

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 23 OF 2012

RICHARD KUBONDO MAINA.....PLAINTIFF/RESPONDENT

VERSUS

NDUNG'U WAWERU.....DEFENDANT/APPLICANT

RULING

This application is dated 22nd March 2018 and is brought under order 10 Rule 11 of the Civil Procedure Rules (2010) and Order I Rule 1 of the procedure Rules 2010 seeking the following orders;

1. That this matter be certified urgent and be heard ex-parte in the instance.
2. That pending the hearing of this matter inter-partes, the court be pleased to issue a stay of the eviction orders issued on 23.11.2017.
3. That the court be pleased to set aside the judgment herein and all subsequent orders.
4. That the court be pleased to join National Bank of Kenya Limited as an interested party in this case.
5. Costs be provided for

The applicant submitted that, on 16th January 2018, he was served with a decree dated 23rd November 2017. Annexed and marked NW1 is a copy of the decree. That upon reading the decree he realized that his land parcel number Kakamega/Kongoni/802 and Kakamega/Kongoni/627 were now not under his name and that he was due for eviction within 3 months. That he went to read the court file and found out that there has been an on-going case against him and that the process server had alleged that he served him with summons. That he does not remember the summons being served on him at any time. The affidavit by one Athanas Aurthur Musambai is false. That after reading the court file he has found out that the plaintiff herein is making allegations that he bought his piece of land in an auction conducted by legacy auctioneering services and 22nd November 2011. That he has also learned that the properties were sold at Kenya shillings 500,000/=. Annexed and marked NW2 is a copy of certificate of sale. That the properties are much worthy than 500,000/= as they cumulatively comprise of 11 acres. That he is aware that he had taken a loan of Kenya shillings 100,000/= from National Bank of Kenya Ltd and that he had problems repaying it and the Bank had sued him in Kitale case number 44 of 1998 whereby judgement was delivered against him for Ksh. 1,174,135.75 in 2008. Annexed and marked NWS is a copy of the decree. That he is apprehensive that it is National Bank of Kenya Ltd which may have put up his titles for sale as he had given them the titles as security though no formal charge had been created on the titles. That prior to the auction, he was never notified of the auction. That he was not notified of the auction date and place of the auction. That the bank could not conduct a public auction without following procedures as laid down by law. That it is his contention that the bank did not pass a good title to the plaintiff and therefore the orders of eviction can be challenged. That the bank committed criminal negligence as it did not ascertain the actual cost of his two properties before the sale was conducted. That he will like to challenge the legality of the plaintiff's title, hence he has trial issues to be heard by this court. That he prays that National Bank of Kenya Ltd be made a party to this suit as an interested party.

The respondent submitted that, he filed the suit herein seeking the eviction orders against the Defendant/Applicant herein from land parcels Kakamega/Kongoni/ and 802. That the judgement was entered against the Defendant/Applicant on the 23rd November, 2017 and the said decree and eviction notice were served upon the defendant/applicant. At all times during the trial process, the Defendant/Applicant was duly served therefore aware of the suit herein and has not even issued a notice to cross examine the process servers. That he duly bought Land Parcels No. Kakamega/Kongoni/624 and 802 through Public Auction conducted by legacy auctioneering services. That the Defendant/Applicant herein acknowledged the fact that he had a loan with National Bank of Kenya Ltd which Bank placed the suit properties to a public auction. That he followed the due process and acquired good title deeds to the aforementioned land parcel. That it is an afterthought that the Defendant/Applicant to allege that the said process and properties were undervalued with the same ought to have been raised in the annexed civil suit No. 44 of 1998 which he was not a party to and had no knowledge that the same existed. That the issue being raised of having repaid the loan that the defendant/applicant acquiring from National Bank ought to have been raised in the said civil suit no. 44 of 1998 and never challenged the decree that was issued. That he was the highest bidder and followed the due process and transferred the said land to his name. That he is the registered owner of land parcel No. Kakamega/Kongoni/624 & 802 and he has a right of use of the said land and having got a good title.

This court has considered the application and the submissions herein. The application is based on the grounds that, the applicant was not served. That the applicant has a defence which raises triable issues. That the plaintiff didn't disclose that there were essential parties who are material to this case. I have perused the court file in great detail and find that the defendant was properly served throughout the process of this trial. This is a 2012 matter and the defendant never bothered to file any defence in this matter. It is only after he was served with the decree that he suddenly woke up. The applicant is aware that he had taken a loan of Kenya shillings 100,000/= from National Bank of Kenya Ltd and that he had problems repaying it and the Bank had sued him in Kitale case number 44 of 1998 whereby judgement was delivered

against him for Ksh. 1,174,135.75 in 2008. Annexed and marked NWS is a copy of the decree. The Applicant cannot now allege that the said process of sale and properties were undervalued as the same ought to have been raised in the annexed civil suit No. 44 of 1998 in Kitale. I find this application is an abuse of the court process. The defendant has been indolent and justice must come to an end.

In the case of **Utalii Transport Company Ltd & 3 Others v NIC Bank & Another (2014) eKLR**, the court held that it is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court. The decision on whether the suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. In **Ivita v Kyumbu (1984) KLR 441**, Chesoni J as he then was, stated that the test is whether the delay is prolonged and inexcusable and if justice will be done despite the delay. Justice is justice for both the plaintiff and the defendant. I find this application has no merit and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 10TH DAY OF JULY 2018.

N.A. MATHEKA

JUDGE