interested party later filed Notice of Motion dated 21st July 2010 seeking orders that the deputy registrar signs transfer forms for the suit property. The application was heard by Ouko J (as he then was). In a ruling dated 11th February 2011, the judge stated:

... The plaintiff obtained, rather late in the day an order to stay the sale. The sale had taken place by the time the order of stay was issued prompting the court on 3rd February 2009 to vacate the order as it served no purpose. The plaintiff has taken no action to challenge the sale. Instead, it is alleged that she continues to occupy the property and is now planning to sell it. ...

Although in terms of Order 22 rule 79 of the Civil Procedure Rules, the applicant ought to have obtained from the court a certificate confirming the sale, that omission is not fatal as no difference would be made even if it was obtained. The plaintiff remains a trespasser and in order to forestall any intention of disposing of the suit property, this application is granted and the Deputy Registrar is directed to execute all the relevant transfer documents to facilitate and give effect to the sale by public auction.

8. It is thus manifest that the auction sale has in essence been confirmed and that in the ruling dated 11th February 2011, the court made orders to ensure that the interested party gets the full benefits of the said sale. Those orders remain on record and have not been varied or set aside. Since through Notice of Motion dated 1st December 2015 the Interested Party in essence seeks to realise the benefits of the sale, I see no valid reason why the orders sought therein should not be granted.

9. The auction sale herein took place on 20th July 2009 while the application seeking its setting aside was filed on 28th February 2018, over 8 years later. I consider a delay of 8 years in the circumstances to be so unreasonable as to disentitle the plaintiff to the equitable relief of setting aside. The plaintiff also sought an order directing the 4th defendant to account for and pay some rent. I have perused the judgment that was delivered in this matter on 8th March 2005 by Muga Apondi J. and I note that the court fully delivered itself on this aspect of the claim. There is thus no basis upon which I can make fresh orders in that regard. All in all, I find no merit in plaintiff's Notice of Motion dated 28th February 2018. It is hereby dismissed.

10. I further order that the prohibition registered against LR No. Subukia/Subukia Block 13/50 (Kianwe) pursuant to an order made by the court on 21st May 2008 be removed.

11. Each party to bear own costs.

Dated, signed and delivered in open court at Nakuru this 30th day of April 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Karanja Mbugua holding brief for Mr Gakinya for the Plaintiff

Mr Mutai holding brief for Mr Ngure for the Defendants

Mr Maragia holding brief for Mrs Gathecha for the Interested Party

Court Assistant: Beatrice & Lotkomoi