



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MILIMANI LAW COURTS**

**ELCNO.459 OF 2015**

**ELIUD MUIGAI KIONGO.....PLAINTIFF**

**=VERSUS=**

**AFRICAN BANKING**

**CORPORATIONS LTD & 3 OTHERS.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. This is a ruling in respect of three separate applications. The first application is dated 4<sup>th</sup> August 2017 brought by the first defendant. The application seeks eviction orders against the plaintiff from LR No.Kikuyu/Township/214. The second application is dated 5<sup>th</sup> September 2017 brought by the plaintiff. The application seeks an injunction against the first defendant restraining it from evicting the plaintiff from LR No.Kikuyu/Township 214, an order compelling the first defendant to submit statements regarding a loan taken by the second defendant until 30<sup>th</sup> June 2017 for submission to the Interest Rate Advisory Centre and nullification of public auction conducted on 14<sup>th</sup> June 2017. The third application is dated 30<sup>th</sup> October 2017 brought by the second, third, and fourth defendants. The application seeks setting aside a consent recorded between the plaintiff and the first defendant on 15<sup>th</sup> March 2016, nullification of public auction conducted on 14<sup>th</sup> June 2017 as well as cancellation of transfer in favour of Rajan Rajnikant Dhanani and an order allowing the second defendant to liquidate the loan amount within a period of three years.

2. The plaintiff was the registered owner of LR Kikuyu/Township/214. The third and fourth defendants are directors of the second defendant company. The second defendant approached the first defendant for a loan facility which was extended to it. The plaintiff offered his title in respect of LR No.Kikuyu/Township/214 (suit property) as security for the loan taken by the second defendant.

3. The second defendant defaulted in repayment of the loan advanced prompting the first defendant to start the process of realizing the security. The plaintiff moved, to court and filed this suit in which he sought a declaration that the first defendant had not exhausted all the available avenues of loan recovery from the second, third, and fourth defendants. He also sought for release and discharge of title in respect of the suit property. The plaintiff contemporaneously filed an application seeking among other orders injunctive orders restraining sale of the suit property.

4. The plaintiff and the first defendant entered into negotiations which culminated into a consent dated 15<sup>th</sup> March 2016. The consent was adopted as order of the court on 22<sup>nd</sup> March 2016. The consent allowed the plaintiff to pay a sum of Kshs.16,669,459.45 to the first defendant. The plaintiff was to open an account with the first defendant where he was to deposit the said sum. A further term of the consent was that in case of default by the plaintiff, the first defendant was at liberty to exercise its statutory right of sale.

5. The plaintiff did not comply with the terms of the consent. The first defendant proceeded to realize the security. The suit property was sold at a public auction conducted on 14<sup>th</sup> June 2017. The suit property was transferred and is now registered in the name of Rajan Rajnikant Dhanani.

**APPLICATION DATED 30<sup>TH</sup> OCTOBER 2017.**

6. The applicants in this application sought the following orders:-

***1. Spent***

## 2. Spent

3. That this Honourable Court be pleased to set aside ,cancel and/or discharge in its entirety the consent order made on 15<sup>th</sup> March 2016 between the plaintiff/ respondent and the 1<sup>st</sup> defendant/ respondent.

4. That the sale of the subject property by Public Auction conducted on 14<sup>th</sup> June 2017 be declared null and void ab initio and the subsequent registration and transfer of Title No.Kikuyu/ Township/214 to one Mr Rajan Rajnikant Dhanani be cancelled and the suit property be re-transferred back to the plaintiff/respondent.

5. That upon the grant of prayers 3 & 4 above, the 2<sup>nd</sup> defendant/applicant be allowed to liquidate outstanding loan amount within a period of three (3) years under section 104(2), (b) and (c) of the Land Act, 2012.

6. Costs of this application be provided for.

7. The applicants contend that the consent between the plaintiff and the first defendant was fraudulent in that they were not made party to the consent which they contend was solely meant to dispose of the suit property; that the extent of their indebtedness to the first defendant was not known and that therefore the amount arrived at in the consent was wrong and can only be determined once the issue of the loan is referred to the Interest Rate Advisory Centre.

8. The applicants also argue that they were not served with the necessary statutory notices and that there is no evidence that the person who purchased the suit property paid all the amounts or that the amount realized over and above what they owed has been accounted for.

9. The first defendant opposed the applicants' application based on grounds of opposition dated 21<sup>st</sup> December 2017. The first defendant contends that the applicant's application is frivolous, vexatious, malafides and is otherwise an abuse of the process of the court. The second ,third and fourth defendant had no part to play in the consent as the property to be sold was registered in the name of the plaintiff and that the second, third and fourth defendants had failed to repay the loan which they had taken.

10. The first defendant further argues that the consent which was entered into by it and the plaintiff was a contract between the two. The applicants were not privy to it and they cannot purport to set it aside. The consent did not impose any obligations upon the applicants who had failed to repay the loan forcing the plaintiff to enter into a consent to try to salvage the property which has since been sold.

11. I have considered the applicants' application as well as the opposition thereto by the first defendant. The applicants had sought to have the status quo maintained pending the hearing and determination of this application. That prayer was not granted in the first instance and it does not therefore stand for determination as it is already spent. The two issues which stand out for determination are whether the consent recorded on 15<sup>th</sup> March 2016 between the first defendant and the plaintiff should be set aside and whether the public auction conducted on 14<sup>th</sup> June 2017 should be set aside. Related to the second issue is whether the applicants should be allowed to liquidate the loan account within a period of 3 years.

12. The grounds upon which a consent can be set aside are now clear. In the case of **Brooke Bond Liebig (T) Vs Maiiya ( 1975) EA 26**, the court of appeal relied on the decision in **Hirani vs Kassam ( 1952) 19 EA 131** where it was held as follows:-

***“Prima facie , any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and on those claiming under them ...and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to policy of the court ...or if consent was given without sufficient material facts or in misapprehension or in ignorance of material facts or in general for a reason which would enable the court to set aside an agreement”.***

13. In the instant case, the plaintiff had offered the suit property as security. The default by the second defendant was communicated to it and thereafter the plaintiff as guarantor. The second defendant did not make good the default. The first defendant then issued the necessary notices and started the process of realizing the security. The plaintiff entered into a consent with the first defendant which consent he did not honour prompting the first defendant to move as per the consent and sold the suit property.

14. The consent was not entered into in a fraudulent way. Even though the applicants were not made parties to the consent, they had failed to repay the loan which was advanced to them. The first defendant had started realizing the security which made the plaintiff to enter into a consent in a bid to salvage the suit property. Unfortunately he did not salvage the property because he did not comply with the consent. The plaintiff is not complaining about the consent. It is the applicants who are complaining about the same. The plaintiff was not coerced into entering into the consent. The applicants knew about their default and were not making any efforts to repay the loan. They cannot therefore come to court seeking to set aside a consent when there are no grounds for doing so.

15. The auction of the 14<sup>th</sup> June 2017 was carried out pursuant to the consent which had been recorded on 15<sup>th</sup> March 2016. Prior to the signing of the consent, the first defendant had issued the statutory notices. The property had been valued and a forced price fixed. The property was sold for more than the forced sale price. There is therefore no ground which exist upon which the auction can be set aside. The equity of redemption was lost at the fall of the hammer and the applicants cannot therefore seek to be allowed to liquidate the loan over a period of 3 years. I find no merit in this application which is hereby dismissed with costs to the first defendant.

## **APPLICATION DATED 5<sup>TH</sup> SEPTEMBER 2017**

16. The plaintiff/applicant sought the following orders:-

a. Spent

**b. That pending the hearing and determination of this application, the 1<sup>st</sup> defendant/respondent, its agents, employees, servant be restrained by way of a temporary injunction from trespassing upon and evicting the plaintiff/applicant from all that parcel of land known as Kikuyu/Township/214 9suit property).**

**c. That this Honourable Court be pleased to order that the 1<sup>st</sup> defendant/respondent do forthwith submit all statements regarding the performance of the loan from the date of inception till 30<sup>th</sup> June 2017 for onward transmission to the Interest rate Advisory Centre (IRAC) to prepare a comprehensive expert report on the performance of the loan.**

**d. That the sale by Public Auction conducted on 14<sup>th</sup> June 2017 and all acts associated thereto be rendered null and void for being in contravention of the well laid out procedure and the title to all that parcel of land known as Kikuyu/Township/214 be reverted back to the Applicant.**

**e. That cost of the instant application be in the cause.**

17. The plaintiff/applicant contends that the sale of the suit property was not carried out in accordance to the law; that he had instructed his former Advocates to talk to the first defendant to allow him to sell some of his properties to clear the loan but that there was no response; that he was shocked to learn that the suit property had been sold in a public auction without following the proper procedures. He therefore contends that though the property is now registered in the name of a third party, the application should be allowed.

18. The first defendant opposed the plaintiff's application based on a replying affidavit sworn on 23<sup>rd</sup> October 2017. The first defendant contends that the applicant's application is an abuse of the process of the court. The suit property was sold after the plaintiff failed to honour a consent which had been entered into by him and the first defendant. The plaintiff had filed an application for injunction seeking to stop the first defendant from auctioning the suit property. This application was comprised in a consent which was recorded.

19. Prior to the signing of the consent, all the necessary procedures had been followed. The requisite notices had been issued. Valuation of the suit property had been carried out. Advertisement was carried out. When a consent was recorded, it was a term that should the plaintiff default, the first defendant was to sell the suit property. This is exactly what happened. The suit property was sold and is now registered in the name of a third party.

20. I have carefully considered the applicant's application as well as the opposition thereto by the first defendant. I have also considered the submissions filed by the parties. The suit property has already been sold in a public auction. There is no injunction which can be issued in the circumstances. The auction cannot be set aside. If the applicant is of the view that the auction was not conducted in accordance with the law, he can only bring a suit for damages against the auctioneer and the first defendant. He cannot seek to set aside the auction or subject the loan due to the Interest Rate Advisory Centre. I therefore find that the applicant's application lacks merit. The same is hereby dismissed with costs to the first defendant.

#### **APPLICATION DATED 4<sup>TH</sup> AUGUST 2017**

21. The first defendant sought the following orders:-

**1. This Court be and is hereby pleased to issue an eviction order against the plaintiff/respondent from property title No. Kikuyu/Township/214.**

**2. The OCS Kikuyu Police Station be orders to enforce order (1) above**

**3. Costs of this application be provided for.**

22. The plaintiff had challenged sale of the suit property vide a suit filed on 22<sup>nd</sup> May 2015. He also filed an application dated the same day in which he sought to stop the sale. Consent was recorded compromising the application of 22<sup>nd</sup> May 2015. The plaintiff did not comply with the terms of the consent which made the first defendant to sell the suit property. The suit property is now in the name of a third party. The plaintiff has been asked to move out of the suit property but he has refused.

23. The plaintiff has opposed the applicant's application based on a replying affidavit sworn on 7<sup>th</sup> September 2017. The plaintiff while conceding that he entered into a consent which led to the sale of the suit property maintains that the auction was shambolic and that it did not adhere to the provisions of the law.

24. I have considered the applicant's application as well as the opposition to the same by the plaintiff. I have also considered the submissions filed by the parties herein. There is no doubt that the plaintiff and the first defendant entered into a consent compromising the application dated 22<sup>nd</sup> May 2015. This is the application which had sought to stop the auction. The terms of the consent were clear that if the plaintiff defaulted, the first defendant was to proceed with the sale. The plaintiff defaulted and the sale by public auction proceeded as per the consent. The suit property was sold and has since been transferred to a third party who has a title. The first defendant is under obligation to give vacant possession to the purchaser. There is no basis upon which the plaintiff can remain in the suit property. His remedies if any do not lie in refusing to move from a property which has been purchased by a third party. The remedies lie in damages if at all he will prove that the auction was not conducted in accordance with the law. I therefore find that the application dated 4<sup>th</sup> August 2017 has merits. I allow the same in its entirety.

**SUMMARY AND CONCLUSIONS.**

25. In summary thereof, the applications dated 5<sup>th</sup> September 2017 and 30<sup>th</sup> October 2017 are dismissed with costs to the first defendant. The application dated 4<sup>th</sup> August 2017 is allowed in its entirety.

It is so ordered.

**Dated, Signed and delivered at Nairobi on this 13<sup>th</sup> day of June 2018.**

**E.O.OBAGA**

**JUDGE**

In the presence of ;-

M/s Wainaina for Mr Kiplagat for 1<sup>st</sup> defendant

Mr Farah for Plaintiff

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**