



REPUBLIC OF KENYA
IN THE ENVIROMENT AND LANDS COURT

AT MALINDI

ELC CIVIL CASE NO. 199 OF 2014

WEBWARK TRADELINK LTDPLAINTIFF/RESPONDENT

=VERSUS=

1. DIAMOND TRUST BANK LTD.....1ST DEFENDANT

2. DIRECT LINE ASSURANCE CO. LTD2ND DEFENDANTS/APPLICANT

RULING

1. Before me is an Amended Notice of Motion dated 13th February, 2017. By the Application, the 2nd Defendant – Direct Line Assurance Co. Ltd is seeking for orders: -

1. Spent

2. THAT this Honourable Court be pleased to issue an order of eviction against the Plaintiff, its agents, servants, workers or anybody claiming under them from all those parcels of land known as Title No. CR. 19210, CR 19214, CR 19215, CR 19219, CR 19220 and CR 19221 situate within Kilifi County in the Republic of Kenya.

3. THAT an order be issued directing an Auctioneers to evict the Plaintiff, its Servants, agents and/or any other person currently living on parcels of land known as Title No. 19210, CR 19214, CR 19215, CR 19219, CR 19220, and CR 19221 situate within Kilifi County in the Republic of Kenya; and to put the 2nd Defendant in possession of the said parcel of land.

4. THAT an order be issued directing the Inspector General of Police, the County Commissioner Kilifi and the County Commander of the National Police Service Kilifi to provide an adequate contingent of policemen to ensure protection of the auctioneer and ensure peace and security during the eviction process.

5. THAT this Honourable Court grants any further orders as it deems fit.

2. The Application is supported by an Affidavit sworn by the Applicant's Advocate Orare Jared Nchore on 13th February 2017. The application is premised on the following grounds: -

(i) That the 2nd Defendant is the registered proprietor of all those properties mentioned hereabove having purchased the same on 22nd October 2014 vide a public auction conducted by

Garam Investment Auctioneers on behalf of the 1st Defendant.

(ii) That the 2nd Defendant has tried to take possession of the said properties since the said sale but the plaintiff remains in possession of the same and has declined to deliver vacant possession.

(iii) That the 2nd Defendant's attempts to obtain vacant possession of the suit property have been thwarted by the Plaintiff through the causing of chaos, mayhem and disturbance of the peace.

3. The Application is opposed. By Grounds of Opposition filed on 28th February 2017, the Plaintiff/Respondent-Webwark Trade Links Ltd states *inter alia*: -

(i) That the application as conceived, formulated and structured is fatally defective, untenable and not known to the law.

(ii) That there is no action or cross-action herein seeking eviction orders and upon which the instant application can be anchored.

(iii) That the suit herein is not in the nature of a Constitutional Petition and thus by purporting to be based on Constitutional Provisions, the instant application is misconceived and bad in law.

(iv) That an order of eviction is a drastic remedy and the same cannot issue on a mere application based on untested affidavit evidence.

4. I have considered the application and the Grounds of Opposition filed herein. I have similarly considered the submissions and authorities placed before me by the Learned Advocates representing the parties herein.

5. It is evident that on or about 30th October 2014, the Plaintiff herein filed the suit against the two defendants seeking a declaration that the sale by public auction of the suit property to the 2nd Defendant on 22nd October 2014 was unprocedural, premature, actuated in bad faith and therefore null and void *ab initio*. In addition, the Plaintiff sought a permanent injunction to issue against the Defendants restraining them from interfering with his quiet possession of the suit properties.

6. Contemporaneous with the suit, the Plaintiff filed an application dated 30th October 2014 seeking temporary orders of injunction restraining the Defendants from the suit premises and/or from effecting transfer of the suit properties to the 2nd Defendant pending the hearing and determination of the suit herein.

7. The application dated 30th October 2014 aforesaid was premised on the fact that the 1st Defendant-Diamond Trust Bank Ltd, had consented to have the suit property sold by the Plaintiff by way of private treaty to offset a debt which the Plaintiff owed the said Bank. It was the Plaintiff's case that as at the time the 1st Defendant unilaterally recanted the said agreement and proceeded to advertise the suit property for sale by way of public action, he had already contacted a 3rd Party who agreed to purchase the property at Kshs 160,000,000/= It was thus his case that the subsequent sale of the property to the 2nd Defendant at Kshs 135,000,000/= was unprocedural and premature as it denied him the opportunity to redeem the property.

8. On 9th October 2015, having heard the application dated 30th October 2015, the Honourable Angote J dismissed it with costs. In his Ruling, the Learned Judge found as a matter of fact that the Plaintiff had earlier on sued the 1st Defendant in Malindi HCCC No. 5 of 2013. It was the Learned Judge's finding that at the time of filing the said suit, the Plaintiff filed an application seeking orders of injunction on grounds similar to those that were being raised in the application dated 30th October 2014 filed herein. It was accordingly the Court's finding that since the application filed in HCCC No 5 of 2013 was dismissed

in a Ruling the court delivered on 11th April 2014, the application filed herein dated 30th October 2014 was res judicata and amounted to an abuse of the court process.

9. It is apparent that the Ruling delivered on 9th October 2015 has not been appealed. The Plaintiff/Respondent however continues to remain in the suit property, even though it is clear from the pleadings filed herein that he is aware that the public auction took place. I note that in his Witness Statement filed together with the Plaint on 30th October 2014, the Plaintiff concedes that the public auction did proceed on 22nd October 2014 as scheduled and that to the best of his knowledge the suit properties were purchased by the 2nd Defendant for the sum of Kshs 135,000,000/=.

10. In my view, upon the fall of the hammer, following the acceptance of the 2nd Defendants' bid, a sale of the suit properties was concluded as between the 1st Defendant and the 2nd Defendant. As the Plaintiff' Chargor, Chargor equity of redemption immediately lapsed upon the fall of the hammer. The valid contract resulting therefrom as between the 1st and 2nd Defendant can only be rescinded and/or set aside if the Plaintiff were able to prove fraud. Indeed, in accordance with Section 26 of the Auctioneers Act, even where the Plaintiffs could prove irregularities in the way the auction were carried out, they would only be entitled to an award of damages. In this case, no irregularities have been either alleged or proven.

11. It is clear to me that the realization that the suit property had passed to the 2nd Defendant/Applicant is what led the Plaintiff to file this suit. The Plaintiff's interests in the suit property having been extinguished at the fall of the hammer, it could only continue occupying the property upon an order of the court. Having failed to be granted those orders in the Ruling delivered by the Hon. Angote J on 9th October 2015, the Plaintiff ought to have vacated the suit property and granted the 2nd Defendant/Applicant vacant possession of the properties. Having failed to do so, the 2nd Defendant has every right to demand that the Plaintiff grant them vacant possession. Consequently, I find and hold that the 2nd Defendant 's application has merit.

12. Accordingly, the application dated 13th February 2017 is allowed with costs.

Dated, signed and delivered at Malindi this 13th day of July, 2017.

J. O. OLOLA

JUDGE