



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 98 OF 2000

SAMUEL AYIENDA MOKUA.....PLAINTIFF

VERSUS

TING'A TRADING CO. LTD.....DEFENDANT

AND

ALFRED KENNEDY MAKORI.....APPLICANT/PURCHASER

R U L I N G

1. Before me for determination is the purchaser's/applicant's Notice of Motion dated 26th June 2008 brought under Section 98 of the Civil Procedure Act, Order XXI Rule 81(1) and Order XLVIII Rule 5(1) (B) of the previous Civil Procedure Rules. The applicant has sought orders that:-

1. The application be heard ex parte.

2. That the Deputy Registrar of the court do make an order confirming the sale made on 16th July 2007 of all that land parcel No. Lietego Settlement Scheme/83 at a public auction.

3. The costs of the application be provided for.

2. The application is grounded on the ground that no application had been made under the provisions of Order XXI Rules 78 and 80 of the Civil Procedure Rules and further that the application made by the plaintiff/judgment debtor under Order XXI Rule 79 Civil Procedure Rules seeking to set aside the sale by public auction was disallowed by the court. The applicant in an affidavit in support of the application deposed that a public auction for the sale of land parcel number **Lietego Settlement Scheme/83** was held on 16th July 2007 at which he participated and was declared the highest bidder on his offer of kshs. 750,000/= as per the Memorandum of Sale of property dated 16th July 2007 annexed and marked "**AKMI**". The applicant further deposed that the plaintiff's judgment debtor's application for stay of execution and/or setting aside of the sale was declined by the court as per the copies of the application and ruling annexed and marked "**AKM-2**" and "**AKM-3**" respectively.

3. This application was not prosecuted as the plaintiff/judgment debtor resorted to filing of a multiplicity of applications before this court which applications have unfortunately all been determined against the plaintiff/judgment debtor. I have had the occasion to hear and determine one of the applications being an application dated 22nd August 2008 where the plaintiff inter alia sought orders of the preservation of status quo and further sought to review or to set aside the judgment and decree entered on 8th January 2001 and the consent order dated 28th June 2001 together with all the consequential orders emanating therefrom.

4. While making my ruling on that application on 30th September 2016 after a careful analysis of the facts and the history of the matter I stated as follows:-

"The net effect of the review and analysis that I have outlined above is that the plaintiff's application dated 22nd August 2008 is in all aspects res judicata. The application for review of the interlocutory judgment was refused by both Wambilyangah, J. and Musinga, J. while the prayer to set aside the sale by public auction and/or annul the consent dated 8th June 2001 was dismissed by Musinga, J. on 22nd April 2010 and the appeal by the applicant to the Court of Appeal was equally dismissed. The applicant's application dated 22nd August 2008 is therefore unsustainable for being res judicata..."

5. On 24th July 2017 the court directed the parties to argue the application dated 26th June 2008 by way of written submissions. The purchaser/applicant filed his submissions dated 25th September 2017 on 28th September 2017. The plaintiff filed his submissions together with the replying affidavit on 18th January 2018. I have considered the replying affidavit sworn by the plaintiff respondent in opposition to the application and I do not find the same relevant to the instant application. The issues raised in the replying affidavit are issues that have been dealt with by the court previously while considering the various applications that the plaintiff has made. The court has previously refused to set aside the judgment or stay execution of the judgment and/or set aside the sale carried out in execution of the judgment.

6. The sale by public auction of the plaintiff/judgment debtor's property in this matter was consequent to an order of the court in execution of a decree. Under the old Civil Procedure Rules, Order XXI Rules 78 and 79 provided for applications to set aside the sale on full deposit of the decretal sum, and/or setting aside the sale on grounds of irregularity or fraud respectively on the part of the property owner/judgment debtor. Under Rule 80 a purchaser at the auction could apply to set aside the sale on the ground that the judgment debtor had no saleable interest in the property sold.

7. Order XXI Rule 81(1) of the Civil Procedure Rules on which the instant application is predicated provides:-

81.(1) Where no application is made under rule 78, rule 79 or rule 80, 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 sold property is concerned.

Rule 83 of Order XXI provided for issue of certificate to the purchaser thus:-

83. Where a sale of immovable property has become absolute the court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser, and such certificate shall bear date and the day on which the sale became absolute.

8. The aforesaid rules under Order XXI being Rules 78, 79, 80, 81 and 83 in the revised Civil Procedure Rules 2010 were replaced by Order 22 Rules 74, 75, 76, 77 and 79 respectively and the wording is the same as in the old rules. Under Order XXI Rule 81(1) which is similar in wording to Order 22 Rule 77(1) where no application is made to deposit the full amount or to set aside the sale for irregularity or fraud and/or the purchaser applies to set aside the sale on the ground there was no saleable interest, the court is obliged to confirm the sale and on application by the purchaser to issue/grant a certificate of sale certifying the sale as absolute.

9. In the instant matter the plaintiff's application to set aside the sale was refused by the court and the application to stay execution and for setting aside and/or review of the judgment were equally disallowed by the court. In those circumstances under the provisions of Order XXI Rule 81(1) the sale became absolute and in terms of Order XXI Rule 83 of the Civil Procedure Rules (old) the court was entitled to grant a certificate confirming the sale as having become absolute in favour of the purchaser. The application by the purchaser dated 26th June 2008 has merit and I accordingly allow the same in terms of prayer (2) thereof. The costs of the application are awarded to the purchaser/applicant.

10. Orders accordingly.

RULING DATED, SIGNED and DELIVERED at KISII this 13TH DAY of APRIL, 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Okenye for Mokuu for the plaintiff

N/A for the defendant

Ms. Momanyi for Ayienda for the applicant/purchaser

Ruth court assistant

J. M. MUTUNGI

JUDGE