



REPUBLIC OF KENYA



KENYA LAW
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**Sulami & another v Zalareeds Limited & 3 others (Civil Suit
220 of 2016) [2022] KEHC 12884 (KLR) (Civ) (4 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12884 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL SUIT 220 OF 2016**

DO CHEPKWONY, J

AUGUST 4, 2022

BETWEEN

YEHUDA SULAMI 1ST PLAINTIFF

BLUERIDGE CAPITAL LIMITED 2ND PLAINTIFF

AND

ZALAREEDS LIMITED 1ST DEFENDANT

DUNCAN ODUOR OTIENO 2ND DEFENDANT

CAROLINE ACHIENG' TUJU 3RD DEFENDANT

KARIRA THUO NDEBU 4TH DEFENDANT

RULING

1. The instant Application is dated December 10, 2021 and therein the Applicant is seeking for orders that;
 - a. Spent;
 - b. Spent;
 - c. An order do issue directing that the subject property known as Nairobi/block 60/134 situated in Langata, Nairobi County and registered in the names of Zalareeds Limited, the 1st Defendant/Respondent herein be advertised and sold by way of public auction to recover the decretal sum of Kshs. 62,004,166.58 together with accrued interest thereon until payment in full;



- d. The 1st, 2nd and 3rd Respondents, their agents, servants, directors or any person acting through them do grant free and unlimited access to the subject property being Nairobi/block 60/134 situated in Langata, Nairobi County for the purposes of inspection, valuation and execution;
 - e. Any tenants living in the subject property being Nairobi/block 60/134 situated in Langata, Nairobi County being Nairobi/block 60/134 situated in Langata, Nairobi County be evicted;
 - f. The honourable court do set the terms and conditions of the sale of the subject property being Nairobi/block 60/134;
 - g. The costs of valuation, auctioneer's fees and any other related expenses to be paid from the proceeds of sale of the subject property being Nairobi/block 60/134;
 - h. The OCS, Langata Police Station to assist in effecting the court orders;
 - i. Costs of the Application be borne by the Respondents.
2. The application is premised on the grounds on the face of it and in the Supporting Affidavit of Joseph M. Munyithya sworn on 10th December, 2021. It is stated that judgment was entered in this matter against the Defendants herein jointly and severally for Kshs.38,002,840/= plus costs and interest at commercial rates until payment in full.
 3. That the court issued a decree on August 21, 2020 which was served upon the Respondents but they have failed and/or refused to settle the same despite numerous demands.
 4. That the total sum demanded in the warrants of execution of the property is Kshs.62,004,166.58 being:

| | |
|----------------------------------|--------------------|
| Decretal amount..... | Kshs 38,002,840.00 |
| Interest on decretal amount..... | Kshs 22,739,223.58 |
| Taxed Costs..... | Kshs 1,258,868.00 |
| Further Court Fees..... | Kshs 950.00 |
| Collection Fees..... | Kshs 1,500.00 |
 5. It is also stated that the 1st Defendant/Respondent owns the property known as Nairobi/Block 60/134 situated in Langata, Nairobi County and which is free from any encumbrances and the Applicant is desirous of selling the subject property to satisfy the decretal sum in full or in part. It is further stated that no appeal has been preferred against the Judgment of the court and the Applicant is apprehensive that the 1st Defendant may subdivide, charge, transfer or otherwise adversely deal with the subject property to defeat the Applicant's execution efforts and subject the Applicant to irreparable loss, damage and prejudice, hence the urgency. It is therefore in the interest of justice that the orders sought be granted.
 6. The Application has been opposed by the 1st, 2nd and 3rd Defendants vide the Replying Affidavit of Duncan Oduor Otieno sworn on January 19, 2022 wherein it is stated that the Defendants will greatly be prejudiced if the Application is allowed.
 7. The 2nd Defendant depones that he was charged in Criminal Case No. 1347/2018 on counts of stealing contrary to Section 268(1) as read with section 275 of the *Penal Code* and Conspiracy to Defraud contrary to Section 317 of the Penal Code. That pending the determination of the criminal case, all his stock and merchandise relating to the suit have been held by police as exhibits hence he is unable to dispose off the said merchandise in order to satisfy the decree.



8. It has also been deponed that they have approached the Plaintiffs before requesting that they to withdraw the criminal case to allow the 2nd Defendant access and dispose the merchandise for purposes of settling the decree but they refused hence the stalemate.
9. They go on to depone that the 2nd Defendant is the only bread winner in the family having lost his job in December, 2015 and that the family monies that were meant to service the agreement are held in the police as exhibits.
10. Further, the 2nd Defendant has stated that disposing off the property will be unfair, prejudicial as this will expose the family to irreparable loss.
11. The 2nd Defendant states that this Application should have been served either at the registered address of each of the Defendants or personally upon each of the Defendants on record but this was not done.
12. According to the 1st Defendant, the Application should have a current valuation report determining the value of the property in question but this has not been done.
13. That it will be fair and just that stay of execution and proceedings be granted pending the hearing and determination of the criminal case, as the 2nd Defendant is apprehensive that unless the Plaintiffs are restrained by this Honourable Court, they are likely to advertise and sell the suit property to the detriment of the 1st Defendant and in disregard to his proprietary rights safeguarded by *the constitution*. The Defendants pray that this Application be dismissed with costs.
14. The Applicants put in a rejoinder to the Respondent's Replying Affidavit vide a Further Affidavit of Joseph M. Munyithya sworn on 23rd February, 2022. It is stated that there is no evidence on the part of the 2nd Defendant to the effect that there is any merchandise held by police as exhibits and that the said merchandise is not the only way the Defendant can satisfy the decree. That the 2nd Defendant is a director in several other companies hence capable of fending for his family even after the suit property is auctioned. It is denied that the 2nd Defendant has proposed any payment plan since the decree was issued. Further, that the Defendants were represented by the Firm of J. Louis Onguto, Advocates who accepted service on their behalf hence it was not necessary to serve them individually. That a valuation report can only be prepared once a valuer has been allowed access to the suit premises and that this court can set conditions for sale as prayed in the Application.
15. By consent of parties, the instant Application was canvassed by way of written submissions which were duly filed and I have read through them for consideration.

Determination

16. I have read through the application, the grounds upon which the same is premised, both on its face and Supporting Affidavit and considered the submissions filed and cited statute and case law by both parties in consideration of the prayers sought. I find the issue of determination being whether the prayers sought are meritable.
17. Section 38 of the *Civil Procedure Act*, Cap 21 Laws of Kenya provides;

Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree—

 - (a) by delivery of any property specifically decreed;
 - (b) by attachment and sale, or by sale without attachment, of any property;
 - (c) by attachment of debts;



- (d) by arrest and detention in prison of any person;
- (e) by appointing a receiver; or
- (f) in such other manner as the nature of the relief granted may require

18. Similarly, Section 44.(1) of the same Act provides;

“All property belonging to a judgment debtor, including property over which or over the profits of which he has a disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf, shall be liable to attachment and sale in execution of a decree”

19. It is not in dispute that the Applicant has a decree of Kshs.62,004,166.58 against the Respondents. It is also not in dispute that the suit property known as Nairobi/Block 60/134 situated in Langata, Nairobi County is registered in the names of Zalareeds Limited, the 1st Defendant/Respondent herein. The 2nd Defendant has admitted that he lives in the suit property which is matrimonial home. The Defence that the suit property is matrimonial home cannot stand against the right of the Applicant to execute and enjoy the fruits of the Judgment.

20. It is not rebutted that no Appeal has been preferred to the Court of Appeal against the Judgment and decree in issue. In my opinion there is no reason why this court should not allow the Applicant to execute the decree by selling the suit property by public auction.

21. With regard to the terms of the sale, reliance is placed upon the provisions of Order 22 Rule 57 of the Civil Procedure Rules, 2010 which provides;

Order 22, rule 57.

- (1) Where any property is ordered to be sold by public auction in execution of a decree, the court shall cause public notice and advertisement of the intended sale to be given in such manner as the court may direct.
- (2) Such public notice shall be drawn up after notice to the decree-holder and the judgment-debtor, and shall state the time and place of sale, and specify as fairly and accurately as possible —
 - (a) the property to be sold;
 - (b) any encumbrance to which the property is liable;
 - (c) the amount for the recovery of which the sale is ordered; and
 - (d) every other thing which the court considers material for a purchaser to know in order to judge the nature and value of the property:

Provided that notice to the judgment-debtor may be dispensed with, or substituted service thereof ordered, for reasons to be recorded by the court.

Having found that there is nothing bring the Applicant from executing their decree, I therefore direct that the sale of the suit property be conducted as provided for under the above cited provisions of the law.

22. The upshot of the foregoing is that the instant Application is merited and the same is allowed in the following terms;



- a. The suit property known as Nairobi/Block 60/134 situated in Langata, Nairobi County and registered in the names of Zalareeds Limited be sold by public auction at the current market value to satisfy the decree.
- b. The sale be conducted in accordance with Order 22 Rule 57 of the Civil Procedure Rules, 2010.
- c. The 2nd Defendant to provide access to the property and any tenants including the 2nd Defendant to vacate the suit property within 30 days of this Ruling.
- d. The proceeds of sale to be use to satisfy the decree, costs of valuation, auctioneer's fees and any other antecedent expenses.
- e. The OCS Langata Police Station to assist in effecting the court orders.
- f. Costs of this Application to be borne by the Respondents.

It is hereby ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF AUGUST, 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Musesia counsel holding brief for Mr. Munyilya for Plaintiff/Decree Holder

Mr. Nyongesa counsel for 1st, 2nd and 3rd Respondents.

Court Assistant - Sakina

