



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISCELLANEOUS APPLICATION NO. 449 OF 2011

IN THE MATTER OF: AN APPLICATION FOR THE ISSUE OF A

VESTING ORDER IN FAVOUR OF KHALID ISLAM ALI SALIM

PURCHASER OF FLAT NO. 2 CR. 18351 ON LR. 1215/1/M.N – NYALI

IN THE MATTER OF: EXECUTION OF THE DECREE

IN MOMBASA RMCC NO. 1560 OF 2010 JENNIFER

DE SOUZA & OTHERS =VS= VINODCHAND D. SHAH & ANOTHER

AND

KHALID ISLAM ALI ISLAM.....APPLICANT

RULING

1. For determination is the application dated 6th June 2011 made by the applicant Khalid Islam Ali Islam seeking orders:

i) That the sale of flat No 2 CR 18351/1/MN held by public auction on 12th April 2011 be confirmed and made absolute in favour of the purchaser

ii) That flat No 2 CR No 18351 on LR No 1215/1/MN be vested absolutely in favour of the purchaser.

2. The application is premised on the grounds that the sale was carried pursuant to a decree in RMCC 1560 of 2010 on 8th October 2010. That the purchaser complied with the terms of the sale and paid the purchase price in full to the advocates of the decree holder. Lastly that no application to set aside the sale has been made by any party. The application is further supported by the affidavit of the applicant sworn on the same date.

3. The application is opposed by the replying affidavit of Devshi Virji Shah who states to hold a power of attorney from Vinodchand D Shah the proprietor of the suit land. Mr Devshi did not however attach a copy of the power of attorney to this affidavit. He deposed that he is aware the property was attached and he made an application for stay which was refused. He filed an appeal against the refusal for stay.

4. He continued that the High Court granted him a stay order on 15th April 2011. Mr Devshi deposed that in the absence of service of 45 days mandatory notice under the Auctioneers Rules 1997, the alleged sale cannot be made absolute. Secondly that in the absence of agreement of the advocates for the debtor and the decree holder on the terms and conditions of the sale, the sale could not have taken place. The Respondent avers that the applicant has not exhibited anything to confirm the alleged payment of the purchase price therefore the Court should not confirm the sale as absolute. For the stated reason, the Respondent urged the Court to set aside the sale and the certificate of sale.

5. The applicant filed written submissions as a mode for arguing the application while the Respondent did not. The Court is asked to grant orders that shall vest the property to the applicant. There are two questions for me to determine while considering whether or not to allow the application. First is whether there is in force an order of stay of execution. The Respondent annexed as **DVO-2** an order issued on 15.4.2011 in HC Civil Appeal No 38 of 2011. The order was issued pursuant to an application made on the same date. However this application was not annexed. Instead the Respondent annexed an application dated 14th July 2011 filed in RMCC No 1560 of 2010. This must be the application which was refused as per the deposition in paragraph 5 of the replying affidavit.

6. The order of stay annexed by the Respondent was issued on 19th April 2011 in HCCA 58 of 2011 granting a temporary stay of execution pending determination of that application. It also directed that the matter be listed for inter parties hearing within 21 days. The present application was filed on 6th June 2011 – 1 ½ months after the issuance of the order of stay. The order annexed is thus purporting to stay orders in an application that was filed after its issuance. If the Respondent intended the Court to put reliance on this order, he ought to have annexed the relevant application and what became of it at least after the 6th of June 2011. The Court can only infer that there is no order to stay the present application as none has been exhibited.

7. The second question raised by the Respondent for my determination is whether the Court can refuse this application for non-compliance with the Auctioneers Rules or failure to exhibit proof of payment of the purchase price. In the present application in my view it is not open for the Respondent to question the validity of the process of sale as conducted. The compliance or non-compliance with the Auctioneers Rules is a ground for setting aside the sale by itself. The Respondent made an application dated 14.7.2011 in RMCC 1560 of 2010 to set aside the sale which application he says was dismissed. He thereafter filed an appeal against the dismissal. Therefore the validity of the sale should be determined in that appeal. Since I have found there is no order staying this application/execution, the mere filing of an appeal is not a bar to the orders herein being granted.

8. As to whether the applicant demonstrated he paid the purchase price, there is annexed a certificate of sale to the affidavit in support of the application. The certificate was issued by the Court on 12.4.2011 and it stated that it confirms the sale of the property at Kshs 2,800,000=.

That the Court must have been satisfied with documents presented to it including proof of payment before it issued the certificate. Accordingly I find the failure to exhibit proof of payment of the purchase price as a non-issue to the present proceedings.

9. In conclusion, I find no valid reasons raised why the application dated 6.6.2011 should not be granted. The result is the said application is hereby allowed in terms of its prayer (1) and (2) with costs in the cause

Dated & signed at Mombasa this 13th April 2018

A. OMOLLO

JUDGE

Delivered at Mombasa this 16th April 2018

L. C. KOMINGOI

JUDGE