



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. 1296 OF 2016**

**JACKSON NJENGA NJOROGE.....PLAINTIFF**

**VERSUS**

**ROYAL CREDIT LIMITED.....DEFENDANT**

**LUCY MWIHAKI MACHARIA.....AFFECTED PARTY/APPLICANT**

**RULING**

1. The originating summons dated 18/10/2016 was taken out on 19/10/2016 by Jackson Njenga Njoroge (hereinafter referred to as **the plaintiff**) against Royal Credit Limited (hereinafter referred to as **the Defendant**). The originating summons relates to Land Title Number Nakuru Municipality/Block 4/46. The plaintiff sought the following orders:

- i. That, an order does issue directing the Deputy Registrar of the Court to sign/executive the re-newed lease on behalf of LUCY MWIHAKI MACHARIA.**
- ii. That execution of the new Lease by one Samuel Kamau Macharia on behalf of Royal Credit Limited be rectified on account of error and in place the Deputy Registrar of the Court to counter sign.**
- iii. That the Charge in favour of Royal Media Credit Limited be endorsed on the re-newed Lease.**
- iv. Such other further orders the honourable court shall deem fit to grant.**

2. The grounds upon which the plaintiff in the Originating Summons sought the above orders were stated thus: (i) the applicant had purchased the suit property through a public auction in 1998; (ii) the applicant paid full purchase price; (iii) the original lease expired before transfer was effected; (iv) upon renewal of the lease, the transfer could not be effected because the original owner had failed to execute the renewed lease; (v) unless the orders sought were granted, the purchaser (plaintiff in the originating summons) would never be registered as owner.

3. On 17/11/2016, parties to the originating summons filed a consent wholly disposing the originating summons in the following terms:

- i. The Deputy Registrar does sign the re-newed lease certificate for and in place of LUCY MWIHAKI MACHARIA.**
- ii. The part of the re-newed lease wrongly executed by SAMUEL KAMAU MACHARIA on behalf of Royal Credit Limited be counter-signed by the Deputy Registrar**
- iii. The charge in favour of Royal Credit Limited be endorsed on the re-newed Lease by the Land Registrar.**
- iv. The re-newed lease be consequently transferred to the Applicant MR JACKSON NJENGA NJOROGE as purchaser.**
- v. Each party to bear their own costs.**

4. On 14/2/2017, the Court Registry listed this matter before this court for the first time. When the matter came up in court, advocates for the parties asked the court to adopt the consent. The court adopted the consent as requested by the parties

5. Copy of the parcel register now placed before the court reveals that the consent order was noted in the parcel register and the suit property was transferred to the plaintiff. It does also appear on the parcel register that on 3/5/2017, the land registrar registered a restriction on the title at the behest of the plaintiff, restricting any dealings without the consent of the new registered proprietor.

6. Subsequently, on 10/5/2017, Lucy Mwhiki Macharia hereinafter referred to as (the Applicant) brought a Notice of Motion seeking, *inter alia* (i) an order enjoining her as a party to the case; (ii) an order setting aside the consent order adopted on 14/2/2017; (iii) an order cancelling the transfer made in favour of the plaintiff; and (iv) interim injunctive orders. Attached to the application is a scanned copy of an affidavit sworn by the applicant on 5/9/2017 before Sudhir Babuta, Notary Public. The applicant subsequently filed a supplementary affidavit on 4/8/2017. Both the plaintiff and the defendant in the originating summons have opposed the application. That application is the subject of this ruling.

7. The applicant's case is that he was still the registered proprietor and lawful owner of the suit property and that the plaintiff ought to have enjoined her in the proceedings and served the originating summons on her. She further contends that parties to the originating summons concealed material facts relating to other pending suits relating to the suit property and involving her and the two parties to the originating summons, namely: (i) Nakuru HCCC 167 of 2009; (ii) Nairobi HCCC No 3443 of 1992 (iii) Nairobi HCCC No 1082 of 2006; (iv) Nakuru CM CC No 2019 of 2006 and (v) Nakuru CM CC 2125 of 2005. Lastly she states that upon expiry of the 99 year lease, she applied for renewal and the lease was renewed.

8. The plaintiff opposes the application. His case is that he is a *bona fide* purchaser for valuable consideration of the suit property having bought the same in a public auction on 20/11/1998. He further contends that the applicant lacks *locus standi* to raise the issues she is raising in the application because her proprietary interest/rights in the property got extinguished once the property was sold to him on 20/11/1998 in a public auction. He adds that the material lease in favour of the applicant expired and was renewed by the defendant with a view to completing the conveyance to him (the plaintiff).

9. The Plaintiff further contends that the applicant is malicious in alleging fraud and collusion between the parties to the originating summons while aware that she lost the suit property in 1998 when the defendant exercised its statutory power of sale and the plaintiff acquired the suit property through purchase in a public auction.

10. The defendant too opposes the application. Its case is that the affidavit attached to the present application is undated, not notarized, not original and does not specify where it was sworn. It contends that the affidavit contravenes the provisions of the Oaths and Statutory Declarations Act, Cap 15. The defendant further contends that the applicant charged the suit property to secure a loan she borrowed from the defendant; she defaulted in serving the loan; she unsuccessfully sought orders to restrain the defendant against exercising its statutory power of sale; the suit property was sold to the plaintiff in a public auction on 20/11/1998; the plaintiff has had possession of the suit property since 1998; and that the defendant adds that the applicant having lost her proprietary rights through public auction, and following the subsequent lapse of the lease, she cannot wake up now to claim ownership of the property at this point.

11. I have carefully considered the application, rival affidavits and rival submissions by the parties. Three issues emerge for determination in this application. The first issue is whether the applicant's affidavit in support of the application is inadmissible. The second issue is whether the applicant is a party who ought to have been enjoined in the originating summons. The third issue is whether the applicant has satisfied the criteria for setting aside a consent order.

12. The defendant in the originating summons has impugned the affidavit in support of the present application on the ground that it is a scanned copy purportedly signed by the applicant in the United States of America; it is undated; it is not notarized and it purports to have been sworn in Nairobi yet the certificate of the notary public shows that the notary public is based in California, USA. I have closely examined the affidavit. It is true that what is before court is a scanned copy of the affidavit. It is also true that the jurat part of the affidavit does not bear the date when it was notarized. The date together with the notary public's seal and second signature appear on a different piece of paper titled **ACKNOWLEDGMENT** which does not bear the signature of the deponent. It is also true that the jurat part of the affidavit shows that the affidavit was "sworn" at Nairobi on an unspecified day and month in 2017.

13. Administration of oaths is regulated by the statutory framework in the Oaths and Statutory Declarations Act (Cap 15). Section 5 of the Oaths & Statutory Declarations Act requires that every commissioner before whom oath or affidavit is taken or made states in the jurat or attestation the place where and date when the oath or affidavit is taken or made. It provides thus:

**Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.**

14. The affidavit in support of the application is a scanned copy and that scanned copy does not bear the date when the affidavit was sworn. The respondents having taken objection to that scanned document, the applicant was expected to tender an explanation as to why the original affidavit cannot be tendered. Similarly, the applicant was expected to apply for leave to file a compliant affidavit that satisfies the requirements of Section 5 of the Oaths & Statutory Declarations Act. She did not make any effort to comply with the mandatory requirements of the law. In my view, the defects in the affidavit go beyond the procedural technicalities contemplated in Article 159 of the Constitution. The requirements of Section 5 of the Oaths & Statutory Declarations Act are substantive statutory requirements which every person administering oath must comply with. In the absence of any attempt by the applicant to remedy the defect, the court has no option but to disallow the affidavit. The net legal effect is that the said affidavit together with the annexures thereto are inadmissible and are struck out and expunged from the court record. What remains is the supplementary affidavit sworn on 6/7/2017. That supplementary affidavit has not been challenged. I will deal with the remaining two issues simultaneously because they are intertwined.

15. The principle upon which the court exercises power to set aside a consent order is well settled. To impeach a consent order or judgment, it must be shown that the consent was attained by fraud or collusion or by an agreement contrary to the policy of the court. See **Board of Trustees of National Social Fund v Micheal Mwalo (2015) eKLR**; and **James Kanyita Nderitu & Another v Marrios Philotas Ghikas & Another (2016) eKLR**

16. From the affidavits of Jackson Njenga Njoroge (the plaintiff) and Samuel Kamau Macharia, it emerges that there were prior suits involving the interested party and the parties in this originating summons. In one of them, Nairobi HCC 694 of 2005, the interested party sued the defendant challenging the validity of the charge subject matter of the originating summons herein.

17. When the Plaintiff brought the originating summons and subsequently filed a consent on 17/11/2016, he did not disclose to the court that there existed a suit by the interested party challenging the validity of the charge. Indeed, no mention was made of the subsisting disputes relating to the charge and title to the suit property. Both the plaintiff and the defendant projected the picture of there being no challenge or contestation from the interested party against the charge and the plaintiff's claim of title to the suit property. The interested party has come to court contending that she holds a renewed lease to the suit property and that both the plaintiff and the defendant concealed material facts relating to the existing cases relating to the suit property. Given the nature of the orders which the applicant and the defendant crafted in their consent letter, they were obligated to make a full disclosure to the court. They elected to withhold those material facts.

18. Besides the above, the originating summons which the applicant brought sought orders authorizing the Deputy Registrar to execute the renewed lease on behalf of the interested party and the defendant. It also sought endorsement of the charge on the renewed lease. The subsequent consent which the plaintiff and the defendant crafted and urged the court to adopt contained an additional order authorizing transfer of the suit property to the plaintiff. This happening against a background where crucial material facts were withheld from the court was most inappropriate.

19. If the said consent orders obtained by the plaintiff and the defendant were to remain undisturbed, the two parties shall have used this originating summons to defeat the interested party's claim, whatever its worth, without any notice to her. Both our constitutional framework and our legal system do not permit that.

20. In light of the foregoing, the court is satisfied that the interested party was and still is a necessary party in this suit. The court is also satisfied that the consent adopted on 14/2/2017 was procured through collusion of the plaintiff and the defendant. Consequently, the interested party is enjoined as a party in this suit. Secondly, the consent adopted and issued by the court on 14/2/2017 is wholly vacated and all the consequential entries made in the register of the suit property are similarly vacated. This suit is hereby transferred to Nakuru Environment and Land Court (ELC) for hearing and disposal of the originating summons dated 18/10/2018.

The plaintiff and the defendant shall share costs of the present application.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF MAY 2018.**

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**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Orenge Advocate for the Plaintiff

Ngare Advocate for the Defendant

Ms Halima - Court clerk