



REPUBLIC OF KENYA



KENYA LAW
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**Shah & another v Shah & another (Environment & Land Case
64 of 2021) [2023] KEELC 15728 (KLR) (21 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15728 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 64 OF 2021**

M SILA, J

FEBRUARY 21, 2023

BETWEEN

DILIPKUMAR N.M SHAH 1ST PLAINTIFF

NAYNABEN D N.M SHAH 2ND PLAINTIFF

AND

LALCHAND DEVSHI SHAH 1ST DEFENDANT

AMEET LALCHAND SHAH 2ND DEFENDANT

JUDGMENT

1. The plaintiffs commenced this suit through an originating summons filed on April 6, 2021 seeking determination of the following questions :-
 1. Whether they are bona fide purchasers of the land parcel LR No subdivision No 1185 section I, mainland north (the suit property), having purchased it at an auction.
 2. Whether the defendants are trespassers on the suit property and should hand over vacant possession to the plaintiffs.
 3. Whether the plaintiffs should be allowed to forcefully evict the defendants; and
 4. Whether the defendants should compensate the plaintiffs for loss of use of the suit property in form of rent at market rates with effect from March 30, 2021 until they hand over vacant possession or are evicted.
2. In the originating summons the plaintiffs seek a declaration that they are the proprietors of the suit land, an order of the eviction of the defendants, and a permanent injunction to restrain the defendants from the suit land.



3. The case of the plaintiffs is contained in the affidavit in support of the originating summons and in the oral evidence of the 1st plaintiff. They aver that they purchased the suit property in a public auction that was held on August 27, 2020 by Spotlight Intercepts Auctioneers after seeing an advertisement in the Daily Nation newspaper. They emerged the highest bidders having placed a bid of Kshs 65,400,000/= and they were issued with a certificate of sale. They then paid the purchase price to the chargee, Bank of Baroda Limited, and the chargee transferred the title to them. They are now the registered proprietors of the suit property. At the time of purchase, the defendants resided in the suit property and the plaintiffs knew them. The plaintiffs engaged the defendants to get vacant possession and the 2nd defendant wrote an email on 28 January 2021 asking for three months to vacate. This plea was accepted in an email of 29 January 2021. However, the defendants still failed to move out after lapse of the three months and refused to open for them the gate or pick their calls. That is what prompted them to file suit.
4. The defendants on the other hand filed a replying affidavit sworn by the 1st defendant wherein he claimed that the plaintiffs had purchased the suit property through a flawed auction that had been carried out by Bank of Baroda Limited through Spotlight Intercepts Auctioneers. He contended that the auction was flawed because it was carried out despite him having filed a suit in this court seeking to stop the sale, being Mombasa ELC case no. 106 of 2020. He claimed that the bank, without proper notice as required by the law, carried a secretive public auction against a court order barring the process and disposed the property to the plaintiffs. They prayed that the court should allow the suit Mombasa ELC Case No. 106 of 2020 to proceed to its logical conclusion before dealing with the plaintiffs' case as the outcome of the said case will affect this suit.
5. The 2nd defendant, Mr. Ameet Shah, gave oral evidence in support of their defence. In his examination in chief, he testified that the 1st defendant is his father who 86 years' old, is a widower, immobile and needs 24 hours care. He stated he resides in the suit premises together with him.
6. He narrated that sometime back he took a loan using the property as security. He was the borrower while his father and mother owned the property. His mother died on 26 March, 2019 leaving his father as the sole owner. As he was preparing to repay the loan, the bank (the Bank of Baroda) kept telling him they had a buyer in place. He tried to stop the auction that had become imminent by filing suit and seeking an injunction. He was directed by the court to deposit Kshs 10,000,000/= but he was not able to comply. He decried that the bank had not given him the statutory 90 days' notice prior to it exercising its statutory power of sale. He claimed that he only got a 40 days notice by email. He complained that the public auction did not follow the required procedure and he described the same as a private treaty between the bank and the plaintiffs. He believed that there was collusion. He claimed that he had a person who wanted to buy the property. He alleged that the auction was held after 3.31 pm so that nobody would have known that there was going to be a sale. He complained to the police on 21 March 2021 and the directorate of criminal investigations undertook investigations. He claimed that the undertaking they gave to move out was made under duress.
7. Cross-examined, he agreed that the loan was outstanding. He also knew that the property was up for sale. He came to court to stop the auction and got a conditional order of injunction. They did not comply with the conditions. He was not present at the auction and he claimed that he was told that it is cancelled. He has never been the registered owner of the property as the property was in the name of his father.
8. There was a report by the DCI which the parties agreed to produce by consent.



9. Both counsel for the plaintiffs and counsel for the defendants filed written submissions. I have considered them before arriving at my decision. I am of the following view :
10. The suit property was jointly owned by the 1st defendant, Dr. Lalchand Devshi Shah and Pushpa Lalchand Shah. In his evidence, the 2nd defendant stated that the property was jointly owned by his father and mother but his mother is now deceased. The property was charged to Bank of Baroda and as admitted by the 2nd defendant, there was default in repayment of the loan. The property was advertised for sale by Sportlight Intercepts Auctioneers with the sale scheduled for 27 August 2020. The plaintiffs emerged the highest bidders at Kshs 65,400,000/= and were issued with a certificate of sale. The property was subsequently transferred to them through a transfer dated 24 January 2020. The transfer was effected on 8 January 2020. The suit property is therefore currently registered in the name of the plaintiffs.
11. In defence to the suit, the defendants contend that the auction was improperly held. Inter alia, they claim that they were not issued with any statutory notice; that the sale was done at 6.20pm; and that it was conducted by an unlicensed auctioneer. The defendants had filed a suit to try and stop the auction sale, but they failed to abide by the conditions of stay thus the auction proceeded. They reported to the DCI and they rely on a report dated 26 August 2022 written by one George Mutonay, Head of Land Fraud Investigations Unit. I have gone through that report. What that report states is that Sportlights Intercepts had no jurisdiction “to execute court orders and distress for rent in Mombasa county” and that the auctioneer only has jurisdiction in Nairobi and Kajiado counties. If this is the sole basis upon which the defendants contend that the auction was improper, then they are on shaky foundation. What the auctioneer did was to undertake a sale by chargee, not an execution of court orders or distress for rent. Moreover, this report affirms that the auctioneer held a Class B licence. The *Auctioneers’ Rules, 1997*, identifies a Class B licence as follows :-
- (a) a class “B” licence which shall be a general auctioneering licence which shall enable the holder to realize charged securities, repossess and sell any property throughout Kenya, execute court orders, and to levy distress within specific districts.
12. It will be seen from the above that a holder of a Class B licence has power to realize charged securities, repossess and sell any property throughout Kenya. It is only execution of court orders and levying of distress which is for specific districts. The DCI report claims that the auctioneer has no offices in Mombasa. He doesn’t need to have an office in Mombasa to conduct an auction in Mombasa. So long as he holds a Class B licence, he can conduct sales by chargee anywhere in the Republic and there is no law that prescribes that a Class B licensee must have an office in all towns that he will obtain instructions. It follows from the above that the report of the DCI is completely misplaced as to the legal standing of the auctioneer. There is nothing else in that report which alleges any issue related to fraud or the contention that the sale was not held. That report is not worth the paper that it is written on.
13. In as much as the 2nd defendant alleged that the auction was held late, after 3.21pm, he has nothing to support this position. He admitted that he never attended the auction. He therefore cannot tell anything about the way the auction was held. He never called any witness to support any of the allegations in the pleadings that the auction was irregularly conducted. Within their pleadings, the defendants alleged that the auction was held despite there being an order of injunction. Nothing is further from the truth. The defendants had sought an injunction which was granted subject to them fulfilling certain conditions. They never met the conditions and there was nothing to stop the auction from proceeding. In any case, the defendants have not, within this suit, joined the chargee or the auctioneer, if they had any issues to raise with the way the sale was held.



14. From the evidence before me, I am persuaded that the plaintiffs duly purchased the suit property in a public auction and they are now the duly registered proprietors of the suit property. They are innocent purchasers for value. I have not found any evidence of fraud in the manner in which the auction was conducted or in the manner in which the plaintiffs purchased the suit property. I have also not found any evidence of irregularity. It follows that the plaintiffs are protected by dint of the provisions of section 99 of the [Land Act](#), which provides as follows :-

Protection of purchaser

- (1) This section applies to—
- (2) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or
- (3) 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.
- (4) A person to whom this section applies—
- (5) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;
- (6) is not obliged to see to the application of the purchase price;
- (7) 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.
- (8) 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.
- (9) 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.

15. From the above, if at all the defendants have any remedy, then it is in damages against the persons who exercised the power of sale. I find that the plaintiffs have good title to the land. By virtue of having good title, it is them who are entitled to exercise proprietary rights over the suit land. This is discerned from a reading of section 24 of the [Land Registration Act](#), 2012, which provides as follows :-

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

16. The defendants have not demonstrated any rights over the suit property. I hereby declare that as between the plaintiffs and defendants, it is the plaintiffs who are the registered proprietors of the suit



property and the ones who are entitled to exercise proprietary rights over the suit property including the right of use and possession. The defendants must give vacant possession forthwith and no later than twenty one (21) days of this judgment. If they do not move out, then they be forcibly evicted. Upon the lapse of this 21 days window, the defendants are permanently restrained from entering, being upon, using, or in any other way interfering with the quiet possession of the plaintiffs of the suit property. The plaintiffs are also at liberty to make entry into the suit property and inspect it at any time after this judgment.

17. Within the suit, the plaintiffs have asked for mesne profits. While this case was proceeding, the parties had entered into a consent permitting the defendants to reside within the suit property subject to paying the amount of Kshs 125,000/= per month. I will enter judgment for the plaintiffs for the sum of Kshs 125,000/= per month from the time that they filed this suit till the time the defendants vacate the suit property. Any amount paid by the defendants to be deducted from this sum. Any unpaid monies to attract interest at court rates from the time the suit was filed.
18. The last issue is costs. Costs will follow the event. I award costs to the plaintiffs jointly and/or severally against the defendants.
19. Judgment accordingly.

DATED AND DELIVERED THIS 21 DAY OF FEBRUARY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

