



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELCA NO. 3 OF 2016**

**DEDAN GITONGA MUREITHI ..... APPELLANT**

**-VERSUS-**

**RICHARD NDERITU KARABA .....1ST RESPONDENT**

**JOHN GITHIRA GITEI ..... 2ND RESPONDENT**

**WATSON WACHIRA MURIITHI ..... 3RD RESPONDENT**

**BEATRICE WANGUI WARUTERE .....4TH RESPONDENT**

**RULING**

1. This ruling is in respect of the motion dated **30th March, 2016** in which Dedan Gitonga Mureithi, the appellant herein, seeks to preserve the parcel of land known as **Muganda/Nairutia/604** (hereinafter referred to as “the suit property”) by a way of restriction and/or inhibition.
2. The appellant who claims to be the beneficial owner of the suit property, claims that he was not party to the proceedings which gave rise to the decree pursuant to which the property was sold; that his household and he have *bona fide* interest in the suit property and that unless the orders sought are granted, there is danger of alienation and or further transfer of the suit property to his detriment and to the detriment of the other people occupying it.
3. According to the appellant, granting the orders sought is, in the circumstances, just and mete.
4. The application is supported by the affidavit of the applicant in which the grounds on the face of the application are reiterated and he has annexed the following documents to the affidavit:-
  - a) Copy of an application he filed in the lower court praying that he be enjoined in the suit at the lower court as an interested party;
  - b) Ruling delivered on 3rd March, 2016 dismissing his application.
5. The application is opposed through grounds of opposition filed on **9th June, 2016** in which it is contended that the applicants’ interest in the suit property has been superseded by the completed auction; that the claim is incompetent and an abuse of the court process and that the applicant’s remedy, if any, is damages.

6. When the matter came up for hearing, counsel for the applicant, **Mr. Nderi**, acknowledged that the suit property was sold through public auction but submitted that the sale did not supersede the applicant's interest in the suit property. He informed the court that the applicant, who is still in possession of the suit property, is apprehensive that unless the orders sought are granted, the 5th respondent, who is now the registered proprietor of the suit property may dispose it off.

7. Terming the appeal lacking in merit, counsel for the respondent, **Mr. Kingori**, pointed out that the applicant was not a party before the lower court and that there is no appeal against the judgment of the lower court. Arguing that the applicant has approached the court in the wrong way, Mr Kingori submitted that the applicant ought to have filed objection proceedings to the execution. Based on the decision in the case of **Stanley Ng'ethe Kinyanjui v. Tony Ketter & 5 Others (2015)eKLR** and **Vinette Daphine Okola v. Akich Okola & 3 Others (2006)eKLR** he submitted that once an auction has taken place, without proof of fraud or illegality, the only remedy is damages.

8. In a rejoinder, Mr. Nderi explained that the applicant could not file objection proceedings because he was not aware of the suit or the execution proceedings. With regard to the authorities cited in support of the respondents' case, counsel for the respondent submitted that the cases are inappropriate in the circumstances of this case. He further submitted that the applicant, who has moved the court for setting aside the orders, has a right of appeal.

### **Analysis and determination**

9. It is not in dispute that the applicant is in possession of the suit property. It is also not in dispute that the suit property was sold by way of public auction.

10. The sole issue for determination is whether the applicant has made up a case for being granted the orders sought.

11. In determining this issue I adopt the reasoning in the case of; **Vinette Daphine Okola v. Akich Okola & 3 Others (2006) eKLR** where it was observed:

**“The question I ask myself as I consider this ruling is whether the 2<sup>nd</sup> Defendant had notice of the Plaintiff's interest in the suit property. The Plaintiff ought to have brought it to the attention of any person wishing to deal with the suit property by perhaps registering a caveat as provided by Section 57 of RTA. It was not enough for the Plaintiff to have said that she believed the 1<sup>st</sup> Defendant had registered her as the co-owner. Having found so, I am of the view that the Plaintiff fails to prove a *prima facie* case with probability of success in regard to the promise she alleges was made to her by the 1<sup>st</sup> Defendant or in regard to her both financial and physical contribution.....**

**..... In regard to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants in their submissions that the Plaintiff had sued the wrong party I have looked at the memorandum of sale and the receipts and have noticed that it is not clear that the property was being purchased by Sadoka Company Limited.**

**The Plaintiff's case and submissions would indeed invoke sympathy but this court cannot be guided by sympathy alone. The law is clear that on an auction of a property the plaintiffs remedy lay only in damages. The Plaintiff has failed to prove therefore that she is entitled to the orders of injunction that she seeks from this court...”**

12. I am also guided by the decision in the case of **Stanley Ng'ethe Kinyanjui v. Tony Ketter & 5 Others (2015) eKLR** where the Court of Appeal stated:-

**“We have no doubt that the provisions on execution, sale and stay as contained in Order 21 (now 22) are so elaborate that they represent a complete code to address every conceivable**

scenario that might arise out of the process. They have in-built safeguards and conditions to ensure the protection of the interests of all persons concerned and they are couched in mandatory terms. The application by Suleiman dated 17<sup>th</sup> June 2011, other than being on the face of it belated, coming as it did some 20 months after the sale, was little more than an attempt to sidestep and evade the clear procedures set out in the appropriate rules. Parties cannot be allowed, by attempting to constitutionalize simple, every-day processes and events, to defeat the procedural scheme of things set up by the rules. It is not lost to us that the application was made when it was quite apparent that Suleiman was unlikely to succeed under the relevant applicable rules....The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application.....” (Emphasis supplied).

13. Like in the case of **Vinette Daphine Okola v. Akich Okola & 3 Others**, (*supra*), the 5th respondent herein, whose title the applicant seeks to encumber, was not aware of the applicant’s interest, if any, in the suit property. I agree with the observation in the case of **Vinette Daphine Okola** (*supra*) that the applicant ought to have registered his interest in the sought property if any. Without registration of such interest, and there being no evidence that the 5th respondent knew about the applicant alleged interest in the suit property, I find and hold that the applicant has not made up a case for issuance of the orders sought against the 5th respondent. Besides, the appeal by the applicant appears to be hopeless in that the applicant sought to be enjoined in a suit that had been heard and determined without first seeking to have the proceedings that had led to the issuance of the impugned orders set aside. I agree with the submission by the respondent’s counsel that the applicant used the wrong procedure to challenge the judgment and decree hereto.

14. The upshot of the foregoing is that the application dated 30th March, 2016 has no merit. Consequently, I dismiss it with costs to the respondents.

**Dated, signed and delivered in Nyeri on this 18<sup>th</sup> day of January, 2017.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

Mr. King'ori for the 1st, 2nd and 5th respondents

Mr. Kimunya h/b for Mr. Nderi for the appellant/applicant

Dedan Gitonga Mureithi – appellant

N/A for the 3rd & 4th respondents

Court assistant - Lydia