



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC MSCJ. CASE NO 62 OF 2015

IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT, 2011

AND

IN THE MATTER OF THE RATING ACT CHAPTER 267 THE LAWS OF KENYA

BETWEEN

NAIROBI CITY COUNTY.....PLAINTIFF/RESPONDENT

AND

ITE FARMERS CO-OPERATIVE

SOCIETY LIMITED.....DEFENDANT/APPLICANT

AND

EASTSIDE DEVELOPMENT LTD.....PURCHASER/RESPONDENT

RULING

1. The dispute in this suit relates to Land Reference Number 27399 comprised in Grant Number IR 103116, situated in Runda, Nairobi (the **suit property**). It measures approximately 0.8020 hectares. Until 3/7/2015, it was registered in the name of Ite Farmers Co-operative Society Limited (the **applicant**).

2. In 2013, the City Council of Nairobi (now the County Government of Nairobi) (the **respondent**) sued the **applicant** in Nairobi City Court RMCC No 20 of 2013 claiming unpaid land rates and penalties. Subsequently, the respondent obtained exparte judgment and decree and proceeded to sell the suit property to M/s Eastside Development Limited (the **purchaser**) through public auction in execution of the decree.

3. On 19/2/2015, the respondent brought a Miscellaneous Civil Application Motion dated 19/2/2015 seeking vesting orders consequent to the sale. On 20/2/2015, Judge Gacheru ordered the respondent to serve the applicant and gave an *interpartes* hearing date for the motion. The motion was subsequently heard exparte and the vesting orders sought by the respondent were granted on 26/3/2015. On 3/7/2015, the suit property was transferred to the purchaser pursuant to the vesting orders. Subsequently, on 14/10/2015, the applicant, Ite Farmers Co-operative Society Limited, brought a Notice of Motion of even date (the **application**) seeking the following orders:

1. That this application be certified as urgent

2. That this honourable court be pleased to hear and determine the matter in the first instance and service of the application be dispensed with.

3. That this honourable court be pleased to grant a stay of any sale, transfer, sub-division of the property known as LR Number 27399 (IR 103116) Runda, Nairobi pending the hearing and determination of this application.

4. That this honourable court do order that the aforesaid prayer No 3 be registered on Title LR Number 27399(I R 103116) Runda, Nairobi, by the Chief Land Registrar.

5. That this honourable court be pleased to set aside the sale of LR Number 27399 (I R 103116) Runda, Nairobi to Eastside Development Limited (Purchaser/Respondent), which sale was carried out by public auction on the 15th of December 2014,

by P G Waweru T/a Ideal Auctioneers.

6. That this honourable court be pleased to set aside the order given by the honourable Lady Justice Gacheru on the 26th of March 2015 and the subsequent vesting order issued on the 1st of April 2015.

7. That this honourable court be pleased to set aside the interlocutory judgment entered on the 26th of September 2013 by 1st Class Magistrate Court at Nairobi City Court – Civil Case No 20 of 2013 and the subsequent decree dated the 2nd of October 2013.

8. That this honourable court be pleased to order the Chief Land Registrar, to cancel the entries Numbers 2,3 and 4 registered on the 3rd of July 2015, on the Title – LR Number 27399 (I R No 103116) Runda, Nairobi.

9. That the costs of this application be borne by the plaintiff/respondent and the purchaser/respondent.

4. The application was supported by the affidavit of Francis Kago Gathuo in which he deposed that both the Judgment in Nairobi City Court RMCC 20 of 2013 and the vesting orders in the present suit were irregular, firstly because no notice was published as required under Section 26 of the Rating Act, and secondly, because neither the summons to enter appearance in Nairobi City Court RMCC 20 of 2013 nor the motion seeking vesting orders in this court were served on the applicant. He further contended that the public auction by Mr P G Waweru t/a Ideal Auctioneers was manifestly irregular and fraudulent in that a property with a market value of Kshs 240,000,000 and forced sale value of Kshs 180,000,000 was sold at Kshs 20,500,000. He urged the court to grant the orders.

5. The application was opposed by the respondent through a replying affidavit filed on 26/10/2015 and a supplementary affidavit filed on 16/11/2015, both signed by Karisa Iha. He deposed that in or around 2013, the respondent discovered that the suit property was in rates arrears running into millions of shillings and issued a demand notice to the registered proprietor of the suit property through the mode stipulated in the Rating Act. He further deposed that the Civil Procedure Act which the applicant relied on was not the primary statute in rates disputes, contending that the governing statute in rates disputes is the Rating Act which provides a framework on service of notices, pleadings and summons in rates disputes. He contended that the framework stipulated in Sections 17 and 26 of the Rating Act was fully adhered to. He added that the affidavit of the process server who served summons to enter appearance had not been challenged in the suit in which it was filed. He urged the Court to dismiss the application.

6. The application was canvassed through written submissions dated 9/11/2017 and filed on 10/11/2017. The County Government of Nairobi and Eastside Development Limited opposed the application through written submissions dated 25/5/2016 and 20/3/2017 respectively

7. I have considered the tenor and import of the application together with the relevant legal framework. I have also deeply reflected on the question of jurisdiction of this court. I am of the view that the question of jurisdiction ought to be disposed at the outset. The application seeks three principal orders: (i) an order setting aside the judgment and decree of the Resident Magistrate Court in Nairobi City Court RMCC 20 of 2013; (ii) an order setting aside the sale of the suit property pursuant to the said judgment and decree; and (iii) an order setting aside the vesting orders issued by this court on 26/3/2015. It is possible that exercise of jurisdiction in the circumstance may entail exercise of discretion.

8. The dispute in the present application relates to the judgment, decree, sale by public auction and vesting order procured in enforcement of payment of rates under Section 17 of the Rating Act. Section 17(2) of the Rating Act requires that the rating authority takes rates recovery proceedings in a subordinate court of the first class. Section 17(4) stipulates that summons to enter appearance may be served by: (a) post; (b) by fixing on or to some conspicuous part of the land; or (c) by any mode of service authorized by any rules made under the Civil Procedure Act. Section 17 (c) specifies the details that must be contained in the decree of the subordinate court of first class issuing the decree. Section 17(6) specifies how the decree of the subordinate court is to be enforced by the court.

9. The judgment and decree giving rise to the present suit and application were issued by the Nairobi City Court Resident Magistrate Court in Civil Case No 20 of 2013. There is no evidence that the Magistrate Court has been moved to set aside the said judgment or decree. This court has been invited to invoke its original jurisdiction and set aside the judgment and decree of the Magistrate Court yet what is before court is neither an appeal nor a judicial review motion. At the time of seeking vesting orders in this court, Nairobi City County Government stated that it had become necessary to file the application for vesting order in this court as opposed to the first class magistrate court which issued the decree.

10. The vesting orders issued in this court by Judge Gacheru were predicated upon the judgment and decree of the Magistrate Court. If the judgment and decree of the Magistrate Court together with the consequential sale of the suit property to the purchaser are set aside, the vesting orders issued by this will, upon a subsequent application, be set aside by this court.

11. The key legal question which arises at this point is whether this court would be acting appropriately if it invoked its original jurisdiction and set aside the judgment and decree of the Resident Magistrate Court in the present suit which is neither an appeal nor a judicial review motion. In my view, that will not be proper. A party aggrieved by the judgment and decree of the Magistrate Court in City Court RMCC 20 of 2013 has three avenues of redress against the judgment and decree of that Court: (i) an application before the same court seeking an order setting aside the judgment, decree and sale; (ii) an appeal to this court; and (iii) a judicial review motion. The avenue to pursue will depend on the ground upon which the orders are sought. It is the view of this court that, to the extent that the present application seeks to set aside a judgment, decree and execution measures of the subordinate court through the present forum, the application is legally untenable. Besides flying in the face of Section 17 of the Rating Act which contains a framework on jurisdiction and execution and the Civil Procedure Act and Rules, it will create disorder in the administration of civil justice in the Country.

12. Similarly, it is the view of this court that determination of the limb of the application which seeks vacation of the vesting orders would be an academic exercise if the judgment, decree and the consequential sale are not set aside in the manner stipulated by the law. The court will therefore refrain from making a determination on that issue at this point and allow the applicant the opportunity to first pursue

appropriate remedies in the appropriate forum in the manner provided by the law.

The net result is that this court finds that the present application is not the proper legal forum for challenging the judgment, decree and sale in Nairobi City Court RMCCC No 20 of 2013. Secondly, the court finds that the plea for an order setting aside the vesting order issued by Judge Gacheru on 26/3/2015 is premature in the absence of an order setting aside the underpinning judgment, decree and consequential sale in RMCC No. 20 of 2013. Consequently, the application is declined on those grounds without going into its merits.

13. Because of the legal complexities created by the initiation of vesting proceedings in this court, each party shall bear own costs of the present application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF AUGUST 2018.

B M EBOSO

JUDGE

In the presence of:-

Mr. Kaka & Mr. Githinji Advocates for the plaintiff

Mr. Wagara Advocate for the purchaser

Ms Halima Abdi - Court Clerk