



**Kamuri v Awino (Environment & Land Case E002 of 2023)  
[2024] KEELC 304 (KLR) (30 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 304 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E002 OF 2023  
MD MWANGI, J  
JANUARY 30, 2024**

**BETWEEN**

**EVANSON NJOROGE KAMURI ..... APPLICANT**

**AND**

**JOHNSON OTIENO AWINO ..... RESPONDENT**

**JUDGMENT**

**Background**

1. The Applicant in this matter approached the court by way of an Originating Summons (O.S) dated 24<sup>th</sup> July, 2023. The Applicant prays for: -
  - a. An order does issue directed at the Respondent ordering him to grant vacant possession of the property known as Maisonette No. 531 erected on L.R No. 209/2049 (Original 209/12875/121) located in Nairobi to the Applicant.
  - b. An order that in the event that the Respondent does not grant vacant possession, the Applicant be at liberty to evict the Respondent forthwith with assistance from the Police.
  - c. Costs be provided
2. The Originating Summons (O.S) is premised on the grounds on the face of it and on the Supporting Affidavit of Evanson Njoroge Kamuri sworn on the 24<sup>th</sup> July, 2023. The Applicant asserts that he is the registered owner of Maisonette No. 531 erected on L.R No. 209/2049 (Original 209/12875/121) (hereinafter referred to as ‘the suit property’), which he purchased from ABSA Bank Kenya PLC at a public auction on 8<sup>th</sup> March, 2023. The Respondent however, who was the previous owner of the suit property has declined to cede possession of the same to the Applicant.
3. In his affidavit, the Applicant deposes that his Advocates have given notice to the Respondent to grant him vacant possession but he has defied the notice and continues to occupy the suit property as a



trespasser. The Applicant asserts that the Respondent's rights over the suit property were extinguished on 'the fall of the hammer' and the registration of the suit property in his favour.

4. The Applicant pleads that he continues to pay the loan to the bank advanced to him to finance part of the purchase price for the suit property despite the fact that he is not benefiting from it. The Respondent has made it impossible for him to enjoy/benefit from the suit property by his refusal to vacate. The continued occupation of the suit property by the Respondent is unlawful.
5. The Applicant therefore prays for an order of eviction against the Respondent.

### **Response by the Respondent**

6. The Respondent in his replying affidavit sworn on 9<sup>th</sup> October, 2023 termed the Applicant's suit as misconceived, frivolous and unmerited since the alleged action that the Applicant is relying on was marred with irregularities, deception and illegal activities, which led to a formal complaint being lodged with the police; investigations are still underway. The Respondent states that there is a contestation on how the transfer of the suit property took place. He alleges that there were irregularities in the transfer of the suit property. He claims that even proper stamp duty has not been paid to date.
7. The Respondent further avers that there is an ongoing case in the Nairobi High Court Commercial Division challenging the auction since statutory notices were not issued to him. The case number is HCCC E118 of 2023.
8. The Respondent claims that there was collusion between the auctioneer and the Applicant as well as the bank which transferred the suit property to the Applicant. The Respondent opines that any auction conducted out of collusion is illegal and the Applicant should not be allowed to take advantage of the illegalities which he was part of. It is therefore appropriate that that application be dismissed or be stayed to await the decision of the High Court in the above case.
9. The Respondent deposes that this application was been rushed to defeat the ends of justice. The Applicant is a party to the proceedings before the High Court and is aware of the case. The Respondent attaches a copy of an application filed by the Applicant herein in the High Court case but which was allegedly dismissed. He accuses the Applicant of material non-disclosure.
10. The Respondent therefore prays for the dismissal of the application by the Applicant.
11. On 28<sup>th</sup> November, 2023, the Respondent filed a further affidavit sworn on the same date. This was well after the Applicant had already filled his submissions. The Applicant had filed his submissions on 6<sup>th</sup> November, 2023. There is no evidence of service of the further affidavit upon the Applicant. Further, this was contrary to the directions by this court given on 12<sup>th</sup> October, 2023, when the Respondent was granted 14 days within which time to file and serve the further affidavit. The Applicant was granted corresponding leave to file a supplementary affidavit alongside his submissions after service of the Respondent's further affidavit.
12. By filing the further affidavit after the time given by the court and without notice to the other party, the Respondent automatically denies the Applicant the opportunity to respond to the allegations therein. It was not only contemptuous of the court's directions but also an attempt to outsmart the other party. In litigation that is not allowable.



13. Mativo J, (as he then was) observed in the case of *Satya Bhama Gandhi v DPP and 3 Others* [2018] eKLR, that: -

“Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different positions clearly, plainly and without tricks.”

14. Having said as much, the further affidavit by the Respondent was filed outside the timelines stipulated in the directions given by the court in the presence of both parties on 12.10.2023. The court therefore, exercising its inherent authority expunges the further affidavit from its record. It shall proceed to consider this matter on the basis of the supporting affidavit by the Applicant and the Replying affidavit of the Respondent deposited on 9<sup>th</sup> October, 2023, only; and off course on the submissions on record.

### **Submissions by the parties**

15. Pursuant to the directions of the court issued on 12<sup>th</sup> October 2023, both parties filed submissions in support of their respective positions. The Applicant’s submissions are dated 3<sup>rd</sup> November, 2023 whereas the Respondent’s submissions are dated 28<sup>th</sup> November, 2023. I have had opportunity to read the submissions.

### **Issues for Determinations**

16. Having considered the Originating Summons by the Applicant, the response thereof by the Respondent as well as the respective submissions by the parties I am of the view that the issues for determination in this matter are: -
- a. Whether the Applicant is entitled to an order of vacant possession/eviction against the Respondent.
  - b. What orders should the court issue on costs.

### **Analysis and Determination**

#### **A. Whether the Applicant is entitled to an order of vacant possession/eviction against the Respondent.**

17. The Applicant’s case is brought under the provisions of Order 37 of the Civil Procedure Rules. Rule 3 of the said Order allows a vendor or a purchaser of immovable property or their representatives to, at any time or times;

“...take out an originating summons returnable before the Judge sitting in chambers for the determination of any question which may arise in respect of any requisitions or objections or any claim for compensation or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract).”

18. The procedure of Originating Summons, as the Court of Appeal observed in the case of *John W. Wepukulu v Secretary Board of Governors, Burn School* [2005] eKLR;

“... is designed for summary or ad hoc determination of points of law, construction of certain specific directions of the court such as trustees, administrators or court execution officers. The procedure should not be used for determination of matters that involve a serious question of determination of disputed questions of facts.”



19. The Applicant's claim is that he purchased the suit property from Absa Bank PLC by way of a public auction. Having complied with all the conditions thereof, including paying the purchase price in full, the title was transferred to him by the chargee. The title to the suit property is now registered in his name. He exhibited a copy of the title confirming that it is in his name.
20. The Respondent in his response to the Originating Summons does not dispute the public auction nor the sale of the suit property to the Applicant. His contestation is that the said auction/sale was marred with irregularities. He asserts that he has challenged the sale/auction in the High Court. Evidently the case before the High Court is yet to be determined as no determination has been attached to the response.
21. This is a proper matter for consideration under the procedure of Originating Summons.
22. The Respondent in his replying affidavit suggests that this matter ought to be stayed to await the decision of the High Court. He however, did not make a formal application for stay of the proceedings.
23. In his submissions the Respondent alludes to fraud having been committed and allege that investigations are going on.
24. The Respondent's allegation of fraud in his submissions is clearly a reaction only to the Applicant's submissions to the effect that under Section 26 of *Land Registration Act*, a certificate of title shall be held as conclusive evidence of proprietorship. I say so because in his replying affidavit the Respondent had not specifically pleaded and particularised fraud.
25. In the case of *Kuria Kiarie and 2 Others v Sammy Magera* [2018] eKLR, the court held that: -
 

“The law is clear and we take it from the case of *Vijay Morjaria v Nansingh Makhusingh Darbar & another* [2000] eKLR, where Tunoi JA (as he then was) states as follows: -

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
26. The Applicant has referred to the ruling by Justice Majanja in the matter before the High Court Commercial Division being case No. E118/2023 [2023] KEHC 19346 (eKLR) (Commercial & Tax) 30<sup>th</sup> June, 2023 (Reg) where the learned Judge observed that the sale of the suit property was undisputed and the equity of redemption was therefore extinguished.
27. The ruling by Justice Majanja is reported and is in the public domain. I have had an opportunity to read the same. In the ruling, the learned Judge rightly observed that,
 

“Once the bank exercised its statutory power of sale by selling the suit property to the 2<sup>nd</sup> Defendant, the highest bidder at the auction, the Applicant's right to redeem the property was extinguished. This means that the Applicant no longer has any proprietary right in the suit property which can support any relief.”
28. The Learned Judge further discussed the import of Section 99 of the *Land Act* which in essence protects the purchaser from any action to set aside the sale and provides for damages as the only available remedy. Sub-section (4) particularly is explicit that;
 

“A person prejudiced by an unauthorised improper or irregular exercise of the power of sale shall have the remedy in damages against the person exercising the power.”



29. The court in the case of Kamulu Academy Ltd and another v BAT (K) Ltd & 2 others [2018] eKLR addressing the same issue cited with approval the Court of Appeal decision in Mbuthia v Jimba Credit Finance Corporation & ano [1986-1989] I EA 340 (CAK). The Court in the said case too was categorical that a sale by public auction extinguishes the equity of redemption at the 'fall of the hammer' whether the property is transferred to the purchaser or not.
30. From the foregoing, the Respondent in this matter has no cause of action against the Applicant. His claim, if any, is for damages against the bank that sold the suit property to the Applicant in exercise of its statutory power of sale. The Respondent has indeed filed a case against the bank which he has severally referred to in his response to the O.S. That case High Court is materially and substantially different from this matter.
31. That said, the court finds and holds that the Applicant herein, is entitled to vacant possession of the suit property having lawfully purchased it by way of a public auction. The Respondent, Johnson Otieno Awino, is hereby directed to grant vacant possession of the property known as Maisonette No. 531 Erected On L.R. NO. 209/2049 (ORIGINAL 209/12875/121) in Nairobi to the Applicant herein Evanson Njoroge Kamuri in the next Forty-five (45) days from the date of this judgement failing which the Applicant will be at liberty to evict the Respondent from the said property without any further reference to this court and with the assistance of the Police or court bailiff.
32. The Applicant shall have the costs of this suits.

It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JANUARY, 2024**

**M.D. MWANGI**

**JUDGE**

**In the virtual presence of:**

**Ms. Mburu for the Applicant**

**Mr. Were for the Respondent**

**Court Assistant: Yvette**

**M.D. MWANGI**

**JUDGE**

