



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 677 OF 2010**

**DANIEL KIPKEMEI KOTTUT.....PLAINTIFF**

**VERSUS**

**SAMUEL GICHERU.....1<sup>ST</sup> DEFENDANT**

**CITIVILLAS LIMITED.....2<sup>ND</sup> DEFENDANT**

**ZANVIEW INVESTMENTS LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The defendants have asked the court to set aside the Warrants of Attachment which were issued on 14<sup>th</sup> May 2014. The said warrants indicated that the sums due from the defendants was Kshs. 5,881,935.53 plus interest and costs.
2. However, the defendants fault the plaintiff for failure to disclose to the court that the defendants had already paid a total sum of Kshs. 3,430,000/-, leaving a balance of only Kshs. 2,451,953/-.
3. In the light of the alleged non-disclosure, the defendants asserted that the warrants of attachment were irregular. It is on that basis that the defendants urged the court to set aside the warrants until and unless the plaintiff had given full credit for the payments received from the defendants.
4. To support the application, the 1<sup>st</sup> defendant, **SAMUEL GICHERU**, swore an affidavit, detailing the payments which the defendants had made. According to the defendants' tabulation, they had paid a total of Kshs. 3,430,000/- between 28<sup>th</sup> October 2011 and 18<sup>th</sup> November 2013. The details are as follows;

	<i>Date</i>	<i>Mode of Payment</i>	<i>Amount</i>
1.	28/10/2011	Cheque No. 012082	505,000/-
2.	8/5/2012	Cheque No. 067515	150,000/-
3.	22/6/2012	Cheque No. 082458	110,000/-
4.	29/11/2012	Cheque No. 083217	235,000/-
5.	May 2013	Cheque to Muhatia Pala Auctioneers	500,000/-

6.	4/7/2013	Cash to Muhatia Pala Auctioneers	200,000/-
7.	10/7/2013	Cash to Auctioneers	50,000/-
8.	2/8/2013	Cash to Auctioneers	100,000/-
9.	15/8/2013	Cash to Auctioneers	150,000/-
10.	16/8/2013	Cheque No. 000133	150,000/-
11.	30/9/2013	Cheque No. 000134	150,000/-
12.	22/10/2013	Cash to Auctioneers	150,000/-
13.	30/10/2013	Cheque No. 000802	280,000/-
14.	7/11/2013	Cash to Auctioneers	200,000/-
15.	18/11/2013	Cash to Auctioneers	280,000/-
16.	18/11/2013	M-pesa	20,000/-

**TOTAL 3,430,000/-**

5. However, the plaintiff said that the defendants had only paid a total of Kshs. 1,500,000/-, towards the decretal amount. That payment was said to be exclusive of interest and costs.

6. According to the plaintiff, the sums paid by the defendants are as shown below;

	<b>Date</b>	<b>Mode of Payment</b>	<b>Amount</b>
1.	30/5/2013	Cheque No. 00122	500,000/-
2.	Unclear	Cheque No. 00121	500,000/-
3.	30/9/2013	Cheque No. 00134	500,000/-
4.	4/7/2013	Cash to Auctioneers	200,000/-
5.	10/7/2013	Cash to Auctioneers	50,000/-
6.	10/7/2013	Cash to Auctioneers	50,000/-
7.	2/8/2013	Cash to Auctioneers	100,000/-
8.	15/8/2013	Cash to Auctioneers	150,000/-

**TOTAL**      **2,050,000/-**

**LESS the Dishonoured**

*Cheque No. 00134*                      **500,000/-**

**1,550,000/-**

7. I must however point out that the cheque No. 00134, which the plaintiff exhibited was for Kshs. 250,000/-, and not Kshs. 500,000/- as shown on his tabulation.
8. The figure of Kshs. 250,000/- appears to be accurate, as it is same amount shown on cheque No. 00134, which was exhibited by the defendants, even though on the defendants' tabulation it was shown as being a cheque for Kshs. 150,000/-.
9. In the face of the information concerning the dishonoured cheques, the 1<sup>st</sup> defendant apologised to the court, for having included the same in his tabulation.
10. But the defendants still insist that they had already paid Kshs. 3,430,000/-, even after the dishonoured cheques were discounted from the payments.
11. The reason why that sum remains constant, in the opinion of the defendants, was that the earlier tabulation reflected some cash payments which had been made to the auctioneers, but which the auctioneers had not remitted to the plaintiff.
12. In my considered opinion, even if there was a genuine dispute concerning the amounts which ought to be recovered from the Judgment-Debtors, that, of itself, ought not to be the basis for stopping the process of execution, when the applicants concede that they still owe Kshs. 2,451,953/-.
13. If the Judgment-Debtors were acting with goodwill, in a genuine attempt to obtain justice, the least that they should have done was to remit the sums which they deem to be outstanding.
14. From the terms of the consent Order dated 15<sup>th</sup> July 2011, the decretal amount was supposed to have been settled within one year.
15. The 1<sup>st</sup> defendant was to have transferred to the plaintiff, the property No. **NGONG/NGONG/10922**, in Kiserian Town.
16. Secondly, the 1<sup>st</sup> Defendant was supposed to have constructed upon that property, a house. The value of the plot and the house was to be approximately Kshs. 6,000,000/-. And the house should have been ready for occupation within one year, from 15<sup>th</sup> July 2011.
17. Apart from that, the 1st Defendant was to pay interest totalling Kshs. 2,000,000/-.
18. Out of that amount of Kshs. 2,000,000/-, the plaintiff acknowledged that he had already been paid Kshs. 1,000,000/-.
19. In the light of that acknowledgment, the balance of the sum payable on account of the agreed interest, was Kshs. 1,000,000/-.
20. Therefore, if the value of the plot and the balance of the interest was added together, the value of what the 1<sup>st</sup> Defendant owed the plaintiff was Kshs. 7,000,000/-.
21. In those circumstances, if it were assumed that no further interest was payable, the defendnats would still owe Kshs. 3,570,000/-.

22. The Muhatia Pala Auctioneers have given detailed particulars of the various steps they undertook to execute the Decree. It is noteworthy that the 1<sup>st</sup> defendant has not responded to the very serious allegations directed against him and his security guards, when the Court Broker was stopped from completing his tasks.

23. The conduct of the 1<sup>st</sup> defendant, in deliberately blocking an officer of the court, from undertaking his lawful duties is so outrageous that the 1<sup>st</sup> defendant must be told clearly that he cannot be permitted to stand in the path of the lawful authority of the court, and then seek the help of the court. He who comes to court seeking justice must acknowledge and appreciate that the court will carefully give consideration to his own conduct with regard to the respect he shows to the law. If he trashes the course of justice or if he obstructs the course of justice, it is unlikely that the court would look kindly to him.

24. Reverting to the consent order dated 15<sup>th</sup> July 2011, it is clear that there are two components to it. The first component is in relation to the parcel of land **NGONG/NGONG/10922**. That piece of land was to be transferred to the plaintiff.

25. But before effecting the said transfer, the 1<sup>st</sup> defendant was to build a house upon it, which was supposed to be ready for occupation within one year.

26. The value of the land together with the house on it was to be approximately Kshs. 6,000,000/-.

27. The second component of the consent order was that of interest, which was agreed upon in the sum of Kshs. 2,000,000/-.

28. In effect, the total value of the consent judgment was Kshs. 8,000,000/-. Out of the amount of Kshs. 2,000,000/-, which was payable in relation to interest, the plaintiff acknowledged receipt of Kshs. 1,000,000/-, prior to 15<sup>th</sup> July 2011.

29. I direct the two parties to bear those facts in mind, when they appear before the learned Deputy Registrar within the next **TEN (10) DAYS**, to establish;

a) *The exact amount of money which the defendants have paid;*

b) *The exact balance still outstanding.*

30. After that sum is verified, the defendants will have 30 days to pay the outstanding balance. In the event of failure to pay the balance within 30 days from the date when the learned Deputy Registrar has verified the figures, execution may issue without any further applications.

31. Each party will bear his own costs of the application dated 27<sup>th</sup> May 2014.

**DATED, SIGNED and DELIVERED at NAIROBI this 17<sup>th</sup> day of February 2015.**

**FRED A. OCHIENG**

**JUDGE**

***Ruling read in open court in the presence of***

Gachuna for Terer for the Plaintiff.

Marieria for Burugu for the 1<sup>st</sup> Defendant.

Marieria for Burugu for the 2<sup>nd</sup> Defendant.

Mariera for Burugu for the 3<sup>rd</sup> Defendant.

Collins Odhiambo – Court clerk