



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 7 OF 2016**

**MAKATIAT LIMITED .....PLAINTIFF**

**VERSUS**

**LIQUIDATON AGENT TRADE BANK LTD (IL).....DEFENDANT**

**RULING**

*(Application to reinstate an application for injunction which was dismissed for non-attendance; applicant having filed an application for injunction together with the suit and interim orders of injunction pending hearing inter partes having been issued; applicant not appearing to take a date for her motion; date taken by respondent and counsel for applicant being served with a hearing notice; counsel and applicant not appearing; motion dismissed; upon dismissal of the motion, respondent proceeding to auction the suit land; applicant now seeking reinstatement of the motion and arguing that the auction was irregular; no substance to reinstate the dismissed motion; applicant and counsel had been absent even on the mention date when the date for hearing of the motion was given; no explanation given for their absence; applicant being aware of the dismissed motion before the date for the auction sale; no application filed immediately to reinstate the dismissed motion; applicant guilty of laches; argument on whether or not the auction sale was regular outside the ambit of the current litigation; application dismissed)*

1. The application before me is that dated 3 November 2017 filed by the plaintiff. It seeks the following substantive orders which are prayers 2, 3 and 4 of the application respectively, being :-

*(i) That the order dismissing the plaintiff's application dated 18 January 2016 which was made on 28 June 2017 in the absence of counsel for the applicant be set aside.*

*(ii) That the temporary orders of injunction be reinstated.*

*(iii) That pending the hearing and determination of this application inter partes a temporary stay of sale of all that parcel of land known as LR No. Nakuru/Githiriga/124 be stayed.*

2. The application is based upon the following grounds :-

*(a) That the failure to attend court by counsel for the applicant was not deliberate.*

*(b) That counsel for the applicant learnt of the dismissal on 16 October 2017 when the matter came up for further mention.*

*(c) That the respondent advertised the property for sale on 3 November 2017.*

*(d) That the intended sale is irregular and illegal.*

*(e) That the applicant has complied fully with the order of the court.*

3. The application is opposed and before I go to the gist of it, a little background will shed light on the same.

4. This suit was commenced by way of a plaint which was filed on 19 January 2016. In the plaint, the plaintiff pleaded that it negotiated with the defendant on a debt due to Trade Bank Limited (under liquidation) and agreed that the plaintiff would pay the sum of Kshs. 16.3 Million and that the debt would not attract any further interest until payment is made in full. It is pleaded that the plaintiff made efforts to pay, but the defendant appointed a firm of auctioneers to advertise its property for sale, which auction was to take place on 29 January 2016. The said property is Nakuru/Githiriga/124 (hereinafter described as "the suit land"). The plaintiff pleaded that it is under a genuine fear that the property may be sold to recover a debt in excess of the negotiated settlement. In the suit, the plaintiff asked for orders to restrain the defendant from selling the suit land and costs of the case.

5. Together with the plaint, the applicant filed an application for injunction, seeking to restrain the respondent from selling the suit land pending hearing and determination of the case. The matter came before me ex-parte, on 19 January 2016, when I gave interim orders of injunction pending inter partes hearing, subject to the applicant depositing the sum of Kshs. 2 Million with the respondent, which order the applicant complied with. Thereafter the matter was mentioned on several occasions when I was informed that parties are negotiating a settlement. On 13 February 2017, Mr. Kipkenei, learned counsel for the applicant was present in court, but there was no representation on the part of the respondent. Mr. Kipkenei applied for leave to amend the plaint and I gave the applicant 14 days to do so and gave 15 May 2017 for mention. On 15 May 2017, Mr. Kipkenei was absent, but Ms. Akong'a, learned counsel for the respondent was present. Ms. Akong'a submitted that no amended plaint had been filed, and sought a date for the application dated 18 January 2016, which is the application for injunction which was filed alongside the plaint. I gave the date of 28 June 2017 for the hearing of the application and directed that counsel for the applicant be served.

6. On 28 June 2017, only Ms. Akong'a appeared for the respondent. There was no appearance on the part of the applicant or his counsel, and Ms. Akong'a, applied for the dismissal of the application dated 18 January 2016 for failure to prosecute. Having satisfied myself that counsel for the applicant was served in good time, on 17 May 2017 to be precise, I duly obliged and proceeded to dismiss the application with costs. I also vacated the interim orders that I had earlier granted. I then directed that the matter be mentioned on 16 October 2017, for pretrial directions, and advised that counsel for the applicant be served with a mention notice. On 16 October 2017, Mr. Kipkenei, for the applicant, was present, and he stated that he thought that the matter was for the hearing of his client's application dated 18 January 2016. I informed him that the said application was dismissed on 28 June 2016, and inquired whether the case is ready for trial. Mr. Kipkenei mentioned that the case is ready for trial and I gave 2 May 2018 for hearing of the main suit.

7. It appears that upon dismissal of the application and vacation of the interim orders, the respondent advertised the suit property for sale, and scheduled the sale for 3 November 2017. On the same day, 3 November 2017, this motion was filed.

8. In the supporting affidavit sworn by Mr. Kipkenei, learned counsel for the applicant, he has deposed that he was not aware of the dismissal of his client's application dated 18 January 2016, as his clerk, despite receiving the hearing notice, failed to record the same in the diary. It is for that reason that he did not attend court. He has stated that he only learnt of the dismissal of the application on 16 October 2017 when he was in court, ready to argue the application, only to discover that the same had been dismissed. He has averred that it was on 2 November 2011, that he learnt from his client that the suit property was advertised for sale on 31 November 2011 (must have meant 31, October, 2017), and the sale was due on 3

November 2017. He has deposed that the notification of sale is irregular and illegal as the same is too short. He thus argued that a temporary stay of sale be granted pending hearing inter partes of the subject application.

9. Upon being filed, the application was placed before my brother, Ohungo J, who was sitting as the duty judge. The judge granted interim orders stopping the auction sale but did note that he has issued the orders at 11.45am, as the sale was due at 11.30am in Nairobi.

10. In reply to this motion, the respondent filed an affidavit sworn by Mr. Peter Kitonyo, its Assistant Liquidation Agent. Inter alia, he has pointed out that counsel for the applicant had absented himself on several occasions before his client's application dated 18 January 2016 was eventually dismissed on 26 June 2017, and it is actually the respondent who took the date for hearing of the applicant's motion. He has further deposed that the auction meant for 3 November 2017, proceeded and the property was knocked down to Jimpatsum Holding Company Limited, who were the highest bidders at Kshs. 24,900,000/=. It is averred that they paid 25% of the purchase price through two cheques of Kshs. 900,000/= and Kshs. 825,000/= and RTGS of Kshs. 4,500,000/=. It is deposed that the auction proceeded at 11.30am, as scheduled, and that the order staying the auction was served at 4.45pm, after the auction had already taken place. It is thus argued that an injunction cannot now issue and there is nothing to preserve.

11. The applicant filed a supplementary affidavit sworn by Mr. Levy Kipkemboi Sirma, an advocate practicing in the law firm of M/s Kipkenei & Company Advocates, on record for the applicant. He averred inter alia that he attended the offices of the auctioneer, M/s Sportlight Intercepts, on the day of the auction, and he was asked to deposit Kshs. 2 Million to qualify for the auction. He has deposed that by 11.50am no auction had taken place. He averred that no bidding took place and that Mr. Kipkenei arrived at 2.30pm with the stay order. He has deposed that the two cheques mentioned by the respondent were deposited on 9 November 2011 in breach of the order of injunction. He has asserted that no sale took place.

12. A further replying affidavit was filed by Mr. Peter N. Gichuki, the proprietor of M/s Sportlight Intercepts auctioneers. He deposed that he advertised the suit property for sale on 17 October 2017 and 31 October 2017, in the Daily Nation newspaper, and that prior to the advertisement, he had issued to the plaintiff a 21 day notice. He deposed that to qualify to bid, one needed to have deposited the sum of Kshs. 2 Million and only two persons did so. Without the deposit, one could not qualify to bid, and he has contended that Mr. Sirma was never present at the auction and he never met him on the day. He has deposed that the auction started promptly at 11.30am, in the presence of two bank officials and the two bidders, and that the auction was completed at 12.00 noon with the highest bidder being Jimpatsum Holding Company Limited. He has reiterated that the stay order was served at 4.45pm after completion of the auction.

13. I allowed a further supplementary affidavit to be filed, and one was filed by Mr. Kipkenei. He deposed inter alia that the cheques exhibited by the respondent go against banking policy as in Kenya, one is not allowed to draw a cheque in the sum of Kshs. 1 Million, as portrayed by the auctioneer. He also attacked the sale for not having been conducted after sufficient notice. He has also deposed that the applicant only took a loan of Kshs. 5,000,000/= and there was no good reason why the respondent was claiming the sum of Kshs. 500,000,000/=. He has also stated that it is not clear whether any money was forwarded by the claimed highest bidder by RTGS as alleged by the respondent.

14. I took in the submissions of Mr. Kipkenei, learned counsel for the applicant, and Ms. Akong'a, learned counsel for the respondent and I have considered the same in this ruling.

15. What is before me is an application to reinstate the plaintiff's application for injunction, which was dismissed for non attendance. The applicant wants the application reinstated and heard on its merits. The main gist of the respondent's objection to the application, is that there is nothing to reinstate, as the suit property was already sold by public auction on 3 November 2017 after interim orders were vacated, when the application for injunction was dismissed for non-attendance.

16. The sole reason presented as to why I should reinstate the dismissed application, is that Mr. Kipkenei, learned counsel for the applicant, did not diarise the date of 26 June 2017, which was the inter partes hearing date for the dismissed application. In as much as mistakes and omissions will be made, and failure to diarise could be one such omission, I am not too persuaded by this reason. Prior to the dismissal of the applicant's application dated 18 January 2016, the applicant and his counsel did not appear at the preceding mention date, and the absence by the applicant and his counsel on this date has not been explained, despite the date having been taken by consent.

17. Further, when counsel appeared before me on 16 October 2017, for pretrials, he became aware of the fact that his client's application for injunction had been dismissed on 26 June 2017. Having become cognizant of this fact, he and his client, must have been aware that they no longer enjoyed any interim orders, and that the suit property could be auctioned, as there was no order staying the sale of the same. Despite this knowledge, no application was filed to have the interim orders earlier granted reinstated, and no request was made to have injunctive orders remain in place pending hearing of the suit. That was a risk that the applicant took and I do not see how the applicant can now be heard to complain that an auction took place. There was time to file an application to reinstate the dismissed motion for injunction, and there was time to seek interim orders, way before the auction date of 3 November 2017, but no motion was ever filed.

18. Thus, even if I was to excuse the applicant's non-attendance on 26 June 2018, when the motion for injunction was dismissed, I cannot excuse the applicant for coming very late, on the date of the auction, to file an application to reinstate the dismissed motion. The applicant is clearly guilty of laches and cannot be assisted. In essence, I am not persuaded that the applicant has tabled before me sufficient material to enable me exercise my discretion to reinstate her dismissed application for injunction. Thus, it does not matter to me whether an auction took place ; I am dismissing this motion completely independent of whether or not an auction took place.

19. The applicant has of course attacked the auction that took place on 3 November 2017. It is argued that no auction took place, and that if any took place, the same was irregular and unlawful. I am afraid that this is not the forum to make those arguments. There is already an accepted bid and already there is a buyer of that property. Whether or not the sale was irregular and ought to be set aside must remain the subject of separate proceedings. I have no pleadings in this suit, seeking to attack the auction sale of 3 November 2017, and I am unable to make a decision as to whether or not the said sale is irregular and ought to be set aside within the context of this application. If the applicant wants to impugn the said sale, she must bring appropriate pleadings for consideration.

20. I think I have said enough in the matter. For the above reasons, the application dated 3 November 2017 is hereby dismissed with costs. Any interim orders granted pursuant to the said application are also hereby set aside.

21. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 22<sup>nd</sup> day of February 2018.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of : -**

Mr. Nanda holding brief for Mr. Kipkenei for the applicant.

Ms. Oseko holding brief for M/s Macharia Njeru & Company Advocates, for the respondent.

Court Assistant: Nelima Janepher.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**