



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. APPEAL NO. 22 OF 2017

ELECTRICAL MARKETING (WHOLESALE) LTD.....APPELLANT

VERSUS

NAIROBI CITY COUNTY.....1ST RESPONDENT

GOPA HARISH.....2ND RESPONDENT

VEKARIA LALJI GOPAL.....3RD RESPONDENT

JUDGEMENT

1. This is an appeal against the ruling and order of Hon. M. W. Njagi, First Class Magistrate at Nairobi City Court delivered on 29/5/2017 in Civil Suit Number 3 of 2011. There are 9 grounds of appeal set out in the memorandum of appeal which can be summarised into three main issues. Firstly, it is contended that there was no proper service on the Appellant. Secondly, that the Learned Magistrate erred in law by failing to find that the proceedings taken before judgement were irregular and unprocedural, and that the court had no jurisdiction to deal with the suit. Thirdly, that the Learned Magistrate erred by failing to make a finding of fraud on the issue of the sale of the Appellant's parcel of land. The Appellant urged the court to set aside and discharge the orders made by the Learned Magistrate on 29/5/2017 together with the proceedings and subsequent orders made by that court. The Appellant further urged the court to grant the orders sought in the application dated 17/11/2015.

2. Through the application dated 17/11/2015, the Appellant sought a prohibition order to restrain dealings with land reference number 209/8323 ("the Suit Property") and the setting aside of the orders made on 30/8/2011 for the sale of the Suit Property by public auction, and any subsequent orders relating to the Suit Property. In that application, the Appellant contended that there was no proper service of the proceedings before the sale of the Suit Property and that the Appellant was placed under receivership on 19/6/2006 yet the receiver manager was not involved in the proceedings. The Appellant contended that it had been condemned without being heard. Further, that the Suit Property was charged to Middle East Bank for Kshs. 20,000,000/= and the chargee's interests were not taken into consideration when the Suit Property was sold. In addition, that the Suit Property was sold at an undervalue for the sum of Kshs. 5,000,000/= yet in 2008 it had been valued at Kshs. 128,000,000/=.

3. The application dated 17/11/2015 was supported by the affidavit of Sunil K. Patel, the Appellant's director who deponed that he learnt of the existence of the suit before the magistrate's court in 2015. He gave his address as Hertfordshire in the United Kingdom (UK) and stated that he had been a resident in the UK from 1991. He challenged the service said to have been effected by the process server at the Suit Property.

4. In her ruling, the Learned Magistrate found that the service effected by the process server by affixing the summons on the gate was proper and provided for under Section 17 (4) (b) of the Rating Act. The court found that despite the Appellant not being served through the other modes provided for under the Rating Act or the Civil Procedure Act, it did not make the service invalid since the modes of service given by Section 17 are in the alternative. The Learned Magistrate stated that Section 17 (4) (b) of the Rating Act did not require the 1st Respondent to first establish whether the Appellant visits the suit land before affixing the summons. The court found that the gate where the summons was affixed is part of the property and being the entry point to the Suit Property, was conspicuous. The court held that the summons together with the notice to show cause and the settlement of terms were validly served on the Appellant when they were affixed on the Suit Property.

5. On the issue of non-disclosure of the charge to Middle East Bank, the Learned Magistrate stated that that did not invalidate the auction of the Suit Property but that it only meant that the 1st Respondent took the risk of auctioning it when it was still charged to a bank, while the purchasers took the risk of purchasing it when it was encumbered. On the claim that the Suit Property was undervalued, the court was of the view that the aggrieved party had the option of suing for the undervalue. The Learned Magistrate declined to set aside the judgement on the basis that the Appellant had admitted owing rates and noted that starting the suit all over again would serve no useful purpose. The court further found that the delay had not been explained.

6. Parties filed submissions which the court has considered. The Appellant submitted that where a person fails to pay rates, the rating

authority must serve a demand notice under Section 17 (2) of the Rating Act before instituting a suit for recovery. The manner in which the demand notice is to be served is provided for by Section 26 of that Act. The Appellant maintained that no demand notice was ever served by the 1st Respondent and further, that the demand notice dated 12/7/2011 predated the rates statement dated 26/7/2011. The Appellant relied on **Nakuru HCCA Number 125 of 2010 Henry Kuria Ndevi v Paul K. Mugambi and another [2015] eKLR** in which the court held that failure to serve the demand for payment of rates was a fundamental breach of law and rendered the proceedings instituted after that a nullity.

7. The Appellant faulted the magistrate for making a finding that proper service had been effected and relied on **John Akasirwa v Alfred Inat Kimuso [2001] eKLR** in which the Court of Appeal found that proper service of summons to enter appearance in litigation is a crucial matter in the process whereby the court satisfies itself that the other party to litigation had notice of the suit and chose whether or not to enter appearance. The Appellants urged that the process server stated in his affidavit of service dated 16th and 26/8/2011 that the Suit Property was deserted and on inquiring from the neighbouring plots was informed that the Suit Property was deserted. The Appellant added that not being a surveyor, it is possible that the process server who swore that he identified the Suit Property by use of map may have affixed the court papers at the wrong place.

8. The Appellant contended that the 1st Respondent was required by Order 21 Rule 6 of the Civil Procedure Rules to serve a notice of entry of judgement upon the Appellant since the Appellant had not appeared or filed the defence. The Appellant gave a summary of the order of events as follows: judgment was entered *ex parte* on 23/8/2011; a notice to show cause why execution should not issue was given on 24/8/2011 which summoned the Appellant to attend court on 30/8/2011.

9. The Appellant also contended that the Learned Magistrate erred in law by failing to find that the entire process of the recovery of rates was marred with irregularities and procedural impropriety. The Appellant urged that Section 19 makes any rates due together with interest a charge against the land and the rating authority may deliver a notification for registration against the land. The Appellant also relied on Order 22 Rule 48 of the Civil Procedure Rules which stipulates that where the property to be attached is immovable, the attachment shall be made by an order prohibiting the judgment debtor from transferring or charging the attached property. The Appellant argued that the decree issued on account of the rates together with the prohibition order should have been registered against the Suit Property which did not happen in this case. The Appellant averred that during the settlement of terms of the sale, the 1st Respondent produced an incomplete title document which was not certified and which the Appellant contended was forged for omitting to show crucial information such as a charge to secure Kshs. 20,000,000/= in favour of Middle East Bank Limited.

10. The Appellant faulted the court for not inquiring into issues such as the current market value of the Suit Property, any encumbrances registered against the land, a current search done on the Suit Property, the reserve price for the property, the terms to be imposed in the advertisement, the amount to be recovered, and the manner of dealing with the proceeds of sale. The Appellant submitted that the Learned Magistrate failed to consider the fact that no valuation was done on the property and that the property was sold at an unreasonably low price. It also faulted the auctioneer for giving misleading information in the notification of sale. The Appellant relied on case of **Nationwide Finance Company Limited v MEK Industries Limited and Another [2001] eKLR** in which Visram J (as then was) stated that the court's power to set aside a sale which is published or conducted irregularly is not affected by the fact that the property had been sold to a *bona fide* purchaser for value without notice of the irregularity. The judge further stated that the failure to comply with the relevant mandatory requirements of the Auctioneers' Rules was a material irregularity and that the failure to include the reserve price resulted in the property being sold at an undervalue which occasioned substantial loss to the plaintiff and had to be set aside.

11. The Appellant urged that a decree holder who exercises the power of sale of land owes a duty of care to the landowner. It relied on the case of **Amos Kanyuru Kinani v Housing Finance Company Limited and another [2007] eKLR** in which the court stated dealt with claims of fraud and the contention that the land was sold at an undervalue. The Appellant faulted the auctioneer for failing to adhere to Rule 15 of the Auctioneers Rules which requires service of the notification of sale and giving of 45 days' notice within which the owner may redeem the property by paying the amount stated. The Appellant submitted that no notification for sale was served. The Appellant contended that there was no proof that an auction actually took place or that the proceeds of the sale were received by the 1st Respondent or the court and relied on Order 22 Rule 70 of the Civil Procedure Rules which requires the purchase money to be paid into court unless the court orders otherwise. Further, it contended that the rates owed were Kshs. 618,456 and the Suit Property is alleged to have been sold for 5,000,000/= yet the difference was never accounted for.

12. The 1st Respondent filed submissions. It submitted that Section 17 of the Rating Act did not oblige it to use any particular mode of service and that it was not under any obligation to effect service in the manner prescribed by the Civil Procedure Act. It maintained that proper service of the summons and the notice to show cause was effected as stated by the process server in the affidavits of service dated 17th and 29th August 2011 respectively. On the challenge of the process of the recovery of rates as being marred with impropriety, the 1st Respondent contended that property passes at the fall of the hammer at an auction which extinguishes the owners' equity of redemption and his only remedy is to pursue damages. The 1st Respondent urged that if there was any irregularity in the manner in which the auction was conducted on 27/10/2011, then any claims should be directed at the auctioneers. The 1st Respondent submitted that the Appellant was properly served and that the sale was conducted above board in the recovery of the rates owed to it. Further, that the Suit Property passed to the purchasers at the auction at which point the Appellant's right of redemption was extinguished. It urged the court to dismiss the appeal with costs to the Respondents.

13. The 2nd and 3rd Respondents also filed submissions. The 2nd Respondent relied on the averments contained in the replying affidavit of Gopa Harish Vekaria urging that they bid for the Suit Property, paid the purchase price and were issued a memorandum of sale, and that the Suit Property was transferred to them after the High Court issued a vesting order. They urged that they stand to suffer prejudice being innocent purchasers for value without notice of fraud and further, that the Appellant's remedy lay in seeking damages against the 1st Respondent. The Respondents argued that any of the modes of service provided in the Rating Act could be used to effect service on the Appellant and contended that proper service was effected and faulted the Appellant for not calling the process server who effected service for purposes of cross examining him.

14. The 2nd and 3rd Respondents submitted that the Learned Magistrate considered all the facts and that the process prior to judgement was

proper. The Respondents argued that there had been a delay of four years before the Appellant filed the application seeking to set aside the sale and that by that time the Suit Property had been transferred to a third party. The Respondents urged that if the court were to invalidate the sale by public auction, then the only remedy available to the Appellant was to sue for damages. He relied on Section 26 of the Auctioneers Act which provides that a person who suffers damage from the unlawful or improper exercise of any power by the auctioneer shall be entitled to recover any damages from the auctioneer by action. They relied on the case of **Joyce Wairimu Karanja v James Mburu Ngure and 3 Others [2018] eKLR** in which the court stated that once the statutory power of sale is legally activated, any irregularity in the sale can only be remedied with damages to the mortgagor. The Respondents urged the court to dismiss the appeal. The authorities which the Respondents relied on dealt with the exercise of the statutory power of sale by chargees and are distinguishable from the facts of this case which arose from execution of a decree by sale of immovable property.

15. The court has looked at the affidavits of service of Julius Kiprop Cheruiyot sworn on 16/8/2011 and 26/8/2011. He deponed in the affidavit sworn on 16/8/2011 that he received summons for disposal of suit and a copy of the plaint from the Director of Legal Affairs of the City Council of Nairobi on 9/8/2011 and went to effect service in Industrial Area, Nairobi. He deponed at paragraph 5 that the Suit Property was a go down which had been deserted for some time. He further deponed that the gate to the Suit Property was unmanned. He decided to affix the summons on the gate after inquiring from a guard of the neighbouring company who informed him that for the time the guard had been there, he had never seen anyone or any activity in the Suit Property. He returned the summons to court as duly served.

16. The court notes that the summons for disposal of the suit attached to the process server's affidavit of service indicates that it was issued by the court on 9/8/2007 while the case number is Nairobi City Court number 3 of 2011. Julius Kiprop Cheruiyot swore on 26/8/2011 that he effected service of the notice to show cause why execution should not issue on the Appellant on 24/8/2011 and found that nothing much had changed at the Suit Property. The guards in the neighbouring company confirmed to him that no one had been inside the premises for some time. He stated at paragraph 8 that he pasted the summons on a conspicuous part of the premises and swore at paragraph 9 that he duly served the notice to show cause why execution should not issue on the Appellant.

17. From these two affidavits, it is clear that there were apparent anomalies in the documents served, the summons bears a date 4 years prior to the suit being instituted and the process server indicates in his second affidavit that he affixed summons on a conspicuous place in the premises yet he had instructions to effect service of the notice to show cause why execution should not issue during his second visit to the suit premises.

18. Section 17 of the Rating Act enjoins a local authority, in this case the 1st Respondent to cause a written demand notice to be served on the Appellant showing the rates due plus the interest before filing suit to secure the payment of the rates plus interest. Section 26 (2) provides the modes for effecting such service. There is no evidence that the 1st Respondent or its predecessor served a demand notice for rates on the Appellant before commencing the suit in the First Class Magistrates Court.

19. Section 17 (4) of the Rating Act provides that the summons shall order the defendant to appear and answer the claim on the day specified in the summons. It further gives the modes for serving the summons as through post, or fixing it on a conspicuous part of the premises or any mode under the Civil Procedure Rules. The purpose of serving the summons is to get the defendant or rent defaulter to appear and answer the claim and a defendant can only appear and answer the claim for rates and interest if he is served. The 1st Respondent maintained that proper service was effected by the process server who affixed the summons on the gate, yet the process server deponed that there was nobody at the premises and the guard in the neighbouring company informed him that there had been no activity in the premises for quite some time. The process server went back to effect service the second time knowing very well that the suit premises were deserted.

20. In the court's view, the process server ought to have relayed this information to the 1st Respondent's Director of Legal Affairs so that other modes of effecting service provided for by Section 17 of the Rating Act could be employed. The requirement to effect service of the written demand letter and the summons after filing suit is to notify the rate defaulter that he owes rates and should arrange to pay the rates due within the time given and also let him know that a suit has been filed to recover rates and that his property may be sold if he does not defend the claim for rates.

21. This court is of the view that the options given for effecting service are not to be applied mechanically by the local authority seeking to recover rates. It must be shown that the rates defaulter had reasonable notice of the demand made by the local authority for the rates due, and of the suit filed to recover the rates to afford him an opportunity to pay the rates due and to defend the claim before the local authority can proceed to sell his land to recover the outstanding rates. The reason for affixing the summons on a conspicuous part of the premises is so that the persons in that compound can find the summons and get to know that a suit for the recovery of rates has been filed against the owner of the property.

22. A process server needs to make reasonable diligent efforts to serve summons on a defendant and if that is impossible like it was in the case here that the Appellant's premises were deserted, under Order 5 Rule 20 (2), the process server should have returned the summons to court with an affidavit deponing to the attempts made to serve the Appellant. His statement would be deemed to be evidence of non-service. Order 5 of the Civil Procedure Rules even provides for service of summons out of Kenya, which would have used to serve the Appellant's director in the UK. No proper service of summons was effected on the Appellant.

23. The process for attachment of land after judgement is to be found in Order 22 of the Civil Procedure Rules. Under Rule 6 of Order 22, no less than ten days' notice of the entry of judgement must be given where judgement was entered against the defendant in default of appearance or defence. The notice of entry of judgement is to be given at the defendant's address of service or served personally. There is no evidence to show that the 1st Respondent gave or served notice of entry of judgement on the Appellant yet it got judgement against the Appellant in default of appearance and defence. The decree was issued on 24/8/2011 and the notice to show cause why a prohibition order should not be issued was given on 24/8/2011 on the same day the application for execution was filed.

24. The court notes that an application for execution was filed on 24/8/2011 stating that the mode of execution was by issuing a prohibitory order and sale by public auction of the Appellant's interest in L.R. No. 209/8323. A notice to show cause issued on 24/8/2011 was attached to the application showing the sum of Kshs. 593,450/= and requiring the Appellant to show cause why a prohibition order and sale of the Suit

Property should not issue. The decree for rates was also drawn on 24/8/2011.

25. A notice to show cause against execution under Rule 18 only applies in the instances specified which are, where an application for execution is made more than a year after the date the decree was issued, or against the legal representative of a party to a decree, or where the salary or allowance of a person is to be attached and it relates to partnership property. In the court's view, the proper way of commencing the execution process in this case should have through an application for a prohibitory order and not a notice to show cause as the 1st Respondent did.

26. Where a decree is being executed through the attachment of immovable property, an order prohibiting the judgment debtor from transferring or charging the property is to be made and registered against the title to the land pursuant to Rule 48. The attachment is effective and complete upon registration of the prohibitory order against the title to the property. A copy of the prohibitory order is to be affixed on a conspicuous part of the property. Julius Kiprop Cheruiyot deponed that he served a copy of the prohibitory order together with the notice of the day fixed for setting a sale notification on 2/9/2011 by affixing them on a conspicuous part of the Suit Property.

27. There is no evidence that a copy of the prohibitory order was ever registered against the Suit Property as required by Rule 48. After entry number 16 showing the charge of the Suit Property to Middle East Bank for Kshs. 20,000,000/= on 18/10/1995, the next entry against the title at number 17 is a court order dated 8/7/2013 issued in **High Court Misc. Civil Application No. 2 of 2013** vesting the Suit Property in Gopa Harish Vekaria and Vekaria Lalji Gopal as purchasers. The attachment of the Suit Property would only have been complete and effective upon registration of the prohibitory order against the title to the Suit Property, which was not done.

28. Rule 56 stipulates that a sale by public auction is to be conducted in the manner prescribed which would be in compliance with the Auctioneers Rules. Rules 57 and 58 of Order 22 give the procedure for the notification of the public auction and time of sale. The public notice should show the encumbrances to which the property is liable and other material factors for a purchaser to know in order to judge the nature and value of the property. The sale ought to take place 30 days of the date of the public notice. There is no evidence that the auctioneers served the notification of sale on the Appellant. The statement of particulars filed by the Auctioneers pursuant to Order XXI Rule 61 (2) and (3) indicated that the encumbrances on the suit land were not known to the applicant and the amount due was given as Kshs. 618,456/=. The schedule attached to it only mentioned an encumbrance by the Commissioner of Lands. There is no evidence that the charge over the Suit Property to Middle East Bank for Kshs. 20,000,000/= on 18/10/1995 was ever discharged, as there should have been an entry noted against the title showing that the land had been discharged from that encumbrance.

29. In the court's view, for a purchaser to judge the nature and value of the property as contemplated by Rule 57, a search and a valuation of the property must be done which would give an indication of the value of the property to potential purchasers. Rule 11 of the Auctioneers Rules, 1997 gives the requirements to be included in a court warrant such as the details of the land, estimated amount due on any encumbrance and details of the encumbrancer and the reserve price for the land based on a professional valuation carried out in the last 12 months. The Appellant contended that the Suit Property was sold at Kshs. 5,000,000/= in 2011 yet its value stood at Kshs. 120,000,000/= in 2008. No valuation was done of the suit land before it was sold which leads to the conclusion that the auction conducted was not only improper, but also fraudulent.

30. Vesting orders are made under Rule 67 with a view to vesting movable property on a purchaser. Entry no. 17 dated 8/7/2013 noted against the title over the Suit Property was registered pursuant to a vesting order issued in **High Court Misc. Civil Application No. 2 of 2013** vesting the Suit Property in Gopa Harish Vekaria and Vekaria Lalji Gopal as purchasers. This being immovable property, a vesting order ought not to have been issued after the sale of the land, it should have been a prohibitory order.

31. Rules 69 and 70 stipulate how payment of the purchase price is to be made by the purchaser. The purchase money is supposed to be paid into court unless the court orders otherwise under Rule 70 (2). The sale proceeds were not paid into court. The 1st Respondent filed an application in court on 16/7/2012 seeking a certificate of sale to certify that the Suit Property was sold to the 2nd and 3rd Respondents on 27/10/2011 by Domicile Auctioneers in execution of the decree. A memorandum on the notepaper of Domicile Auctioneer Services was attached to the application stating that the Suit Property was sold at an auction on 27/10/2011 and Kshs. 5,000,000/= being the total purchase price was paid by bank transfer to Domicile Auctioneers to complete the sale.

32. No evidence was adduced to confirm that indeed the purchase price was paid, bank statements showing the bank transfer would have sufficed. In any event, the sale proceeds ought to have been paid into court since there is no indication that the court had directed otherwise. There is also no evidence to confirm that the purchase price was paid to the 1st Respondent, who was the decree holder.

33. The Respondents urged that the Appellant's recourse lay in suing for damages. The court does not think so. Rule 75 of Order 22 entitles a person affected by the sale of immovable property in execution of a decree to apply to court to set aside the sale on grounds of material irregularity or fraud in publishing or conduct of the sale, provided he can prove to the satisfaction of the court that he has sustained substantial injury by reason of such irregularity or fraud.

34. The 1st Respondent did not demonstrate that the procedure for the sale of immovable property in Order 22 of the Civil Procedure Rules was duly followed in the sale of the Suit Property. This court is satisfied on the facts presented that there were material irregularities and fraud in the conduct of the sale of the Suit Property.

35. The court allows the appeal and sets aside the orders made for the sale of L.R. No. 209/8323 by way of public auction on 30/8/2011 and all subsequent orders relating to the Suit Property.

36. The judgement of Hon. M. W. Njagi, First Class Magistrate at Nairobi City Court delivered on 29/5/2017 in Civil Suit Number 3 of 2011 and all consequential orders are hereby set aside.

37. The Appellant is awarded the costs of the appeal to be borne by the 1st Respondent.

Dated and delivered at Nairobi this 15th day of July 2019.

K. BOR

JUDGE

In the presence of: -

Mr. A. M. Mulekyo for the Appellant

Mr. V. Owuor- Court Assistant

No appearance for the Respondents