



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. CASE NO. 538 OF 2017

(FORMERLY CIVIL APPEAL NO. 402 OF 2002)

NAIROBI CITY COUNCIL.....APPELLANT

VERSUS

JEREMIAH O. ESHITEMI.....1ST RESPONDENT

GIKOE TRASO HOTEL.....2ND RESPONDENT

JUDGEMENT

1. This is an appeal against the decision of the Honourable Mr. N. H. Oundu, Resident Magistrate, made on 5/7/2002 in which he held that the 1st Respondent was not properly served with summons to enter appearance in the suit for recovery of rates filed before the first class magistrate.

2. The Appellant contends that the Learned Magistrate erred in finding that the 1st Respondent was not properly served with the notification of sale, prohibitory order and the other processes. The Appellant contends that the Honourable Magistrate should not have set aside the sale and the auction there being no evidence of fraud since the 1st Respondent had failed to satisfy the requirements under Rules 79, 80 and 81 of Order XX1 of the Civil Procedure Rules. The Appellant also contends that the 1st Respondent did not have a good defence to the action and that no useful purpose would be served in setting aside the judgement.

3. The Appellant seeks to have the orders of the subordinate court made on 5/7/2002 set aside and an order dismissing the 1st Respondent's application dated 1/11/2001 with costs together with costs of this appeal.

4. The background of this appeal is that the Appellant filed **RMCC No. 131 of 1990- City Council of Nairobi v. Jeremiah Eshitemi and Another** seeking to recover the outstanding rates in the sum of Kshs. 8,012.50 in respect of Plot number 36/3/1019 ("the Suit Property") with interest at 1% per month. The certificate filed by the Appellant in court indicates that as at 31/8/1990, the rates due from the 1st Respondent were Kshs. 4,098.50. The first class magistrate's court at Nairobi City Court issued a decree for rates in favour of the Appellant for Kshs. 15,084.50 on 14/7/1992. The Appellant went ahead and executed the decree and the Suit Property was sold to the 2nd Respondent at a public auction conducted by Galaxy Auctioneers on 13/4/1994.

5. The 1st Respondent filed a chamber summons dated 1/11/2001 seeking to set aside the ex-parte judgement. The Honourable Mr. N. H. Oundo (SRM) vide the ruling delivered on 5/7/2002 set aside the

ex-parte judgement together with all subsequent orders made.

6. The Appellant contends that it has the mandate to recover outstanding rates on properties within its jurisdiction pursuant to Section 17 of the Rating Act and that Section 17 (4) (b) of the Rating Act provides for the mode of service for fixing summons ordering the defendant to appear on or to some conspicuous part of the land. It further argues that notices under Section 26 (2) (d) of the Rating Act allows for any notice demand or other documents required to be served or sent for purposes of the Act, to be served by delivering it to the person; or leaving it at the usual or last known place of abode; or sent by ordinary or registered post; or by delivering it to some person on the premises or if there is no person by fixing it on some conspicuous part of the property.

7. The Appellant contends that having elected to serve the demand notes and notices on a conspicuous part of the property it had complied with the law. The Appellant faults the subordinate court for taking issue with the fact that the summons and notices were affixed on an inconspicuous part of the property.

8. The subordinate court noted that that Section required that if that mode of service is chosen, it has to be by affixing on or to some conspicuous part of the land. The Appellant urges the court to find that proper service was effected since the return of service exhibited shows that the summons were served by affixing at the outer door of the house standing on the Suit Property.

9. The court has looked at the return of service prepared by Michael Kiganya. He states that on 29/1/1991 he served the summons upon the defendant at Eastleigh Section III. He further states that he served the summons by affixing copies of the summons and plaint on the outer door of the house standing on plot number 36/3/1019 being the house in which he/she/they ordinarily reside, carry on business/personally work gain the property subject matter of this suit.

10. The return of service which was typed appears to be a standard form document in which the details of the process server, the date of service, the case number, the time of service, the place of service and the land reference number would be inserted by hand. It is not clear whether the defendant ordinarily resided or carried on business in the Suit Property where it is where it is alleged he was served.

11. The Appellant did not include the affidavit sworn by the 1st Respondent in support of the application for setting aside the ex-parte judgement in the record of appeal. It would have been helpful for the court to see the averments in the affidavit on the disputed service. The Appellant's replying affidavit sworn by Rashid Hamisi Mwakiwiwi, its Chief Litigation Counsel states that proper service was effected by affixing copies on the outer door of the Suit Property. Paragraph 5 of the affidavit states in response to the defendant's affidavit that the property in question is one and it does not matter how many entrances or doors the building has.

12. Section 15 of the Rating Act ("the Act") provides that every rate levied by the rating authority under the Act shall become payable on a date fixed by the rating authority and requires the rating authority to publish at least 30 days' notice of the amount payable as rates.

13. Under Section 16 of the Act, when the rating authority has given the notice contemplated by Section 15, of the day on which the rate levied is payable, it shall be the duty of every person liable to pay the amount of such rate at the offices of the rating authority or to any person authorised by the rating authority to collect such rent failing which proceedings may be taken as provided in that Act.

14. Section 17 (1) of the Act empowers the rating authority to cause a written demand to be made to a person who fails to pay the rates due from him and interest where they fail to pay at the time fixed for payment within 14 days after service of the notice while Section 17(2) empowers the rating authority to take proceedings in a subordinate court of the first class to secure the payment of such rate and interest if a person who has had such demand served upon him makes default.

15. The modes of service of summons issued in proceedings under that section are set out in Section 17 (4). These include post, or by affixing the summons on some conspicuous part of the land, or by any

mode of service authorised by the Civil Procedure Rules. The Longman Dictionary of Contemporary English defines 'conspicuous' as very easy to notice.

16. Section 26 (2) of the Act provides that any notice, demand or other documents required to be sent or served for purposes of that Act may be served either by delivery to the person, or by leaving it at the usual last known place of abode or business of that person, or sent by ordinary or registered post, or by delivering it to some person on the premises to which it relates or if there is no person on the premises, by fixing it on some conspicuous part of the rateable property.

17. The proviso to Section 26 states that having attempted the aforementioned methods of service, if the rating authority has reason to believe that such notice has not been received by the addressee it may advertise the general purport of such notice or demand in the Kenya gazette and in one or more newspapers circulating in the municipality. Thereafter such notice demand or other documents shall be deemed to have been received by that person. The advertisement may refer to one or more notices, demands and many rateable owners.

18. The court notes that the Appellant did not attach any evidence of service of the notice contemplated by Section 15 of the Rating Act. This is what would precede the liability of a rate payer under Section 16 before the rating authority can commence the proceedings contemplated by Section 17(2) and (3). Section 17 (2) states that if any person who has had a demand served upon him defaults, the rating authority may take proceedings in a subordinate court. The Appellant did not show that such a demand was served upon the 1st Respondent before taking out the proceedings before the subordinate court.

19. In the ruling of the Hon. N. H. Oundo, the court observed that the defendant had deponed that the premises had several units occupied by tenants which averment was not challenged. The court noted that fixing the process on any part of the land was not sufficient since it must be a conspicuous part on the premises which can be seen by the defendant. The court stated that if the plaintiff did not effect personal service then the place on which the process was fixed should have been conspicuous. The court was in doubt owing to the fact that the premises had many units some of which were not occupied by the defendant and it was not specified that the particular door on which the process was fixed was conspicuous to the defendant.

20. The court also noted that the Notice for Settlement of Sale Terms and the Prohibitory Order were served on one Alex Mwalo without an indication of how the said Alex Mwalo was related to the defendant. The defendant denied knowing Alex Mwalo. The court noted that even after the sale the rates were still being paid in the defendant's name giving the impression that ownership of the Suit Property had not changed.

21. The decree annexed to the record of appeal shows that the decretal amount was Kshs. 15,084.50 while the application for execution contains the sum of Kshs. 19,798.65 as owing as at 30/12/1993. The certificate of sale confirms that the 2nd defendant was declared the purchaser of the Suit Property at a sale conducted by public auction on 13/4/1994 by Galaxy Auctioneers.

22. The memorandum of sale dated 14/4/1994 drawn by Galaxy Auctioneers states that the Suit Property was sold for Kshs. 500,000 out of which a deposit of Kshs. 125,000 was paid to the auctioneers. It is also not clear whether the 2nd Respondent paid the balance of the purchase price. No mention is made of whether the Appellant refunded the difference to the 1st Respondent after the auction. It would be unconscionable for the Appellant to withhold the difference between the sale proceeds and the decretal sum.

23. The return of service dated 6/1/1994 states that the Notice for settling a Sale Notification and the Prohibitory Order were served upon Alex Mwalo on behalf of the defendant. It states that Mr. Alex Mwalo accepted service but declined to sign the original notice and prohibitory order.

24. The return of service prepared by Rogers Kinyua Karuri dated 6/9/1995 states that on 5/9/1995 the process server proceeded to the Suit Property in Eastleigh but did not find the defendant and he duly

served the hearing notice by affixing it on the main entrance to the plot. Another return of service prepared by this process server states that a hearing notice was served on the defendant by affixing of the notice on the main entrance to the plot.

25. From the returns of service annexed to the record of appeal, it is not clear where the documents were fixed. Some of them indicate that they were affixed on the main entrance to the plot without describing whether it was on the gate or on the entrance to the building situated on the Suit Property.

26. The court is inclined to agree with the finding of the Learned Magistrate that no proper service was effected, the Appellant having failed to show that summons to enter appearance were fixed on a conspicuous part of the rateable property.

27. The fact that the hearing notice in respect of this appeal had to be served upon the 1st Respondent by substituted means in *The Standard* of 9/2/2018 confirms that the Appellant was unable to trace the defendant for service. It is not clear why the Appellant or the process servers did not make diligent effort to find out the whereabouts of the 1st Respondent from the tenants on the Suit Property.

28. Under Section 24 of the Rating Act, in any proceedings to recover rates, a certificate issued by an officer authorised by the rating authority setting out the details of the defaulter, the amount of the rates due plus interest stating the fact that such person has been served in accordance with Section 26 and has failed to comply with the notice requiring him to make payments is admissible as *prima facie* evidence of the facts provided that a party to such proceedings may tender evidence to prove the contrary. The certificate is also supposed to state the fact that such rate and interest do not exceed the maximum amounts prescribed by the act.

29. The court has considered the Appellant's submissions together with the 2nd Respondent submissions. The 1st Respondent did not participate in these proceedings. The 2nd Respondent urges the court to set aside the ruling and order made by the Honourable Mr. N. H. Oundo on 5/7/2002 arguing that it purchased the Suit Property at an auction and is therefore protected by Section 26 of the Land Registration Act. The 2nd Respondent relies on the memorandum of sale in the record of appeal in support of the averment that it purchased the Suit Property for 500,000 shillings.

30. Where the certificate of title was acquired illegally, unprocedurally or through a corrupt scheme, the title of a proprietor can be challenged and certificate of title issued to the purchaser shall not be taken as *prima facie* evidence that the person named is the absolute and indefeasible owner pursuant to Section 26 of the Land Registration Act.

31. The court agrees with the Learned Magistrate that proper service not having been effected on the 1st Respondent, a good title did not pass to the 2nd Respondent following the auction conducted as a result of the decree issued in the proceedings for the recovery of rates from the 1st Respondent.

32. The 2nd Respondent relies on the case of **Captain Patrick Kanyagia and another v. Damaris Wangechi and Others** [1995] eKLR in which the court stated that no duty was cast on an intending purchaser at an auction to inquire into the rights of the mortgagee to sell. That reasoning is not applicable in this case which does not relate to a mortgagee but the recovery of rates by a rating authority under the Rating Act.

33. The 2nd Respondent seeks the alternative prayer for reimbursement and or compensation of damages and costs against the Appellant with interest on the purchase price it paid at the auction. It urges the court to grant this prayer pursuant to Order 42 Rule 32 of the Civil Procedure Rules which empowers the court to which the appeal is preferred to pass any decree and make any order which ought to have been passed or made. This power may be exercised in favour of any Respondent who may not have filed any appeal or cross appeal.

34. The court orders that the Appellant is to reimburse the 2nd Respondent the amount the 1st Respondent paid for the Suit Property at the auction together with interest at court rates from the date the sum was paid until payment in full. However, the 2nd Respondent must provide evidence that it paid the full purchase price of Kshs. 500,000 shillings to the Appellant before the reimbursement is made.

35. The appeal is dismissed. The Appellant will pay costs of the appeal to the 2nd Respondent.

Dated and delivered at Nairobi this 12th day of April 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Kibet holding brief for Mr. Oange for the Appellant

Mr. Ndirangu for the 2nd Respondent

Mr. V. Owuor- Court Assistant

No appearance for the 2nd Respondent