



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 61 OF 2017

MICHAEL MATU.....APPLICANT

-VERSUS-

MARTIN LUTHER KING ANDATI.....RESPONDENT

JUDGEMENT

1. The Applicant brought the Originating Summons under Order 22 Rules 80 and 83, Order 37 Rule 3 and Sections 98 (4) and 99 of the Land Act seeking a determination on the following questions:-

- i. Whether the Applicant is the *bona fide* purchase of flat 6A Kiambere Flats on L.R. No. 37/769 Nairobi (“the Suit Property”) having purchased this property at an auction;
- ii. Whether the Respondent is a trespasser on the Suit Property and should hand over vacant possession of the Suit Property to the Applicant;
- iii. Whether the Plaintiff should be allowed to forcefully evict the Respondent; and
- iv. Whether the Respondent should compensate the Applicant for loss of user of the Suit Property in form of rent at market rates with effect from 5/6/2015 until he hands over vacant possession or is evicted.

2. The Applicant seeks a mandatory injunction to compel the Respondent to hand over immediate vacant possession of the Suit Property to the Applicant. In default, the Applicant seeks leave to evict him from the Suit Property with Officer Commanding Station of the Nairobi Area Police Station observing law and order during the eviction process. The Applicant also seeks to have the Respondent ordered to pay rent for the Suit Property at prevailing market rates from 5/6/2015 until he gives vacant possession or he is evicted.

3. The Summons is supported by the affidavit of Michael Matu. The Applicant depones that he attended an auction on 28/10/2014 conducted by Garam Investments Auctioneers where he was the highest bidder for the Suit Property having bid for Kshs. 16 million. He paid the full purchase price to Bank of Africa Ltd and has exhibited copies of the cheques and bank transfers.

4. The Suit Property was transferred to the Applicant’s name but the Respondent refused to peaceably hand over vacant possession of the Suit Property to the Applicant and instead threatened to mete out violence against the Applicant if he persisted in trying to move him out of the property. The Applicant’s advocate wrote to the Respondent requesting him to move out. The Respondent ignored the letter.

5. The Applicant desires to take possession of the Suit Property but cannot do so while the Respondent is

still in occupation. He avers that he is the *bona fide* purchaser of the Suit Property since the sale has not been vitiated. The continued occupation of the Suit Property prejudices the Applicant and it denies him the opportunity to enjoy his investment.

6. Applicant states that Suit Property is located in a prime area of Nairobi and could fetch rent of Kshs. 250,000 per month. The Applicant annexed a copy of a draft lease agreement prepared when he was approached by a tenant who wished to rent the Suit Property.

7. The Defendant filed a Replying Affidavit. He admits that he purchased the Suit Property in 2011 and that the purchase was financed by Bank of Africa Ltd in the sum of Kshs. 12,150,000. He urges that the Applicant did not comply with the conditions of the sale at the auction and that the sale was a fraud committed jointly by the Applicant, Auctioneers and the Bank. The Respondent contends that the Applicant fraudulently transferred the Suit Property to himself without following the legal procedure. He claims that the registration of the Applicant as the owner was tainted with fraud and illegalities.

8. The Respondent avers that he filed **ELC No. 832/2016** against the Applicant herein, Bank of Africa and the Auctioneers. The Respondent claims he has been unable to serve the Applicant with the suit papers since the Bank and auctioneers have been hostile to him. He alleges that the sale of the Suit Property to the Applicant is tainted with fraud and illegality and that it ought to be declared null and void.

9. The court has looked at the pleadings together with the submissions filed by both parties. The Respondent contends that Section 99(3) of the Land Act protects a purchaser in an auction if at any time before completion of the sale the person has actual notice that there has been no default by the chargor or that a notice has been duly served or that the sale is somewhat irregular except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee where the person had notice. The Respondent argues that he seeks to prove in **ELC 832/2016** that the auction was irregular and fraudulent and to have the court reverse the sale.

10. The Respondent further argues that this suit contravenes the provisions of Section 6 of the Civil Procedure Act and ought to be stayed since the parties and subject matter are similar. It has not been stated that interim orders were granted in that case against the Applicant.

11. The Respondent relied on the case of **Maina Wanjigi and another V. Bank of Africa Kenya Ltd and 2 others** (2015) eKLR. The orders sought in that case were to stay the intended sale emanating from the auction and payment of the purchase price and transfer of the suit property pending hearing of the suit. In the instant case the property sold at the auction has already been transferred to the Applicant.

12. Section 98 (4) of the Land Act states that upon registration of the land or lease sold and transferred by the chargee, the interest of the chargee shall pass to and vest in the purchaser free of all liability on account of the charge.

13. Havelock J. in **Simon Njoroge Mburu V. Consolidated Bank of Kenya Ltd** (2014) eKLR stated that the owner of the land lost his rights of redemption at the fall of the hammer at the public auction. The Judge observed that Section 9 of the Land Act gave the right of the chargor prejudiced by the irregular exercise of the statutory power of sale a remedy in damages. Upon the sale of the property at the public auction to the Applicant, the sale became absolute and the Respondent cannot lay claim to the Suit Property, his remedy lies in seeking damages.

14. Section 24 of the Land Registration Act vests the absolute ownership of property upon registration of the transfer in favour of the proprietor. The Respondent's remedy lies in damages if it is found that the sale to the Applicant was irregular.

15. The Applicant has proved his case on a balance of probabilities. The court grants the orders sought in the Originating Summons. The Respondent is to be evicted from the Suit Property within 14 days of this judgement. The Applicant will have the costs of this suit.

Dated and delivered at Nairobi this 16th day of October 2017.

K. BOR

JUDGE

In the presence of: -

Mr. Nyaga for the Applicant

Mr. Andolo for the Respondent

Mr. V. Owuor- Court Assistant