



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC CASE NO 295 OF 2015**

**JANET MWENDWA.....PLAINTIFF**

**VERSUS**

**NANCY MAVUTHA MUSYAKA.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. This matter was commenced by way of an Originating Summons dated 10<sup>th</sup> November 2015 in which Janet Mwendwa, the Applicant is seeking for Orders that a Vesting Order do issue in her favour in respect of all that parcel of land known as **PLOT NO.4612 SECTION II MAINLAND NORTH**; that the Deputy Registrar of this Court be authorized to execute all such documents as are necessary to effect transfer of the property to the Applicant and that the Registrar of Titles to take all necessary step to ensure the property is registered in the name of the Applicant.
2. The Summons is made on the grounds in the body of the summons and is supported by the affidavit of the Applicant sworn on 10<sup>th</sup> November 2015.
3. The Respondent filed a Notice of Preliminary Objection dated 17<sup>th</sup> February 2016 and a Replying Affidavit dated 29<sup>th</sup> March 2016 in opposition to the application.
4. The parties agreed to dispose of the application by way of Written Submissions.

**APPLICANT'S CASE**

5. It is the Applicant's case that she saw an advertisement in the Star Newspaper of 10<sup>th</sup> February 2015 about an impending sale by Public Auction of all that parcel of land known as **PLOT NO.4612 SECTION II MAINLAND NORTH** pursuant to instructions issued by the Court in Mombasa **SRMCC NO.2225 OF 2013, ROSE WAKIBIA AND JANE AWUOR ABUODHA –VS- PETER MASYA AND NANCY MASYA**. The Applicant states that she developed an interest in the said property, attended the sale on 18<sup>th</sup> February 2015 and made her bid and was declared the highest bidder. A Memorandum of Sale was thereafter executed between the Applicant and the Auctioneer and the Applicant paid Kshs.1,000,000.00 being 50% of the purchase price. That subsequently the Subordinate Court issued the Applicant with a Certificate of Sale and a Vesting Order in respect of the Suit Plot and after paying the necessary stamp duty the Vesting Order was duly registered on 7<sup>th</sup> May 2015 and the property was registered in the Applicant's name. The Applicant states that she paid the balance of the purchase price of Kshs.1,000,000.00 to the Auctioneer and the sale became absolute. The Applicant further states that no application was made to set aside the Auction Sale. According to the Applicant, the

Respondent as the previous registered owner of the suit property has protested that the Vesting Order was issued without jurisdiction and the process of registration in the Applicant's favour was not proper and therefore the Applicant moved this Court in this Applicant to have the matter settled once and for all.

### **RESPONDENT'S CASE**

6. In her response to the summons, it the Respondent's contention that the Applicant is not entitled to the Orders sought because the whole process and proceedings and conduct of the Public Auction was fraudulent and irregular as the right procedure was not followed and that the Respondent was not served as required by law. The Respondent has denied that the sale had become absolute and deponed that the sale and the Vesting Order issued by the Subordinate Court are being challenged in proceedings pending before this Court. The Respondent has deponed that the execution applied for was for movable and not immovable property and that the suit property which is the Respondent's matrimonial home is valued over Khss.8,000,000.00 whereas it was sold for only Kshs.2,000,000.00. The Respondent further avers that the Vesting Order was registered fraudulently and by collusion with Land Registrar who registered it using a skeleton file and not the original file. The Respondent states that he has ever disputed the decree in which, according to her, consent was entered into by way of coercion and intimidation of being imprisoned. It is the Respondent's contention that the acquisition of Provisional Title by the Applicant was against the law and fraudulent and the whole process was a nullity that ought to be set aside and proper execution be conducted.

7. In the Notice of Preliminary Objection dated 17<sup>th</sup> February 2016, the Respondent states that the Application contravenes the provisions of Section 6 of the Civil Procedure Act and that the same is misconceived, frivolous, totally devoid of merit and mala fide for reasons inter alia that the matter is directly and substantially in issue in previously instituted proceedings pending before this Court between the same parties and subject matter hence an abuse of the Court process and the same ought to be struck out.

### **SUBMISSIONS**

8. Both parties filed Written Submissions in which they reiterated the positions of their respective cases. In her submissions, the Applicant has submitted that she acquired the suit property procedurally. In addition, the Applicant has submitted that the Respondent herein had filed a Judicial Review Application in the High Court being **MISCELLANEOUS APPLICATION NO.33 OF 2015** in which she sought an Order of certiorari to quash the proceedings in the Subordinate Court and an Order of mandamus to have her name reinstated in the Certificate of Title of **PLOT NO.4612 SECTION II MAINLAND NORTH**, but the High Court dismissed the said application on 17<sup>th</sup> May 2016 as it found no illegality, irrationality or procedural impropriety in the sale. The Applicant further submitted that any challenge of the decree of the Subordinate Court and the manner in which it was enforced cannot be raised in these proceedings. The Applicant relied on the cases of **SAMUEL NGUGI KIMANI (2013) eKLR** and in Re **THE MATTER OF MILAND CO. LTD (2010) eKLR**.

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9. In her submissions, the Respondent maintains that she was never served with the requisite notice and therefore the execution was illegal and null and void. It was further submitted that the suit property is valued at Kshs.8,000,000.00 and the Magistrate's Court lacked the requisite pecuniary jurisdiction to issue the Vesting Order. The Respondent admitted that she moved to the High Court in **JUDICIAL REVIEW APPLICATION NO.33 OF 2015** which was determined in the Applicant's favour. The Respondent further submitted that the Vesting Order sought would be in vain as the Vesting Order issued by Magistrate's Court was fully implemented and though still challenged, has not been set aside. That if the Orders in this application are issued, there will be two Vesting Orders on the same subject matter and the Order of this Court will serve no purpose because what it seeks to vest in the Applicant has already been vested in her. The Respondent submitted that these proceedings ought to be stayed as there is in this Court **ELC NO.147 OF 2016, NANCY KAVUTHA MUSYOKA AND ANOTHER -VS- ROSE WAKIBIA AND OTHERS.** The Respondent also submitted that these proceedings are premature as

directions have not been taken as required under Order 37 Rules 16, 17, 18 and 19 of the Civil Procedure Rules. In her submissions, the Respondent relied on the case of **JAMES KANYIITA NDERITU AND ANOTHER VERSUS MARIOS PHILOTA GHIKAS AND ANOTHER (2013) eKLR** and **MOMBASA TANZANIA SINGH CONSTRUCTION AND ANOTHER (2013) eKLR**

## **ANALYSIS**

10. The Applicant is seeking for Orders that the Vesting Order do issue in her favour in respect to the suit property and that the Deputy Registrar of this Court be authorized to execute all such documents as are necessary to effect transfer of the property to the Applicant and that the Registrar of Titles to take all necessary steps to ensure the property is registered in the name of the Applicant.

11. It is not in dispute that the Applicant bought the property at a Public Auction which was held on 18<sup>th</sup> February 2015 pursuant to instructions issued by the Subordinate Court in **MOMBASA SRMCC NO.2225 OF 2013** in execution of the decree thereon. It is also not in dispute that through the Magistrate's Court, a Vesting Order was issued and fully implemented by the Land Registry and the property is now in the Applicant's name and the sale has not been set aside. The Respondent sought to quash the proceedings giving rise to the Vesting Orders in the Magistrate's Court but that application was dismissed. To my mind, it is wholly unnecessary to make another Vesting Order when the one issued by the Subordinate Court is subsisting and in force. As it is, the Applicant remains the registered owner of the suit property by virtue of the Vesting Order granted by the Senior Resident Magistrate's Court. Another Order for a Vesting Order would be superfluous in these circumstances and would not be of any benefit to the applicant who is already vested with the property based on the Vesting Order by the Magistrate's Court. The Respondent contends that the process that led to the issuance of the Vesting Order by the Subordinate Court was not proper and that that Court had no jurisdiction on to grant it. Even if that were to be so, it is really not a matter for consideration in this summons. This is not an application for review and neither is this Court sitting as an Appellate Court in the matter. I however, agree with the Respondent that if the Orders in this application are issued, there will be two Vesting Orders on the same subject matter. The Applicant remains the registered owner by virtue of the Vesting Order granted by the Resident Magistrate's Court. Granting another Vesting Order would be in vain as the Applicant is already vested with the suit property. Courts do not issue Orders in vain. I find that this application was misconceived, unnecessary, and an abuse of the Court process.

12. In the circumstances, and for the reasons I have given, I decline to issue the Orders sought and the application dated 10<sup>th</sup> November 2015 is hereby struck out.

I Order that each party shall bear their own costs.

**Judgment delivered, dated and signed at Mombasa this 25<sup>th</sup> day of July 2017**

**C. YANO**

**JUDGE**