



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CIVIL APPEAL NO. 100 OF 2012

DR. CYPRIAN KATHERU MWIRABUA THIAKUNU.....APPELLANT

VERSUS

SAMUEL MUGAMBI LUKA.....1ST RESPONDENT

JESSIE MUKURUGURU.....2ND RESPONDENT

E.M. LYRIA T/A NDIUNGI AGENCIES AUCTIONEERS.....3RD RESPONDENT

JUDGMENT

(Appeal from Ruling delivered by Hon. R.N. Kimingi on 28th September 2012 in C.M.C.C. No. 176 of 1985)

BACKGROUND

This is an appeal arising from the ruling by Hon. R.N. Kimingi Chief Magistrate in CMCC No. 176 of 1985. In an application dated 7th March 2012, the Applicant Samuel Mugambi Luka who was also the defendant in the Magistrate's Court case had moved the Court under **Rules 48, 68, & 75 Civil Procedure Rules and Section 51(A) & B Civil Procedure Act** seeking an order that the sale of parcel No. NYAKI/MULATHANGARI/1510 be set aside and the certificate of sale issued by the Court be recalled and cancelled. The Applicant was also seeking to be allowed to deposit the decretal sum in Court. In his supporting affidavit sworn on 7th March 2012, the Respondent deponed that he had come to learn of the purported sale of his land parcel No. NYAKI/MULATHANGARI/1510 from an application filed in HCCA No. 54 of 1999. The Applicant further stated that he was shocked his land could have been sold by public auction without being served with notice and any other Court document. He contends that the purported sale of his land for a meagre sum of 1.4 million without notice was fraudulent and irregular and should therefore be recalled and cancelled.

In a replying affidavit sworn on 14th April 2012, E.M. Lyria t/a Ndiungi Agencies Auctioneers opposed the said application and stated that he was given instructions to execute the decree of the Court by selling land parcel No. NYAKI/MULATHANGARI/1510 belonging to the judgment debtor Samuel Mugambi Luka. The deponent also stated that on 30th June 2011, he personally served the judgment debtor with the requisite 45 days redemption notice and annexed a copy of the said notice to the replying affidavit. On 3rd September 2011, he advertised for sale the said parcel of land in the Nation Newspaper which he also attached to his replying affidavit. The 3rd Respondent who was the Interested party before the Magistrate's Court further deponed that on 21st September 2011, he sold the aforesaid parcel of land by public auction to the Appellant who was the highest bidder at a price of Ksh. 1.4 million. He attached a copy of the receipt issued to him. On 10th June 2011, the Court issued a certificate of sale in respect of the aforesaid parcel of land a copy of which was also attached and marked EM 4. That application is also opposed with another replying affidavit sworn by Dr. Cyprian Katheru Mwirabua Thiakunu, the Appellant herein on 14th March 2012 and filed on 2nd April 2012 respectively. The Appellant who is also the highest bidder in the purported sale herein deponed that on 21st September 2011, outside Kingora Building in Meru Town and in a public auction, he lawfully purchased land parcel No. NYAKI/MULATHANGARI/1510 at a sum of Ksh. 1,400,000/= which amount he paid in full to M/S Ndiungi Agencies Auctioneers. He attached a copy of the receipt No. 1502 dated 21st September 2011. The Appellant also stated that on 8th November 2011, the Honourable Court lawfully issued a certificate of sale for the land parcel No. NYAKI/MULATHANGARI/1510 to him.

ANALYSIS AND DECISION

I have re-evaluated the affidavit evidence both in support of the Notice of Motion dated 7th March 2012 and the replying affidavit sworn on 14th April 2012. I have also considered the submissions by the counsels appearing for both parties and the applicable law. **Rule 15 of the Auctioneers Rules** sets out an elaborate process to be undertaken before a public auction is conducted in regard to immovable property as follows:

(a) Record the Court warrant or letter of instruction in the register.

(b) Prepare a notification of sale in the form prescribed in sale form 4 set out in the second schedule indicating the value of each property to be sold.

(c) Locate the property and secure the notification of sale of the property on the registered owner or adult members of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect.

(d) Give in writing to the owner of the property a notice of not less than forty five days within which the owner may redeem the property by payment of the amount set forth in the Court warrant or letter of instructions.

(e) On expiry of the period of notice without payment, arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.

From my perusal of the notification of sale in the second schedule, there is no indication of the value of the property to be sold contrary to **Rule 15(b)**. I also note that the notification of sale annexed to the affidavit of the Respondent is blank on the date of service of the notice. The same is also blank on the place and time of service. There is also no signature of the registered owner and no certificate from the auctioneer is attached to state that the registered owner refused to sign contrary to **Rule 15(c)**. These are elaborate mandatory requirements that the law has put in place to ensure that the owner of an interest in land does not lose his property unlawfully. In the case of **MOSES KIBIEGO YATOR VS ECO BANK KENYA LIMITED (2014) e K.L.R.**, it was held as follows:

“It will be seen from the above that the notification of sale needs to give the chargor 45 days to redeem the property. The same ought to be served on the registered owner or an adult member of his family residing or working with him or where the person refuses to sign such notification, the auctioneer needs to sign a certificate to that effect. In this instance, there is no affidavit from the auctioneer stating when and upon whom the notification of sale was served. The notification of sale annexed to the affidavit of the defendant is blank on the date of service of the notice. It is also blank on the place and time of service. Neither is there a signature of the registered owner and no certificate from the auctioneer is attached to state that the registered owner refused to sign”

Again in **HARRISHAHA BEHOSANBHAI JOBANPUTRA & ANOTHER VS PARAMOUNT UNIVERSAL BANK LTD & 3 OTHERS (2011) e K.L.R.**, the Court held as follows:

“Failure to indicate the reserve price is therefore, an express breach of Rule II(I) b(x) which is couched in mandatory terms and which must, therefore, be obeyed in observance. Failure to comply can only denote that no valuation of the property was undertaken contrary to the express requirement of that rule. The total sum of these irregularities is that it would be procedurally illegal to allow the Applicant’s property to be sold unless and until the laid down procedure has been adhered to. I therefore find that it would be improper to allow the Applicant’s to sell the said property without complying with the law and that the Applicants have established a prima facie case with a probability of success. As the suit property has not been subjected to any valuation, it is difficult to tell what loss the Applicants will suffer in monetary terms, if the said property is sold”.

In the same breath, Justice Abnashir Visram J. (as he then was) in **Nationwide Finance Co. Ltd Vs Meck Industries Ltd & Michael Gerald Kimani (2001) e K.L.R.** held as follows:

“It is not disputed that the notification of sale did not contain a reserve price. At the time of its issue, no valuation had been done. The power of the Court to set aside a sale on the ground of irregularity is dealt with under Order XX1 Rule 79 of the Rules. That rule provides as follows:

“79: Where any immovable property has been sold in execution of a decree, the decree holder or any person whose interest are affected by the sale, may apply to the Court to set aside the sale on the ground of material irregularity or fraud in publishing or conducting it; provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved to the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

If the conditions of this rule are satisfied, the sale will be set aside though the purchasers may be a bona fide purchaser for value without notice of the irregularity or fraud in publishing or conducting the sale”.

I have noted that the Respondents committed material irregularities in conducting the purported sale on 21st September 2011 which the learned magistrate used to set aside the said sale. I have no reason to interfere with the said order in this appeal. In the upshot, I find no merit in this appeal which I hereby dismiss with costs to the Respondent.

READ, DELIVERED AND SIGNED BY E. C. CHERONO, ENVIRONMENT AND LAND COURT JUDGE KERUGOYA AT MERU THIS 14TH DAY OF NOVEMBER, 2018.

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In the presence of:

C/A: Janet

Omari for appellant