



**Marionga v Joseph (Environment & Land Case E003 of 2023)
[2024] KEELC 13281 (KLR) (19 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13281 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE E003 OF 2023**

M SILA, J

NOVEMBER 19, 2024

BETWEEN

JOSEPHINE NYABONYI MARIONGA APPELLANT

AND

ISMAEL NYABUTO JOSEPH RESPONDENT

*(Being an appeal against the judgment of Hon. P.K Mutai, delivered
on 12 July 2023 in the suit, Kisii CMCC/ELC No. 40B OF 2019.)*

JUDGMENT

1. The suit herein was commenced by the respondent through a plaint filed on 4 April 2019. In the plaint, the respondent averred that the purchased the land parcel Central Kitutu/Daraja Mbili/2309 from Agricultural Finance Corporation (AFC) through a public auction conducted on 17 March 2011 by M/s Joni Consult, an auctioneering firm. The property was hitherto registered under the name of the appellant who had charged it to AFC. The respondent pleaded that despite purchasing the suit property and becoming registered as proprietor, the appellant had denied him occupation of the suit land. He pleaded that the respondent had sued AFC vide the suit Kisii High Court Petition No. 49 of 2011 which was dismissed. In the case, the respondent asked for the following orders:
 - a. A declaration that he is the lawful proprietor of the suit property.
 - b. Eviction of the appellant;
 - c. A permanent injunction against the appellant;
 - d. Costs and interest;
 - e. Any further relief deemed fit to award.



2. The appellant entered appearance and filed defence and counterclaim on 1 October 2019 which she subsequently amended on 4 May 2023. She pleaded that the purchase by the respondent was done in breach of law as no notice was issued under Section 90 (1) of the Land Act, 2012; that her rights to a fair trial under the Constitution were violated; that the respondent has no clean title capable of being protected; that the respondent obtained the property through fraud and misrepresentation, illegally, unprocedurally, and through a corrupt scheme; that only the respondent was aware of the auction and it is not disclosed who the other bidders are. It was pleaded that the respondent purchased the suit property without due diligence to establish that the law under Section 90 of the Land Act was complied with before the purchase; that he failed to consider the rights of the chargor in respect of remedies for default; that he failed to confirm why the chargor (sic) had not sued for the recovery of monies owed instead of undertaking the auction; that he failed to issue notice of sale under Section 97 of the Land Act, 2012. By way of counterclaim, she averred that the auction did not follow the law as required under Section 90 as read with Section 97 of the Land Act, 2012; that the auction was marred by procedural impropriety and amounted to a farce; that the title is impeachable under Section 26 of the Land Registration Act. In the counterclaim she asked for the following orders:
 - a. A declaration that the registration of the respondent as proprietor of the suit land was unprocedural and the said registration be cancelled;
 - b. Costs of the suit.
3. The respondent testified on 22 November 2021. His evidence was that the suit property was advertised in the Standard Newspaper of 22 February 2011 with the property scheduled for sale on 17 March 2011. He attended the auction and was declared the highest bidder at Kshs. 1,100,000/=. He paid the purchase price; was issued with a Memorandum and Certificate of Sale, and was subsequently registered as proprietor. He stated that he went to take possession but the defendant declined to give vacant possession. He added that the appellant had filed the suit Kisii HCCC Petition NO. 49 of 2011 which was heard and dismissed. After the respondent had testified, counsel for the appellant applied for adjournment which was granted and the matter fixed for defence hearing on 26 January 2022. On that day an adjournment was applied for and granted and the matter set for defence hearing on 2 March 2022. Yet again an adjournment was applied for but this time it was declined and the court closed the defence case. Counsel were directed to file submissions and judgment was read on 11 May 2022 in favour of the respondent. The appellant changed counsel and came to court with an application to set aside the judgment, pleading that she deserves to be heard. The trial court was gracious enough to set aside the judgment and subsequently the appellant gave her evidence on 8 May 2023 after her application to adjourn was declined. She faulted the sale for reason that she was never given notice and that the property was not valued. Cross-examined, she acknowledged that she had filed a Petition at the High Court but she claimed not to remember its outcome. After she had testified, Mr. Ondieki, learned counsel for the appellant, applied for adjournment to call another witness. That application for adjournment was opposed on the reason that there was no other witness disclosed. The court agreed with the objection and the case of the appellant was closed. Counsel were directed to file submissions and judgment was delivered on 12 July 2023 in favour of the respondent. The court found that the respondent had purchased the property through a public auction and that the appellant's challenge of the sale through Kisii HCCC Petition No. 49 of 2011 was not successful. The court held that the respondent had proved his case and allowed all the prayers in the plaint with the appellant being given 90 days to give vacant possession.
4. Aggrieved by the judgment, the appellant has now preferred this appeal. There are 18 grounds of appeal raised but I see no need to set down all of them. I can condense them into four broad grounds; firstly that the court violated the principles of fair trial under Articles 25 (c), 27 (1) , 50 (2) and 159 of the



Constitution; secondly, that the court erred in not reversing the sale as there was no valid exercise of the statutory power of sale; thirdly that the court erred in issuing an eviction without interrogating the concerns about the process and value of the property, and fourthly that the trial court misdirected itself on issues of law and fact and arrived at the wrong decision.

5. I directed that the appeal be heard through written submissions and I have taken note of the submissions filed by Mr. Ondieki for the appellant, and Mr. Bunde for the respondent. I am of the following view:
6. The respondent's case was that he purchased the suit property through a public auction, that the property was transferred to him, and he deserved to be the one enjoying the property. The defence of the appellant was essentially an attack on the manner of sale of the suit property.
7. In his submissions, Mr. Ondieki went at great lengths to demonstrate how a proper auction ought to have been conducted, and urged that it was not so conducted in this case. Indeed, he submitted that the auction violated the constitutional rights of the appellant.
8. I do not see how the appellant can succeed in claiming that the sale was not above board within the suit herein or claim that it violated her constitutional rights. She cannot succeed because she had sued AFC, Joni Consult Auctioneers, and the respondent, in the suit Kisii HCCC Petition No. 49 of 2011 where she alleged that the sale violated her constitutional rights. In that petition, she complained that she was never served with a statutory notice, that she was never served with handbills advertising the sale, and that the sale was irregular. She asked for orders for a declaration that the sale was irregular and contravened her constitutional right; general damages; and a permanent injunction against the respondents to stop them from evicting her. That petition was dismissed. It would mean that the appellant failed to convince the court that the sale was not above board; in essence there is a judgment from a competent court affirming the sale. I do not see how the appellant can now be heard to assert that the sale was irregular in a subsequent suit as that would violate the res judicata rule.
9. Even assuming that the appellant could raise the issue of the sale a second time within this suit and claim that the sale was irregular, the person to sue for any irregularity would be AFC and the auctioneer, not the respondent, for the respondent is clearly an innocent buyer for value and is protected by Section 99 of the Land Act, 2012, which provides as follows:

99. Protection of purchaser

1. This section applies to—
 - a. a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or
 - b. a person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.
2. A person to whom this section applies—
 - a. is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;
 - b. is not obliged to see to the application of the purchase price;



- c. is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.
 3. A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.
 4. A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.
10. From the above, particularly Section 99 (2) (c), it will be seen that a bona fide purchaser is not obliged to inquire whether there is default, or whether any notice supposed to be given was indeed given, or whether the sale is proper or regular. Further, Section 99 (4) provides that any person prejudiced by the irregular sale has his remedy in damages against the person exercising the power, and that is the chargee. In a bona fide sale, the chargor's remedy is against the chargee and not the purchaser. Indeed, it is the chargee who is the person that can answer to any irregularity in the sale and not the purchaser.
11. The appellant was duly heard on the question of the irregularity or otherwise of the sale within the Petition that she filed. The trial court was not wrong in holding that the appellant had been heard in her contention regarding the sale, and was correct in finding that a court of competent jurisdiction had already made a decision touching on the veracity of the sale, which the court could not revisit. I see no issue there and I am not moved to alter that finding.
12. As to a fair hearing, the appellant was more than accommodated by the trial court. She failed to attend court many times and benefited from several adjournments. I have already mentioned that the matter had in fact earlier proceeded with a judgment being pronounced in favour of the respondent, which the appellant applied to set aside and the court obliged. She was given an opportunity to ventilate her defence which she did. Her application for adjournment to call another witness was properly declined as no other witness had been discovered. She cannot be heard to complain that she was not given a fair hearing.
13. I see nothing wrong in the decision of the trial court and I come to the same conclusion as the trial Magistrate. The respondent properly purchased the suit property at a public auction and he deserves to be declared the rightful owner of it. He also deserves to have the order of eviction against the appellant and also fully entitled to the prayer to have the appellant permanently restrained from the suit land. In essence I uphold the judgment of the trial court. In fact, the appellant is lucky that the respondent had not made any claim for general damages for trespass or mesne profits which I think he would have fully merited. I observe that the 90 days given by the trial court to have the appellant give vacant possession have now long lapsed. I order the appellant to give immediate vacant possession and no later than 30 November 2024. In default, the respondent is entitled to proceed to forcefully evict the appellant and any person in possession of the suit property under her. After 30 November 2024, the appellant and/or her servants/agents, or anybody else claiming possession under her, is permanently restrained from entering, being upon or in any other way interfering with the suit property.
14. There is certainly no merit in this appeal and it is hereby dismissed with costs.



15. Judgment accordingly.

DATED AND DELIVERED THIS 19 DAY OF NOVEMBER 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

In the presence of: -

Mr. Ondieki present for the appellant

Mr. Bunde present h/b for Mr. Ochillo for the respondent

Court Assistant – David Ochieng'

