

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
KAKAMEGA
ELC APPEAL NO. E045 OF 2021

CLASSIC INTERIORS.....

APPELLANT

VERSUS

SAMUEL OMUSULA

LIBUYI.....RESPONDENT

(Being an appeal against the judgment of Hon. B. Ochieng, (CM) delivered on 15th September 2021 in Kakamega CMCL&E Case No. 142 of 2019)

JUDGMENT

Introduction

1. The appeal before this court was filed by Classic Interiors challenging the judgment of Hon. B. Ochieng (Chief Magistrate) delivered on 15th September 2021 in Kakamega Chief Magistrates court ELC case no. 142 of 2019. In the impugned judgment, the learned trial

magistrate considered the suit instituted by Samuel Omusula Libuyi against Eshikhoni Auctioneers and Classic Interiors, the 1st and 2nd defendants respectively, for vesting of property interests in land parcels L.R. Butso/Indangalasia/5879, 5325, and 825. The trial court held that a duly advertised public auction was conducted on 21st December 2018, in which the plaintiff participated and was declared the highest bidder. That the plaintiff had paid the full purchase price, with the 1st defendant issuing a certificate of completion of payment, but that the 2nd defendant had failed to surrender the original title deeds and execute the transfer documents. The court further held that the plaintiff had established his claim on the requires standard. It therefore proceeded to declare that the suit properties be vested in the plaintiff's favor, directing the 2nd defendant to surrender all original title deeds and execute all transfer documents, or in default, the Executive Officer of the court to do so. Costs of the suit were awarded to the plaintiff. The appellant being dissatisfied with the trial court's judgment, filed this appeal seeking to have the trial court judgment set aside.

Background

2. By way of a plaint dated 19th September 2019, the plaintiff in the trial court (respondent herein) instituted a suit against the 1st defendant, Eshikhoni Auctioneers, and the 2nd defendant, Classic Interiors, seeking orders the following orders;

a) Declaration that a vesting order to issue that the property interests in L.R. Butso/Indangalasia/5879, Butso/Indangalasia/5225, and Butso/Indangalasia/825 have since passed on to the plaintiff.

b) The 2nd defendant to surrender all the original title deeds for the said parcels of land and execute all transfer documents in favour of the plaintiff and in default the Executive Officer of this court to execute all transfer documents on his behalf.

c) Costs of the suit.

3. The plaintiff averred that the 1st defendant conducted a public auction on 21st December 2018 to satisfy a decree arising from Kakamega High Court Civil Suit Nos. 8 and 17 of 2017 (consolidated) and that he had been declared the

highest bidder for the parcels L.R. Butso/Indangalasia/5879, 5325, and 825 at a total purchase price of Kshs. 19,000,000/-. The plaintiff further alleged that he had paid a 25% deposit on the auction date and subsequently paid the remaining balance in full, with proof of payments acknowledged by the 1st defendant and a certificate of completion of payment issued.

4. The plaintiff averred that he had taken possession of the three parcels of land, but the 2nd defendant had failed to comply with the requirements under the law to effect transfer of ownership, while the 1st defendant had not facilitated registration as obliged under the Auctioneers Act. He prayed for a declaration that the property interests had vested in him, for an order directing the 2nd defendant to surrender the original title deeds and execute all necessary transfer documents, and in default, for the executive officer of the court to do so. The plaintiff further sought an order for costs of the suit.

5. Vide undated defence and counterclaim filed on 1st November 2019, the 2nd defendant denied the plaintiff's claim in its entirety. It expressly disputed the occurrence

of any lawful public auction on 21st December 2018 pursuant to the decree in Kakamega ELC Suit Nos. 8 and 17 of 2017. The 2nd defendant further denied that the plaintiff had ever been declared the highest bidder at a purchase price of Kshs. 19,000,000/-, or that any valid sale had resulted from the alleged auction.

6. It maintained that it remained in possession of parcel Butsotso/Indangalasia/825 and was actively seeking possession of parcels Butsotso/Indangalasia/5879 and 5325 from third parties who were allegedly occupying them, asserting that the decree holder had concealed material facts regarding the status of the properties. The 2nd defendant contended that no valid auction took place and alleged that the purported sale was fraudulent and intended to defeat its proprietary rights.

7. It pleaded particulars of fraud against the plaintiff and the 1st defendant, including conducting the auction contrary to the Civil Procedure Rules, altering auction dates, purporting to sell the properties while negotiations with a third party were ongoing, failing to appear at the advertised venue, disposing of the properties through a

private treaty, and selling the land at a gross undervalue without transparency.

8. In its counterclaim, the 2nd defendant reiterated these allegations, averring that no lawful auction could have occurred on 21st December 2018 as time does not run under the law on that date, and asserted that the value of the properties exceeded the pecuniary jurisdiction of the trial court thus it was bereft of requisite jurisdiction to determine the matter. It sought orders dismissing the plaintiff's suit with costs and a declaration that the alleged auction was null and void.

9. The suit proceeded to hearing through oral evidence. The plaintiff testified as the sole witness. The 2nd defendant likewise called one witness in support of its case, whereas the 1st defendant neither filed pleadings nor took part in the proceedings.

Plaintiff's evidence.

10. The plaintiff adopted his witness statement dated 19th September 2019 as his evidence in chief and produced documents in his list of documents of even date. He testified that he participated in a public auction conducted by the 1st defendant after seeing an advertisement published in the Star Newspaper on 5th December 2018, as well as another public auction advertisement along the Lurambi-Mumias road. He testified that the auction related to land parcels Butso/Indangalasia/5879, 5325, and 825, all registered in the name of the 2nd defendant, and produced official searches confirming the said ownership. He stated that he attended the auction held on 21st December 2018 at Lurambi Chief's Camp, where he placed the highest bid of Kshs. 19,000,000/- and was declared the successful bidder. That he immediately paid a 25% deposit of Kshs. 5,000,000 via RTGS, and later paid the balance of Kshs. 5,000,000/- on 4th February 2019 and Kshs. 9,000,000/- on 8th February 2019. That he was then issued with a memorandum of sale and a certificate of completion of payment and subsequently took possession of the three parcels of land.

11. During cross-examination, the plaintiff confirmed that the auction took place at around 11:00 a.m. at Lurambi chief's camp and that several bidders were present, although he could not recall their names. He stated that the payments were made to the auctioneer through RTGS, which did not expressly indicate the parcel numbers but referenced purchase of land. He acknowledged that he did not complete the payment within the 21 days stipulated in the conditions of sale but maintained that no notice of forfeiture was ever issued to him. He confirmed that he is currently in possession of the properties and that he was not informed of any third parties occupying any of the parcels at the time of purchase.

12. In re-examination, he reiterated that the auctioneer neither forfeited his deposit nor issued any notice to that effect, and that he paid the full purchase price and is in possession of the properties. That marked the close of the plaintiff's case.

Defence evidence

13. DW1 was Moses Anyangu, the Director of Classis Interiors. He adopted his witness statement dated 1st November 2019 as his evidence in chief and testified that the 2nd defendant was never served with any notification of sale or the letter dated 19th October 2018, and that the claim that such documents were allegedly served upon an unnamed secretary was false. He testified that at the time the alleged auction was conducted, the 2nd defendant and the decree holder were in negotiations with a third-party purchaser, Decoding Limited, who had offered Kshs. 23,000,000/- for the same three parcels of land through a letter dated 6th August 2018. According to him, the existence of this higher offer made it unfair and unreasonable to claim that the properties were lawfully sold at a significantly lower price of Kshs. 19,000,000/-. He further stated that he only saw the notification of sale after it was annexed in an application filed in Kakamega ELC Misc. No. 14 of 2019, and that the documents relating to the purported auction were inconsistent as to the date, time, and venue of the alleged sale.

14. DW1's evidence was that the notification of sale indicated that the auction was scheduled for 6th December 2018 at the Kakamega Old Post Office, whereas the memorandum of sale stated that the auction was conducted on 21st December 2018, and the Star Newspaper advertisement indicated yet another venue, next to the chief's office along Kakamega-Webuye road. He testified that these discrepancies were deliberate, misleading, and intended to defeat the 2nd defendant's right of redemption. He also relied on a letter by the auctioneer addressed to the Deputy Registrar dated 1st February 2019 indicating that the highest bid was Kshs. 16 million, whereas the memorandum of sale recorded the bid as Kshs. 19 million, which he stated was further evidence of fraud. DW1 maintained that no public auction took place, that the 2nd defendant was denied a lawful opportunity to redeem the property, and therefore the entire process was illegal, unprocedural, and null and void.

15. In cross-examination, DW1 confirmed that the decree authorizing sale arose from Kakamega ELC Nos. 8 and 17 of 2017 (consolidated), and that he did not appeal against

the decree, nor did he apply for stay of execution. He also conceded that although he claimed the auction never took place, he personally did not attend the auction on 21st December 2018 and only relied on information allegedly given to him by a representative of Decoding Limited, whose statements he had no written evidence to support. He confirmed that he did not challenge the auction. He admitted that the memorandum of sale and the plaintiff's signature therein showed that the plaintiff was declared the highest bidder, but he insisted the auction was fraudulent. He denied knowledge of the plaintiff being in possession of the properties.

16. In re-examination, DW1 emphasized that payment of the balance of the purchase price was made outside the 21-day period stipulated in the conditions of sale and that he was never served with the notification of sale necessary for exercising the right of redemption. He maintained that the inconsistencies in dates, venues, and the stated bid amounts confirmed the illegality of the purported auction. That marked the close of the defence case.

17. Upon consideration of the pleadings, evidence and submissions, the trial court found that the plaintiff had proved his case on a balance of probabilities. The court held that the auction process leading to the sale of the suit properties had been properly conducted and that the plaintiff, having been declared the highest bidder and having complied with the payment terms, was entitled to the reliefs sought.

18. Having been dissatisfied with the trial court's decision, the appellant lodged the present appeal vide a memorandum of appeal dated 12th October 2021, citing the following grounds of appeal:

a) THAT the learned trial magistrate evaluation of the evidence before him was wanting.

b) THAT the learned trial magistrate grossly erred by barring evidence from the appellant's crucial witness who attended the venue of the purported auction.

c) THAT the learned trial magistrate grossly failed to hold that the purported auction which allegedly took place on 21st December, 2018 in execution of a court decree was null

and void as the said period is excluded under the provisions of the Civil Procedure Act for execution of decrees by court.

d) THAT the learned trial magistrate grossly erred in not resolving glaring inconsistencies in the respondent's case in favor of the appellant.

e) THAT the learned trial magistrate grossly erred in not arriving to a finding that the appellant's right of redemption of the properties herein was fettered.

f) THAT the learned trial magistrate grossly erred in finding that lack of a verifying affidavit to a counter claim is an incurable defect.

g) THAT the learned trial magistrate exhibited actual bias against the appellant by failing to consider the appellant's submissions before delivering judgment.

h) THAT the learned trial magistrate grossly erred in not dismissing the suit as incompetent the same having been filed by a party in person instead of an auctioneer as envisaged in law.

i) THAT the learned trial magistrate erred in law by finding that there were no evidence that the value of the properties did not exceed Ksh. 19,000,000/- yet the appellant filed in court a potential offer to buy the property for Ksh.23,000,000/- by Decoding Limited.

19. Consequently, the appellant sought the following orders:

a. THAT the entire judgment delivered on 15th September, 2021 be set aside.

b. THAT there be judgment in terms of the appellant's counter claim.

c. THAT the respondent be condemned to bear costs of the lower court as well as this appeal.

20. The appeal was canvassed by way of written submissions.

On record are submissions by the appellant dated 17th January 2023 and submissions dated 21st May 2025 filed by the respondent; both of which this court has carefully considered.

Appellant's submissions.

21. Counsel for the appellant submitted that the appellant had raised nine grounds of appeal, chief among them being

that the trial court failed to address the applicability of Order 50 Rule 4 of the Civil Procedure Rules. Counsel contended that the impugned auction took place on 21st December, a date excluded from computation of time for the doing of any act under the Rules, and that this issue was material to the determination of the dispute yet was not considered by the trial magistrate.

22. Counsel further submitted that there were glaring inconsistencies in the plaintiff's case which ought to have been resolved in favor of the 2nd defendant. It was argued that the only notification of sale on record was dated 19th October 2018 and indicated that the auction would take place on 6th December 2018. Counsel questioned why the plaintiff allegedly proceeded with an auction on 21st December 2018, asserting that such conduct was irregular, malicious and curtailed the 2nd defendant's right of redemption over the suit properties.

23. The appellant also faulted the trial court for failing to address the issue of pecuniary jurisdiction. Counsel submitted that the suit properties were sold to the appellant for Kshs. 22,000,000/= and that there were

negotiations to sell the same for Kshs. 21,000,000/=, amounts which exceeded the monetary jurisdiction of the subordinate court. It was argued that the trial court therefore lacked jurisdiction and ought to have downed its tools, or in the alternative, called for a valuation report in light of the conflicting figures.

24. Counsel additionally argued that the trial court erred in failing to determine whether the suit had been instituted by the proper party. According to the appellant, the proceedings were incompetent as the respondent, rather than the auctioneer, filed the suit seeking a vesting order, despite lacking the requisite capacity.

25. It was further submitted that the trial magistrate misapprehended Article 159(2) of the Constitution by dismissing the appellant's counterclaim on the basis of a defect in the verifying affidavit. Counsel contended that such a defect did not go to the root of the matter and was curable, and that the court ought to have determined the counterclaim on its merits. Lastly, counsel faulted the trial magistrate for declining to admit a witness who had been availed to testify on behalf of the appellant, arguing that

the exclusion of the witness amounted to manifest bias and prejudiced the appellant's case.

Respondent's submissions.

26. Counsel for the respondent isolated and submitted on four key issues for determination by this court. On whether lack of a verifying affidavit to the counterclaim is incurable, counsel submitted that the counterclaim filed by the appellant was not accompanied by a verifying affidavit as required under Order 7 Rule 5(a) of the Civil Procedure Rules. It was argued that the appellant never sought leave to regularize the omission and that the issue only arose during cross-examination when the appellant's witness admitted being unaware of the requirement. Counsel maintained that a counterclaim is a suit in itself and failure to verify it renders it defective and invalid, placing reliance on the decision in **Dickways Construction Co. Ltd v Akai Enterprises Ltd, Associated Architects (Interested Party) [2024] KEHC 3749 (KLR)** and provisions of Order 4 Rule 1(2). The respondent therefore submitted that the trial court correctly held the counterclaim to be fatally defective.

27. As to whether the trial court had pecuniary jurisdiction, counsel submitted that the value of the subject matter was Kshs 19,000,000/- as determined by Hon. Malesi (SRM) in a ruling delivered on 19th June 2020, following which the matter was placed before the Hon. Chief Magistrate whose jurisdiction extended to Kshs 20,000,000/- under Section 7(1)(a) of the Magistrates' Courts Act. Counsel argued that the appellant never challenged the said ruling and that reliance on a conditional letter of offer showing a value of Kshs 23,000,000/- was misplaced, as the document was not binding and merely reflected ongoing negotiations. It was submitted that the correct value is the actual purchase price at the fall of the hammer, being Kshs 19,000,000/-, which placed the matter squarely within the trial court's jurisdiction.

28. Regarding the issue of whether the respondent acquired good title, counsel submitted that the respondent purchased the suit properties at a public auction held on 21st December 2018 after conducting due diligence and offering the highest bid. That the auction was undertaken in execution of a decree of the High Court in Kakamega

ELC Nos. 8 and 17 of 2017. Counsel contended that the appellant neither challenged the auction nor sought to enjoin the decree holder and was therefore guilty of laches. It was argued that the auction complied with section 21 of the Auctioneers Act, that the appellant's equity of redemption was extinguished at the fall of the hammer, and that at any rate the respondent was a bona fide purchaser for value without notice. Counsel referred the court to the following authorities: **Mbuthia v Jimba Credit, Ze Yu v Yang, Kamulu Academy Ltd v British American Insurance(K) Ltd (2018) eKLR**, and **Weston Gitonga and 10 others v Peter Rugu Gika Anor (2017) eKLR**.

29. On the final issue concerning costs, counsel submitted that costs of both the appeal and the proceedings before the subordinate court should be borne by the appellant, the same having instituted the proceedings without merit and having failed to demonstrate any error on the part of the trial court.

Analysis and determination.

30. The court has carefully considered the appeal, the entire trial court record and the parties' rival submissions. The role of this court as a first appellant court is to rehear the dispute. It therefore must re-assess, re-evaluate and re-analyze the facts and the law and make its own independent conclusions. This position was stated in the case of **Selle & Another -vs- Associated Motion Boat Co. Ltd & Others (1968) EA 123.**

31. This appeal faults the trial court's finding on three main grounds; that the trial court was wrong in concluding that it had the pecuniary jurisdiction to determine the dispute herein; that the appellant's counterclaim was incurably defective and hence incompetent for want of a verifying affidavit; and that the process of the respondent's acquisition of the suit property through auction was unlawful.

32. Jurisdiction flows from the Constitution, statute or both and a court cannot arrogate itself jurisdiction it does not have. (See **Samuel Macharia & Another v Kenya Commercial Bank Ltd & 2 Others (Application No. 2 of 2011) [2012] KESC 8 (KLR) 923 October 2012**)

(Ruling). On jurisdiction, the appellant argued that the suit property had the value of over Kshs. 19 Million on the basis that he purchased it at Kshs. 22 Million and that there was a potential offer for purchase of the same at Kshs. 23, 000, 000/=, hence outside the pecuniary jurisdiction of the Chief Magistrates court.

33. Section 7 of the Magistrates' Court Act provide for jurisdiction of a Chief Magistrate to be capped at Kshs. 20 Million. In the instant matter, the amount stated in the plaint being the value of the subject matter is Kshs. 19 Million. The appellant in his defence stated that the value of the suit property was more than 19 Million but no specific amount was given. The appellant counterclaimed for dismissal of the respondent's claim and the nullification of the auction. The pecuniary jurisdiction is what is pleaded by the parties and not what the subject matter could potentially fetch, as that is speculative and not what is pleaded. In this case, the value of the subject matter as pleaded is Kshs. 19 Million and therefore, I am satisfied that the trial court was right in finding that it had

pecuniary jurisdiction to hear and determine the claim herein.

34. On whether the failure of the appellant to attach a verifying affidavit to his counterclaim was fatal, it is trite that procedure is the handmaid of substantive law. Order 7 Rule 5 as Read with Order 4 Rule (2) of the Civil Procedure Rules provides that a counterclaim **shall** be accompanied by an affidavit sworn by the defendant verifying the correctness of the averments in the counterclaim. The couching of the above provision makes it mandatory for a counterclaim to be accompanied by a verifying affidavit. While a claim should not be defeated on a technicality that does not go to the core of the dispute, a party guilty of non-compliance ought to seek opportunity or extension of time to cure the technical lapse. A party who has failed to comply with procedural law cannot be excused if he fails to seek opportunity to cure the incompetence of his pleading on the argument that noncompliance with procedure is not incurable. A procedural failure that does not go to the core of the dispute and does not touch on jurisdiction is curable, but the defaulting party must apply to cure the defect.

Procedural failure is excused at the point the defaulting party asks for opportunity to atone his or her failures not when he or she has decided that he or she will not rectify the situation. Noncompliance with procedure is not a serious issue as long as opportunity to comply is sought by the noncomplying party, but it becomes a serious issue when disregard to procedure and unwillingness to comply with the procedure becomes the stance taken by the noncomplying party. In short, a procedural lapse becomes fatal and will bring down a suit if the noncompliant party fails to seek opportunity to cure the procedural lapse.

35. In the instant matter, the appellant filed his counterclaim without an accompanying verifying affidavit. There was no application by the appellant to seek to rectify this procedural lapse, and so no verifying affidavit was ever filed in this matter by the appellant. Therefore, the appellant's noncompliance with provisions of Order 7 Rule 5 as read with Order 4 Rule 1 (2) of the Civil Procedure Rules made the counterclaim incompetent. In the premises, the trial court was right in striking out the counterclaim as being incompetent.

36. Regarding the question of whether the respondent lawfully acquired the suit property, the respondent's case is that he acquired it by purchase at a public auction which was carried out in execution of a decree made in Kakamega ELC Case Nos. 8 of 2017 and 17 of 2017 (Consolidated). He stated that he was the highest bidder in the auction having offered to purchase the suit property at Kshs. 19 Million which carried the day at the fall of the hammer. The appellant confirmed that he did not challenge the auction in the court that made the decree and executed the same. Therefore, the validity of the auction as a means of ensuring that the decree holder in that case enjoyed the fruits of the judgment of court, was not contested in the court that made the decree and or executed it. The appellant did not avail evidence to challenge the fact that the respondent was the highest bidder. The respondent produced the newspaper advertisement, relevant notices and the certificate of sale from the auctioneer who conducted the auction. The issues raised by the appellant concerning the legality of the auction are matters which

the appellant ought to have raised in Kakamega ELC Case Nos. 8 of 2017 and 17 of 2017 (Consolidated).

37. Section 34 (1) of the Civil Procedure Act provides that all questions arising between parties to a suit regarding execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not through a separate suit. Therefore, the appellant could not lawfully raise a challenge on the legality of the auction before the trial court in this dispute as that was a wrong forum. He could only challenge the auction in Kakamega ELC Case No. 8 and 17 of 2018 (Consolidated). Besides, the respondent paid the purchase price in full in the acquisition of the suit property. Article 40 (1) and (6) of the Constitution of Kenya grants legal protection only in respect to lawfully acquired property. Clearly, the respondent proved that he lawfully acquired the suit property through auction having paid the entire consideration and there being no challenge on the auction in the executing court. I therefore do not find any material before me to suggest that the trial court was wrong in

arriving at its conclusion that the respondent had proved lawful acquisition of the suit property.

38. The upshot is that I find no merit in this appeal, which I hereby dismiss with costs to the respondent.

39. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA
IN OPEN COURT/VIRTUALLY THROUGH
MICROSOFT TEAMS VIDEO CONFERENCING
PLATFORM THIS 26TH DAY OF NOVEMBER, 2025**

**A. NYUKURI
JUDGE**

In the presence of;

Ms. Adeya holding brief for Mr. Mmbaka for the respondent

No appearance for the appellant

Court Assistant: Delphine