



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC MISC APP. NO. 1300 OF 2002**

**BUSURU RICHARD MARK**

**T/A BUSURU M M & PARTNERS ARCHITECTS.....CLAIMANT**

**=VERSUS=**

**B A OMUSE T/A**

**AFRO ANGLO INVESTMENTS LIMITED.....RESPONDENT**

**PETER KAKAI CHELOTI.....INTERESTED PARTY/APPLICANT**

**RULING**

1. This is the notice of motion dated 6<sup>th</sup> March 2018 brought under Section 48, 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Section 14(a) of the Land Registration Act and Order 22 Rule 77(1), 79 and 81 of the Civil Procedure Rules, 2010.

2. It seeks orders:-

- (1) That this honourable court do make a declaration that the sale by public auction with respect to LR NO. 2116/IV/26 Kitale, which was conducted on 3<sup>rd</sup> December, 2007 is absolute.*
- (2) That this honourable court do issue a certificate confirming that the Applicant herein, Peter Kakai is the purchaser of the property LR No. 2116/IV/26 Kitale.*
- (3) That this honourable court direct the Deputy Registrar to execute the Transfer instrument on behalf of the registered owner, the respondent herein.*
- (4) That the respondent, B A Omuse T/A Afro Anglo Investments Limited, do produce and handover the original title documents to the Registrar of Lands within seven (7) days of service of an order requiring him to do so.*
- (5) That in the alternative, should the respondent fail, neglect or refuse to hand over the original title documents, the Registrar of Lands be directed to dispense with the requirement that the original document of title be made available before the property can be transferred.*
- (6) That upon the registration of the Transfer of title to the Applicant, the Registrar of Lands be directed to issue to the Applicant a provisional certificate of Title for LR No. 2116/IV/26 Kitale.*
- (7) That a vesting orders of a good and valid title do issue in favour of the applicant, upon completion of the process of the transfer of the title.*
- (8) That the respondent and/or its tenant be ordered to forthwith hand over vacant possession of LR No. 2116/IV/26 Kitale to the Applicant.*
- (9) That costs of this application be borne by the Respondent.*

3. The grounds are on the face of the application and are set out in paragraphs a-f.

*(a) The applicant lawfully purchased by way of public auction, the parcel of land known as LR NO. 2116/IV/26 Kitale (hereinafter referred to as "the property") and paid 25% of the purchase price.*

*(b) At the time the public auction was scheduled for 3<sup>rd</sup> December 2007, there were no orders of stay of the sale of the property.*

*(c) The respondent's notice of motion application dated 23<sup>rd</sup> March, 2016 seeking inter alia orders staying the sale of the property to the applicant (which sale had already occurred) was dismissed on 6<sup>th</sup> October 2017.*

*(d) There being no order or application before this honourable court to set aside the sale of the property, this court should confirm the said sale and grant the orders as prayed.*

*(e) The applicant has been willing and ready to complete the sale but his efforts have been thwarted by the numerous applications filed by the respondent which have threatened his right to property as enshrined under Article 40 of the Constitution of Kenya, 2010.*

*(f) It is therefore in the interest of justice and equity to have this applicant allowed with costs.*

4. The application is supported by the affidavit of Peter Kakai Cheloti, the interested party/applicant sworn on the 6<sup>th</sup> March 2018.

5. The application is opposed. There is a replying affidavit sworn by Bonaventure, Andrew Omuse, a director of the Respondent sworn on the 19<sup>th</sup> December 2018.

6. The application was canvassed by way of oral submissions on the 25<sup>th</sup> March 2019.

7. It is the applicant's case that he acquired the subject property through a public auction in execution of a decree. The sale by public auction was conducted on 3<sup>rd</sup> December 2007. The applicant was the highest bidder at the said auction and paid a deposit of Kshs.2,250,000/-. The balance has not been paid due to the pendency of this case. He prays that the sale be declared as absolute.

8. It is the respondent's case that he has lodged an appeal against the dismissal of the Notice of Motion dated 23<sup>rd</sup> March 2016. Further that the sale was conducted during the pendency of a valid order of injunction. This application is premature as there are proceedings challenging the sale. The sale has not been concluded. Further that nothing has prevented the applicant from paying the balance.

9. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the replying affidavit, the rival submissions of counsel and authorities cited. The issue for determination is whether this application is merited.

10. It is not in doubt that a sale was conducted by public auction on 3<sup>rd</sup> December 2007. The applicant emerged the highest bidder and he paid a deposit of Kshs.2,250,000/-. The balance was to be paid within 30 days. A memorandum of sale is annexed to the application and marked 'PKC 1'. A certificate of sale was also issued by M/s Gillet Traders Auctioneers dated 3<sup>rd</sup> December 2007.

11. It is also not in doubt that the respondent filed a notice of motion dated 14<sup>th</sup> March 2012 challenging the said sale. A ruling was delivered by Hon. J. Mutungi on 17<sup>th</sup> March 2016 dismissing the said application. The respondent filed another application dated 23<sup>rd</sup> March 2016 which was dismissed on 6<sup>th</sup> October 2017.

12. I agree with counsel for the applicant that the issue of whether the sale by public auction on 3<sup>rd</sup> December 2007 was proper has been dealt in the previous application. The respondent cannot raise it here. He contends that he has filed a notice of appeal against the decision of the notice of motion dated 23<sup>rd</sup> March 2016. However he did not obtain any orders of stay from the Court of Appeal. This application is therefore not premature.

13. Section 48 of the Civil Procedure Act provides that:-

*"Where immovable property is sold in execution of a decree and the sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute".*

14. Order 22 rule 77(1) of the Civil Procedure Rules provides that:

*Where no application is made under rule 74, rule 75 or rule 76, or where such application is made and disallowed, the court shall make an order confirming the sale, and thereupon the sale shall become absolute in so far as the interest of the judgment debtor in the property sold is concerned.*

The respondent's previous application to challenge the sale and/or set it aside was dismissed. In paragraph 9 of the supporting affidavit, the applicant avers that he is ready, willing and able to pay the balance of the purchase price.

15. He states that he has not been able to pay the balance of the purchase price because the respondent has not shown any willingness to

handover the title documents to the property. I find that this is a reasonable explanation as to why the applicant has not paid the balance of the purchase price.

16. I agree with counsel for the applicant that there is no application before this court to set aside the certificate of sale.

17. In conclusion, I find merit in the application and I grant the orders sought namely:-

*(a) That a declaration be and is hereby issued that the sale by public auction in respect of LR No. 2116/IV/26 Kitale, which was conducted on 3<sup>rd</sup> December 2007 is absolute.*

*(b) That a certificate do hereby issue confirming the applicant herein, Peter Kakai Cheloti is the purchaser of the property known as LR NO. 2116/IV/26, Kitale.*

*(c) That the Deputy Registrar is hereby directed to execute the transfer instrument on behalf of the registered owner the respondent herein.*

*(d) That the respondent herein B. A. Omuse T/A Afro Anglo Investments Ltd, is hereby ordered to produce and hand over the original title documents to the Registrar of Lands within twenty (21) days of service of an order requiring him to do so.*

*(e) That in the alternative, should the respondent fail, neglect or refuse to handover the original title documents, the Registrar of Land is directed to dispense with the requirement that the original document of title be made available before the property can be transferred.*

*(f) That upon registration of the transfer of title to the Applicant the Registrar of Lands is directed to issue to the Applicant a provisional Certificate of Title for LR No. 2116/IV/26 Kitale.*

*(g) That a vesting order of a good and valid title do issue in favour of the applicant upon completing the process of the transfer of the title.*

*(h) That the respondent and/or his tenant be ordered to forthwith hand over vacant possession of LR NO. 2116/IV/26 Kitale to the Applicant.*

*(i) That costs of this application be borne by the respondent.*

It is so ordered.

Dated, signed and delivered in Nairobi on this 27<sup>TH</sup> day of JUNE 2019.

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Claimant

.....Advocate for the Respondent

.....advocate for the interested party/applicant

.....Court Assistant