



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.218 OF 2014

STEPHEN KIBOWEN.....PLAINTIFF

VERSUS

AGRICULTURAL FINANCE CORPORATION.....DEFENDANT

RULING

(Application by persons to be enjoined to suit as interested parties; suit already finalized and decree issued; applicants claiming that they were condemned unheard; suit did not make any determinations against the applicants; suit being one to enforce an auction sale and compel the chargee to transfer the land to the purchasers; applicants claiming to be chargors of the land and claiming that the sale was irregular; whether sale was irregular can be subjected to other litigation but not by applicants coming into this finalized suit as interested parties; application dismissed with costs)

1. The application before me is that dated 20 May 2015 filed by two persons, namely Jeruto Tapkili Tengekyon and Samwel Kipruto Chepkeitany. They seek the following principal orders which are prayers 3 and 4 of the application, being :-

(i) *That the applicants be joined into the proceedings herein as interested party.*

(ii) *That this honourable court be pleased to review, vary and/or set aside the judgment of 19 March 2015 upon terms as are just in the circumstances.*

2. The application is opposed and before I go to the gist of it, let me give a brief background of the matter.

3. This suit was commenced by way of plaint on 24 July 2014. In the suit the plaintiff averred that he had purchased the land parcel Lembus/Kiplombe/157 from the defendant through a public auction conducted on 27 May 2014 by the defendant, in exercise of its right to sell as chargee. Despite being declared the highest purchaser, the defendant had refused to transfer the suit property to the plaintiff and in the suit, the plaintiff sought orders inter alia for an order to compel the defendant to transfer the suit land in his name. The defendant filed a defence and I proceeded to hear the matter. I delivered judgment on 19 March 2015, I held that the defendant had no justification whatsoever in refusing to transfer the suit land to the plaintiff. I issued an order compelling the defendant to transfer the suit land to the plaintiff. A notice of appeal was filed but I am made to understand that the same was withdrawn and there is therefore no appeal pending over the judgment. The judgment has now been executed and the suit land transferred to the plaintiff.

4. In this application, the applicants contend that the suit land was previously registered in the name of the

1st applicant and that the 2nd applicant purchased it from her and has been residing on it and therefore has a beneficial interest. It is averred inter alia that the applicants had no notice of the proceedings herein; that they were never served with any statutory notice before the auction sale by chargee; that the defendant was all along receiving payment for the loan; that there is now risk that the plaintiff may evict them from the land without them being given a hearing; and that the applicants were condemned unheard.

5. The plaintiff filed a replying affidavit to oppose the motion. He has inter alia contended that the applicants have no locus standi to set aside the judgment; that joinder of a party is only possible while the suit is subsisting; and that the applicants have no useful contribution to make to this suit. It is further argued that allowing the application will be to irregularly allow a fresh suit.

6. I took in the submissions of Mr. Kibii for the applicants, Ms. Ogange for the plaintiff and Mr. Mabonga for the defendant and I have considered the same in this ruling.

7. What the applicants want to do is come to this suit as interested party, have the judgment set aside, and the suit re-litigated. It is their argument that they were never heard yet the auction sale was irregular.

8. First, it should be observed that this suit was filed by the plaintiff seeking transfer of the suit property which he purchased from the defendant pursuant to the defendant's exercise of its power of sale as chargee. What the interested parties want to agitate is that the said sale was irregular. That to me is a cause of action that is separate from what the plaintiff has agitated in this suit. If the applicants are of the view that the auction sale was irregular and needs to be set aside, then they have the avenue of filing a suit of their own to agitate the said claim. I do not see how coming into a suit as interested party will help their cause, forget for a moment that the suit is already finalized and a decree issued and executed.

9. The applicants argue that they were condemned unheard. That cannot be the position. No order was ever issued for or against them, in the judgment of 15 March 2015. The issue in this suit revolved on whether or not the defendant could decline to transfer land to a purchaser in a public auction. It never revolved around whether or not the applicants have rights to remain in the suit property, which is a completely separate claim, best agitated through a separate suit, or whether the defendant had a right to sell the suit property by use of its statutory power of sale.

10. It was argued by Mr. Kibii, that the plaintiff after obtaining a transfer of the property has sued some person who are on the land for eviction, in the case Nakuru ELC No. 174 of 2015, but has deliberately declined to sue the applicants. That issue was indeed resolved in the mentioned case, where I held that it is upon the plaintiff to chose whom to sue for trespass and eviction, and the court cannot compel him to sue persons whom he does not believe are interfering with his possession of the land.

11. I really do not see any utility in me setting aside the judgment merely to allow the applicants come into the case to agitate a claim that they can properly agitate through a separate suit. It indeed emerged that the applicants have filed a separate suit, being Eldoret ELC No. 119 of 2017. I recall asking Mr. Kibii, learned counsel for the applicants, why the applicants want to have two suits agitating the same issue, and I did not get any satisfactory answer.

12. Whichever way I look at it, I see no merit in this application and it is hereby dismissed with costs.

Dated, signed and delivered in open court at Nakuru this 15th day of November 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -