REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 222 OF 2012

FUBECO CHINA FUSHUN…...………………...PLAINTIFF

Versus

NAIPOSHA COMPANY LIMITED …..…...........……………………………… DEFENDANT

MILESTONE COMPANY LIMITED………....………....………..1ST INTERESTED PARTY

STEPHEN SIMIYU T/A U DESIGN ARCHITECTS

AND INTERIOR DESIGNERS………………...……….……….2ND INTERESTED PARTY

PINNACLE PROJECT LIMITED…………........…………….........3RD INTERSTED PARTY

MILESTONE ESTATE & CONSTRUCTION LIMITED....…..........4TH INTERESTED PARTY

CATHERINE NGUGI NJERI …………………….....……..........…..5TH INTERESTED PARTY

HIGH FLYERS SISTERS INVESTMENT……………......……….6TH INTERESTED PARTY

JOYCE MURUGI MUIGA……………………………....…........…....7TH INTERESTED PARTY

THIRIKA TEA FARM LIMITED…………………….............……8TH INTERESTED PARTY

NELLIE GECAU…………………………………...................…....9TH INTERESTED PARTY

RUTH WAMUCA NJUGUNA…………………....…......……......10TH INTERESTED PARTY

JOHN NDEITHI GATHERU…………………………...…………11TH INTERESTED PARTY

MAGARITTA VILLAS…………………………………….............….12TH INTERESTED PARTY

RULING

A sad story

[1] This case has a rather protracted and unpleasant history. The proceedings emanated from an arbitral award dated 12th February, 2012 made by P.M. Gachoka, the sole arbitrator on a reference of a dispute between the parties which arose from a contract dated 1st March, 2010. The Defendant had contracted the Plaintiff to carry out the construction of holiday homes and related civil engineering works on a piece of land known as Naivasha LR No. 398/15 (hereinafter "the suit property"). The arbitral proceedings were undertaken in the presence of both parties and a final award was given in favour of the Plaintiff against the Defendant. The Defendant was ordered to pay the Plaintiff a total sum of Kshs. 64, 651,817.10/= together with interest at the rate of 17.5% per annum from 15th September, 2010 plus costs. Thereafter, the Plaintiff, through an application dated 10th April, 2012 sought for, and on 3rd May, 2012 the Court granted the adoption and enforcement of the Arbitration award. A decree was issued on 25th May, 2012.

[2] The Plaintiff subsequently filed a Notice of Motion dated 7th June, 2012 for attachment and sale of the suit property. By consent of both parties, the orders therein were granted. The Court issued further orders barring all transactions on the suit premises and directed the Defendant to pay the amount due under the decree within 15 days, failure to which the property would be sold to satisfy the decree. The Applicant nevertheless failed to pay the decretal sum within the stipulated period, and parties subsequently appeared before Hon. Mr. Nyakundi, the Deputy Registrar of the court on 18th September, 2012 to settle the terms and conditions of sale of the suit property. They recorded Consent and an order was issued on 20th September 2012 that the sale of the property was to be done through public auction or private treaty. In the event that the property was to be sold by public auction, the firm of Auctioneers known as Bealine Traders would supervise the public auction.

[3] Negotiations afterwards kicked off between Plaintiff and various prospective buyers. After considering the various proposals by buyers, the Plaintiff in consultation with the Defendant settled on Chalbi Villas Limited as the purchaser to the suit property. However, the Plaintiff rescinded the agreement by a letter dated 27th September, 2013 due to the aforesaid company's inability to complete the transaction within the stipulated completion period. The said Chalbi Villas was also evicted from the property to facilitate a new buyer. Subsequently, the 1st interested party was identified as a viable buyer for the suit property. All the parties having no objection to the 1st interested party as the buyer, this court directed on 17th February, 2014 that the Deputy Registrar should sign the agreement of sale between the Plaintiff and the 1st interested party. But, before the transaction was completed, a number of applications were filed thereafter by the various parties in this matter. And the plethora of applications forced the Court to issue directions that: 1) the two applications dated 4th March, 2014 and 19th March, 2014 by the Defendant to be heard together; 2) the issues raised in the applications dated 4th April, 2014 and 6th May, 2014 by the by the Plaintiff and the 1st interested party, respectively be canvassed in the hearing of applications in (1) above; and 3) all the issues raised in all the applications above shall be determined within (1) above. I will, therefore, proceed on that basis and determine all the issues herein within the Defendant's applications dated 4th March, 2014 and 19th March, 2014.

Applications Dated 4th March, 2014 and 19th March, 2014

[4] The Defendant's Notice of Motion dated 4th March, 2014 sought for several reliefs but the first three prayers are spent. Therefore, the only significant relief therein is the one seeking to set aside the consent orders/directions made on the 17th February, 2014. The other application dated 19th March, 2014 is brought under Order 2 rule 15 of the Civil Procedure Rules and seeks the following orders; 1) That the miscellaneous Application dated 10th April, 2010 be struck out; and 2) That the proceedings in this cause and the adoption of the Arbitral Award of the sole proprietor P. Mwaniki Gachoka dated 13th February, 2012 and further Ruling dated 3rd April be set aside.

Both applications are asking for costs to be provided for.

Issues

[5] Looking at the applications by the Defendant and those by the Plaintiff and the Interested Party, and on keen consideration of the submissions by counsels for the parties together with the applicable law, the following issues emerge for determination:

> **a) Whether the Plaintiff is a juristic person. This issue subsumes yet other issues namely, whether there has been a misdescription of the Plaintiff, and if so whether misdescription of a party makes the proceeding null and void; and**
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> **c) Whether the property herein should be sold by public auction or private treaty. Under this issue, I will determine two other related strands; that is, whether the court has jurisdiction to order sale by private treaty of a property under attachment by the Court and whether the sale by private treaty which had been undertaken should be set aside. Arguments on and allegations of alleged fraud or undervalue of the property will be considered too; and**
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> **d) Whether the Defendant had passed a resolution authorizing Caroline Wairimu Kimemia to file the affidavit herein or appointing the advocates on record to act in these proceedings. Here the court will reflect on the effect of lack of crucial resolutions of the company.**

Juristic personality of the Plaintiff: is it a case of misdescription?

[6] This issue of juristic personality of the Plaintiff is of preliminary significance for it goes to jurisdiction. It is trite law that for the court to have jurisdiction proper parties must be before the court. But the question is: whether this case is one of non-existent entity or of misdescription of parties? That is the critical question that must be answered and forms the gist of the Defendant's Notice of Motion dated 19th March, 2014 and expressed to be brought under Order 2 rule 15 of the Civil Procedure Rules.

[7] In the Affidavit of Caroline Wairimu Kimemi sworn on 19th March, 2014, the Defendant argued that the Plaintiff is a non-registered entity in law. It established that fact through the search it carried out at the Registrar of Companies' office. Therefore, the plaintiff is a sham and a non-entity incapable of suing or being sued or giving authority or instructing advocates to act on its behalf. These proceedings are, thus, null and void. And on that basis, the Court must set aside any orders made in favour of the Plaintiff. The Defendant anchored their arguments on the following cases: **APEX FINANCE INTERNATIONAL LTD & ANOR v KENYA ANTI-CORRUPTION COMMISSION HCC JR NO. 64 OF 2011; SITCO (KENYA) LIMITED v FORTUNE COMMODITIES LTD AND CO-OPERATIVE BANK OF KENYA (2005) eKLR,** and **HOUSING FINANCE CO. KENYA LTD v EMBAKASI YOUTH DEVELOPMENT PROJECT (2004) 2KLR** which held that juristic personality of a company is a fundamental issue that touches on Jurisdiction and once it is raised by the Applicant, the Respondent bears the legal burden to prove otherwise under section 112 of the Evidence Act. The Defendant annexed a certificate of incorporation which shows that the registered company is China Fushun Number One Building Engineering Company Limited which is entirely different company from the Plaintiff. It then discarded the argument that the Plaintiff's name consisted of acronyms of the name appearing on the certificate of incorporation. It also refuted the truth of the Plaintiff's assertion that China Fushun Number One Building Engineering Company Limited had established a business name known as FUBECO; and submitted that the alleged business name had no legal existence or capable of conferring locus standi to institute a suit.

[9] In light of these facts the Defendant contended that all proceedings and orders flowing therefrom are null and void ab-initio. In the circumstances, the Plaintiff could not even contract

with the 1st interested party to the sell the suit property.

[10] The Plaintiff and the 1st Interested Party vehemently opposed the application dated 19th March, 2014. The Plaintiff filed Grounds of Opposition and the Replying Affidavit of Bao Ping sworn on 21st March, 2014. It argued that the application herein was bad in law, incompetent and brought in bad faith since it was geared towards stalling the instant proceedings. They urged that the Defendant Company had never made a resolution appointing the advocates in this matter as required by law. It was also contended that the there was no authority exhibited by the Defendant to show the directors of the Defendant company appointed Caroline W. Kimemia to appear on its behalf in the instant proceedings and swear any affidavits therein. Additionally, there was no resolution to appoint the Defendant's Advocates and the lack of such a resolution rendered the instant application fatally defective. The Plaintiff and the 1st Interested Party denied the Defendant's claims that the Plaintiff was a non – entity and asserted that it was duly incorporated. It also legally carried out business as evidenced by its certificate of incorporation and Registration of business name issued by the Registrar of companies on 10th May, 2001and 1st March 2004 respectively. According to the Plaintiff, Fubeco China Fushun existed in law but in the event that there was any doubt or ambiguity on the Plaintiff's juristic personality, it is should be a mere misdescription of parties which is not fatal to the instant proceedings. Counsel to the Plaintiff relied on the cases of **ISMAEL SULEIMAN & OTHERS v RETURNING OFFICER ISIOLO COUNTY MERU PETITION N0. 3 OF 2013** and **NEW DELHI INCOME TAX APPEALS NO.S 7 OF 2006, 2 OF 2006, 3/2006,4/2006, 5/2006, 10/2006, 11/2006 AND 22/2006 AT THE NEW DELHI HIGH COURT** in support of this submission.

[11] The Plaintiff argued that it is the Decree holder and had identified itself at the onset of the transaction with the Defendant and the doctrine of estoppel strictly applies to stop the Defendant from approbating and reprobating over the party it had engaged with. It was also argued that the original contract signed by the parties clearly showed the seal and the full names of the Plaintiff. That fact had never been questioned by any party. Counsel for the Plaintiff provided the court with the original contract which bears the original seal of the Company and name.

[12] Learned counsel Mr. Wanjau also made similar submissions on behalf of the 1st Interested Party and emphasized that the proceedings before the court are proper. He said that the names appearing at the Plaintiff's certificate of incorporation, that is China Fushun Number One Building Engineering Company Limited, was a mouthful and it was therefore logical that the Plaintiff chose to use acronym such as FUBECO Fushun in carrying out its business like most businesses do in Kenya. According to Mr. Wanjau, the name FUBECO, which is an acronym for the Plaintiff, was registered as a business name in favour of the Plaintiff and the same was competent for trading or use in judicial proceedings. That the Plaintiff Company was registered in 2001 vide Registration number 93860 and the defendant had not adequately demonstrated that the company indicated in that certificate was different from the Plaintiff. That even though there may have been misdescription of the Plaintiff, the Defendant replied to all the pleadings filed by the Plaintiff. That as such, the Defendant knew who was suing it and what the dispute in question concerned. Mr. Wanjau therefore argued that any misdescription of the Plaintiff was not fatal to the proceedings and the cause of action has not been affected. He urged further that the Defendant's assertion that the Plaintiff was not a juristic person lacked merit and was not an act of bona fides as the Defendant signed an agreement at the centre of the dispute, participated in the arbitration proceedings and was even involved in sourcing for the initial buyer of the suit property. Therefore the Defendant is estopped from approbating and reprobating over the party it had engaged with. According to the 1st interested party, the application before the court was an attempt by one Caroline Wairimu Kimemia to scuttle the process for her own ulterior motives. The said Carline Wairimu Kimemia did not have the authority by the Board of the Defendant to institute any proceedings on behalf of the Defendant and was seeking to commit the company to her own personal position without the other company directors' concurrence. The 1st interested party therefore urged the court to dismiss the Defendant's application.

[13] The Court also allowed Mr. Chege, Learned Counsel for the Chalbi Villas limited to address the court on the issues raised by the Defendant's application. Learned counsel stated that the aforesaid company had an interest in the outcome of the application since it wanted to know whether Plaintiff was a legal entity given that it had intended to purchase the suit property in the first instance. Mr. Chege was of the opinion that the Plaintiff and China Fushun Number One Building Engineering Company Limited were two different entities.

Court's view on the issue of juristic personality

[14] On careful perusal of the pleadings, consideration of the submissions and the cases cited by the respective parties, the Court takes the following view on the issue whether the plaintiff is a juristic person or not. The Defendant has not denied that it entered into an agreement dated 1st March, 2010 with the Plaintiff. The original document of the contract was supplied by the Plaintiff to the Court and the Defendant confirmed it was the authentic original contract document. Both the Plaintiff and the Defendant executed the said agreement at page 49 of the said agreement. The Seal and stamp of the Plaintiff who was the contractor indicates clearly that the FUBECO Fushun Company is China Fushun No. 1 Building Engineering Company Limited. The said name also appears in the Certificate of incorporation number C. 93860 provided by the Plaintiff as Exhibit Number "B-1". Further the aforesaid company registered a business name referred to as FUBECO on 1st March, 2004. During the performance of the contract, the Defendant knew who the party to the contract herein was. From the turn of events herein and the circumstances of this case, the Defendant knew very well the person it was dealing with, and that it was a Registered Company called China Fushun No. 1 Building Engineering Company Limited. The Defendant was also aware of the trading name of FUBECO CHINA FUSHUN. The agreement subject of these proceedings became a subject of arbitral proceedings in which the Defendant fully participated and was fully aware of the other party to the proceedings to be China Fushun No. 1 Building Engineering Company Limited alias FUBECO CHINA FUSHUN. It is worth repeating that the contract giving rise to the arbitral proceedings and which has been produced in this Court is clear on the parties and has not been challenged. These things tell one story; that the objection being raised now by the Defendant is a desperate way of undoing these proceedings. It has no basis. The evidence before the Court connects the Plaintiff with China Fushun No. 1 Building Engineering Company Limited and FUBECO CHINA FUSHUN is merely an alias or trade name. The use of FUBECO CHINA FUSHUN as the Plaintiff, at worst, is a misdescription of the party, that is, China Fushun No. 1 Building Engineering Company Limited. Such misdescription of the Plaintiff is not fatal to the proceedings and does not defeat a party's cause of action. In taking this decision, the Court is guided by the constitutional desire to serve justice which is the very reason why courts have been given unfettered discretion in ordering an amendment in such case in order to reflect and have the correct parties before the Court. Under that power, the Court would still allow the amendment to correct the misdescription. I so order for the avoidance of doubt. I hold and find that this is not a case of non-existent or faceless entity that would invariably be incapable of suing or being sued. It is a case of pure misdescription of a party and is governed by the same law on misdescription of parties in a contract. I find support of that position in the words of **Lenaola J** in the case of **NZOMO WAMBUA v WOTE TOWN COUNCIL (2008) eKLR** while citing the case of **JAMES MWANGAGI & 64 OTHERS VS WOTE TOWN COUNCIL HCC 113/ 2004** that:-

> **"Clearly, the advocates as did their client knew who was being sued and understood the misdescription in the name of the defendant but that fact does not change the cause of action against it nor the substratum of the suit as well as the questions in dispute. I therefore agree with Wendoh J, in James Mwangagi (supra) when the learned judge stated as follows:-**
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> **"the Defendant/Respondent is not properly described but mere misdescriptions of a party cannot render a suit incompetent. This matter has just been filed and the court has wide discretion under Order 1 Rule 10 of Civil Procedure Rule to an amendment of the parties on its own or upon application" "**

[15] Despite the misdescription, I repeat, the Defendant all along knew who the Plaintiff was; it was the person with whom it entered into contract herein. All its pleadings and responses show that the Defendant made adequate and pointed responses to the Plaintiff's claim; leaving no doubt whatsoever that it was addressing the Plaintiff's claim which arose from the contract dated 1st March, 2010. The Defendant is just dishonest. If it was serious about the juristic personality of the Plaintiff nothing would have been easier than to raise it before the tribunal. For those reasons, estoppel would arise to prevent the Defendant from contending that the Plaintiff was not a juristic person. See the case **INDIAN CASE OF UNION OF INDIA v K.P MANDAL, AIR 1958 Cal.415.**

[16] In light thereof, I dismiss the defendant's contentions that the plaintiff is not a juristic person.

Need for a resolution to file affidavit and instruct an advocate.

[17] These issues that the application before the court is improper by virtue of the fact that the affidavits of Caroline Wairimu Kimemia did not disclose that she had authority to act on behalf of the Company and the other directors: and further that there was no board resolution instructing the advocate on record to act on behalf of the Defendant; apply to both applications. Let me be emphatic on this issue that, I am aware of ample decisions of the court, and I can cite an example; the case of **BUGERE COFEE GROWERS LTS v SEBADUKA & OTHERS (1970) EA 147** where the court held that a company authorizes the commencement of proceedings by resolution of the company or by way of minutes of its board of directors. However, I find a lot of persuasion in the thread of thinking in the Ugandan case of **UNITED ASSURANCE CO. LTD v ATTORNEY GENERAL: SCCA NO.1 of 1998** where the Supreme Court of Uganda held that it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company. In the case before me, Caroline Wairimu Kimemia is a director of the Defendant Company and she duly authorized the Advocates on record to commence this Application. That fact is not denied and I am surprised the person laying the objection is the Plaintiff and not the Defendant Company. The Plaintiff has also not presented any material or affidavit from the other directors denying the authority of Caroline Wairimu Kimemia as a director in the Defendant Company. As such, I do not think the Court is in any position to dispute the authority of Caroline Wairimu Kimemia or the instructions to the advocate on record to defend the interest of the company. Therefore, in the absence of evidence to the contrary, I find the affidavits filed to be in order and the advocate herein to be properly on record for the Defendant.

[18] Following my finding that the Defendant is a juristic person and that the misdescription herein is not fatal to the proceedings, the upshot is that the application dated 19th March 2014 is dismissed. In any event, the application does not meet the threshold set out in section 35(3) or 37 of the Arbitration Act for the setting aside of the Arbitral award of the sole arbitrator, P. Mwaniki Gachoka dated 13th February, 2012 and the further ruling dated 3rd April, 2012.

Should the Court order sale of suit property by public auction?

[19] This issue featured prominently in the Application dated 4th March 2014 which is supported by the affidavit of Caroline Wairimu Kimemia sworn on 4th March, 2014. The Defendant averred that it is the major party in the suit and is being affected by the orders made on 17th February, 2014 for; it was not made aware of the consent orders recorded on the sale yet it had received a better offer on the suit property by a company known as Cosmic Developers Limited. The Defendant was also never informed of the new purchaser; the 1st interested party. It was further averred that the offer made by the 1st interested party was not the best offer on the suit property. The consent recorded on 17th February was therefore bad in law as the Plaintiff cannot purport to

sell the suit property vide private treaty without the prior approval and consent of the Defendant. The Defendant asserted that the selection of the 1st interested party as the preferred buyer ought to have been explained to the Court and the Defendant. The Defendant alleged that the purported sale was an attempt to swindle the Defendant out of its property. The Defendant claimed that the Plaintiff and the firm of Wanjao and Wanjau, had colluded to have the suit property disposed of in a manner that was not provided for in law. The Defendant was also of the opinion that the courts order directing the Deputy Registrar to execute the sale agreements was highly irregular and illegal. That further the court had failed to give directions on how the proceeds of the sale would be applied as is necessary in law. In the foregoing it was the Defendant's position that the orders issued by the court on 10th and 17th February, 2014 should be vacated.

[20] The Defendant further argued that the suit did not confer any rights of ownership of the suit property to the Plaintiff as such rights are only vested in the Defendant as the registered proprietor. The Plaintiff could not, therefore, sell the suit property by way of private treaty, since its interest is only confined to recovery of money owed under the decree. According to the normal rules of practice and procedure, a sale of the suit property by way of private treaty could only be exercised by a judgement debtor at the first instance. And it is only after such a failure that the court could order or authorize the sale to be by an officer of the court. In such instance, Order 22 of the Civil Procedure Rules would become operative, and the officer of the court envisioned by this provision in law to carry out the sale was an auctioneer through public auction. It was thus submitted that the law does not authorize a decree holder to deal or take part in the attachment and sale of the suit property as done in the present case. The decree-holder cannot sell attached property by private treaty without first attempting to sell it through public auction where the property is advertised and a reserve price given. The Defendant further urged the court to consider the claims by interested parties who had rightfully purchased sub-plots of the suit property. The Defendant also pointed out that there was a possibility that the proposed sale of the suit property to the 1st interested party might be a gross undervalue. The Defendant hypothesized that had the Plaintiff each of the 120 half-acre plots at Kshs. 6,000,000/= as it had intended, the suit property would fetch Kshs. 720,000,000/= which would be Kshs. 540,000,000/= more than what was being offered by the 1st Respondent. This makes it imperative that the suit property is sold via a public auction.

[21] The Plaintiff opposed the application and asserted that the Defendant was duly represented by counsel when the consent was entered between the parties on 10th and 17th February, 2014. It was also asserted that there was neither a specific order which directed that the Defendant should take part in the sale of the suit property that was under attachment by the court, nor a requirement in law to inform the Director of the sale of the suit property. The Defendant's advocates were all along involved in the transactions pertaining to the suit property. After sale, the decree holder received the decretal sum and so there was no need of giving directions as to who would receive the proceeds of the sale. In any case, the process of sale had already commenced and the Plaintiff had already received Kshs. 16,000,000/= as deposit from the 1st interested party. The Plaintiff argued that it was mandated in law to sell the suit property and it followed the due process. It was further contended that the Defendant as the Judgement Debtor had neither the capacity nor the legal authority to sell its own property. Accordingly, the Plaintiff urged the court to dismiss the application.

[22] The 1st Interested also opposed the application on similar grounds as those proffered by the Plaintiff. But added that parties had settled the terms of the sale of the suit property before the Deputy Registrar and the Defendant could not feign ignorance of that fact. Equally, there is no law which stipulates that public auction is the preferred mode of execution of a decree as opposed to a private treaty. Additionally, the 1st interested party stated that the Defendant had not tabled ant evidence to prove it had received a better offer on the suit property or that property was undervalued- the extent of the 1st interested party's offer of Kshs. 180,000,000/=. According to the interested party, there was no irregularity, impropriety or collusion in the sale. The 1st interested party therefore urged the court to dismiss the application with costs as the same were

geared towards derailing and frustrating the process of execution.

[23] The 11th and 12th interested parties also filed written submissions with regard to the application on 28th May, 2014 but were substantially similar to those of the Defendant. They supported the approach that it is only after a public auction has failed that attached property could be sold by a private treaty. Mr. Mburu, who appeared for the 11th and 12th interested parties, further pointed out that there the suit property comprised of 120 plots and 42 of these plots had been bought by other persons. And if the suit property was sold at undervalue, it would prejudice the interest of the said interested. It was therefore Mr. Mburu's assertion that a valuation was necessary for a sale to be carried out effectively.

Court takes the following view on the issue

[24] There are two matters that emerge. One, whether the plaintiff has established sufficient grounds for the court to set aside the consent order dated 10th and 17th February, 2014. Second, whether I should set aside the sale by private treaty and order a sale of the suit property by public auction. Of the setting aside of the consent orders dated 10th and 17th February, 2014, the principles to be considered by the court are well enunciated in the case **FLORA N. WASIKE v DESTIMO WAMBOKO [1982-88] 1 KAR 625** (**Hancox JA)** as follows:

> **"It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which could justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in J. M. Mwakio v Kenya Commercial Bank Ltd Civ Apps 29 of 1982 and 69 of 1983. In Purcell v F C Trigell Ltd [1970] 3 All ER 971, Winn LJ said at 676:**
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> **'It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.' ''**

[25] See also **HIRANI V KASSAM (1952) 19 EACA 131,** that:

> **"The mode of paying the debt, then, is part of the consent judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here. The position is clearly set out in Seton on Judgments and Orders (7th edn.), vol 1, p 124, as follows:**
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> **"Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them … and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court …; or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement."**

[26] The Defendant claims that its former advocates entered into the consent without its authority and knowledge. The Defendant stated that it never gave instructions to its former advocates to enter into the said consent since at the time representation was in issue following the intimation by its former advocates, MM Kimuli & Co. Advocates that they had ceased acting on behalf of the Defendant. The Plaintiff and the 1st interested party said the said consent was entered into by the parties in accordance with the law and the Defendant was duly represented by counsel when consent was entered between the parties on 10th and 17th February, 2014. The 1st interested party added another angle to the issue; that there were no substantive orders granted on 10th and 17th

February, 2014 which were capable of being set aside. The court merely gave directions based on earlier orders and findings on matters that had not been challenged. To unravel the claim that the advocate who appeared did not have instruction, the Court summoned the particular advocate who had appeared for the Defendant when the orders of 10th and 17th February were made. The court resolved the issue after it found that there was some sort of confusion or lack of proper communication between the former advocates and the Defendant on this matter. The Court could not find any fault on the part of counsel who appeared. Counsel also confirmed that the firm of MM Kimuli & Co. Advocates was no longer acting for the Defendant in this suit. In the circumstances, I will give the benefit of doubt to the Defendant in the interest of justice on representation. Related thereto, I quickly add that the contested orders which the Court issued on 10th and 17th February, 2014 were partly substantive and partly by way of directions following the earlier orders of the Court on the sale of the property. They were follow-up orders. But whether the orders and or directions will remain is dependent upon the decision I make on the other issue on sale by private treaty versus public auction.

Private treaty versus public auction

[27] The basis upon which the sale of the suit property by private treaty has been faulted is that, sale by private treaty is premature, irregular and contrary to section 38 of the Civil Procedure Act and Order 22 of the Civil Procedure Rules; it ought to have come after sale by public auction has failed or by consent of the parties. The counter-argument is that there was no requirement in law for the Plaintiff to have first utilized public auction mode of sale before resulting to a private treaty. I will start by restating the law. Once a property is attached pursuant to a court order, it becomes the property of the court and is bound by the law. Execution by way of sale will be regulated by the Court in tandem with the application procedures in execution of a decree unless there is a specific agreement of the parties on the sale. Whether the sale is by private treaty or public auction, any questions which are raised on the propriety of the sale particularly of immovable property, should be investigated by the Court. And where any serious irregularity or impropriety is found, it will result into the setting aside of the sale. Circumstances which lead to the setting aside of a sale will depend on the merit of each case. Queries on the mode of sale and possibility of prejudice to the Defendant and other interested parties have been raised and there is nothing which prevents this court from investigating the matter. First, the allegations of collusion and fraud are serious matters and impute a charge on the Plaintiff and the 1st interested party. Such matters require cogent evidence to prove. That has not been done and treat them as not proved; except the Court observed and it was confirmed by the Plaintiff and 1st interested party that the latter had sold part of the suit property to other third parties without the authority of the Court.

[28] What about the purport of the Consent order issued on 20th September 2012, that the sale of the property was to be done through public auction or private treaty? And that, in the event that the property was sold vide public auction, the firm of Auctioneers known as Bealine Traders would supervise such auction? The Judgement Holder elected to dispose the property by way of private treaty. But the Defendant, who is the judgment-debtor and the registered proprietor of the suit property is of the contrary opinion and favours sale by a public auction. Order 22 rules 56 and 57 of the Civil Procedure Rules 2010 are instructive on this matter. Rule 56(1) provides that;

> **"Save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the court or by such other person as the court may appoint in this behalf, and shall be by public auction in the prescribed manner"**.

Rule 57 (1) provides that;

"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."

Final verdict on the sale of property

[29] From the reading of Order 22 rules 56, public auction is not the only mode of sale of attached property. Other modes can be prescribed in the law or ordered by the Court or agreed between the parties. Sale of attached property by private treaty is one such permitted modes of sale of attached property. However, the Consent recorded on the mode of sale leaves room for parties to go either way except in choosing one mode of sale particularly private treaty, all parties including the judgment-debtor ought to have been involved in the election. Although none of the parties filed any valuation report to establish their claims on the true value of the property, the values quoted by the parties are hugely apart in the sum of Kshs. 540,000,000. Despite that lacuna, in the circumstances of this case, the question of the value of the suit property becomes a concern to the court. I also consider that there are other numerous parties who are involved in this case and some have paid money. The decretal sum is also yet to be paid. When I couple all these things together, I am convinced the best way of covering the interest of the decree-holder and the other parties is to order the sale herein to be by way of public auction where the property shall be valued and a reserve price fixed by the court with the parties. In consequence thereof, the directions and orders I issued on 10th and 17th February 2014 are hereby set aside. Any previous sale of the suit property to any person, whether a party in these proceedings or not is also set aside. I need not state again that some of the sales herein had been done without the order of the court and border on contempt of the court or abuse of court process. But I wish to be cordial and pass a mild verdict on those purported sales by declaring them unlawful, null and void. Meanwhile, the Plaintiff and the Defendant shall each appoint a Valuer or agree on a single Valuer within 14 days of today. The Valuer or valuers shall carry out a valuation of the suit property and file a report within 30 days of the appointment, and such report should clearly indicate the market price and forced value of the suit property. On receipt of the valuation report, this case shall be mentioned on a date to be agreed among the parties for settlement of the terms and conditions of sale after which the court will give directions to the auctioneer herein to give giving of public notice and advertisement of the intended sale in such manner as the court may direct. This order varies the consent order of 20th September 2012 only to the extent that the sale of the suit property shall be sold at first instance by public auction that I have ordered, but should the public auction fail to follow through; the suit property shall be sold by private treaty.

Applications by interested parties and Costs

[30] Although the Defendant has lost the one application and succeeded in the other save in part, the conduct of the parties particularly the Plaintiff and the Defendant is such that it does not excite any discretion of the court to award them costs. Much of the delay herein has been caused by the two parties. On the other hand, the interested parties saddle upon the two substantive parties. Therefore, I order each party to bear its own costs of the applications.

Dated, signed and delivered in open court at Nairobi this 18th day of September, 2014

F. GIKONYO

JUDGE