REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL CASE NO.179 OF 1990

KENYA COMMERCIAL BANK LTD. :::::::::::: PLAINTIFF/REPSONDENT
V E R S U S
MARK MAKWATA OKIYA
MARKO PETROLEUM DEALERS :::::::::::: DEFENDANTS/APPLICANTS
R U L I N G

1. The Application dated 10.11.2009 is premised on the provisions of ***sections 3, 3A, 34, 38*** and ***80*** of the Civil Procedure Act, Order XLIV rule 1, Order XXI Rules 18, 62 and 79, as well as section 4 (4) of the Limitation of Actions Act, Cap 22, section 143 of the Registered Land Act and section 21 and 26 of the Auctioneers Act, 1996 and Rule 11 (I) (X) of the Auctioneers Rules, 1997.

2. The Orders sought are as follows;

"1. That this application be certified as urgent and the same be heard ex-parte in the first instance.

2. That there be interim orders of stay of execution or further execution, further proceedings, or the enforcement of the decree herein pending the hearing and determination of this application.

3. That the consent judgment and the decree dated 18.01.1991 be reviewed and set aside, together with all the consequential proceedings and orders

4. That the judgment herein cannot be further enforced by execution or otherwise as the same is barred under the provisions of Section 4 (4) of the Limitation of Actions Act, Cap 22 Laws of Kenya, and any such execution or enforcement levied after 17.01.2003 is null and void, are set aside and the consequential or resultant transfers of the following properties are hereby nullified: Bungoma/Naitiri/386; Bungoma/Naitiri/387; Bungoma/Naitiri/388; Ndivisi/Muchi/2672; and E.Bukusu/S. Kanduyi/1031.

5. That the Plaintiff has unjustly enriched itself at the expense of the first Defendant and is liable to reimburse and compensate the First Defendant for the loss arising from this case.

6. That the Plaintiff, or the Auctioneers, or both the plaintiff and the Auctioneers are, subject to prayers 3 and 4 herein, liable in damages (to be assessed or by way of filing a fresh suit against them) to the first Defendant for the irregular and unlawful sale of the First Defendant's parcels of land;

7. That the court be pleased to exercise its inherent jurisdiction to make such other or further orders so as to promote the ends of justice;

8. That costs be provided for."

3. The grounds in support are as follows;

i. ***"That the Plaintiff is keen on enforcing the decree herein (dated 17th January 1991) and yet the same was barred by the Limitation of Actions Act way back 17th January 2003, and the law does not allow interests on the decretal sum to accrue after six years – in this case after 17th January 1997;***

ii. ***That the plaintiff has sold the first Defendant's seven parcels of land in contravention of the law and when the actions have been barred by the law, and no interest can pass in such an illegal process;***

iii. ***That there is new and important evidence to warrant a review of the judgment herein, and in any event, there are sufficient grounds for the Court to review the judgment;***

iv. ***That the Auctioneers engaged by the Plaintiff sold the several parcels of land without notice to, or knowledge of, the first Defendant and without prior valuation thereof, contrary to the law;***

v. ***That the evidence filed in court by the Plaintiff on 4th August 2009 now confirms beyond***

doubt that the position of the Defendants that the Defendants never took money from the Plaintiff is correct and the judgment amounts to a fraud on the Defendants;

vi. ***That the plaintiff has failed to produce and file in court Bank Statements relating to the matters in dispute, but has instead prepared a different document to suit its position.***

vii. ***That the first Defendant has been searching for justice for the last 19 years and prays that the court looks at the substance of his case without undue regard to technicalities of procedure, as envisaged under Section 3 of the Judicature Act and indeed Section 1B of the Civil Procedure Act;***

viii. ***That the Plaintiff's insatiable thirst for a claim that never was, has subjected the first Defendant and his family to the maximum suffering when the Plaintiff knows that no money was advanced to the defendants;***

ix. ***That mistakes by lawyers retained to represent the Defendants should not be a ground to shut out the Defendants from the corridors of justice, and the Court should always advance the course of justice."***

4. I have read the supporting Affidavit sworn on 10.11.2009 by the 1st Defendant/Applicant and I note that according to him although his erstwhile advocate, one Mr. Ogada, entered into a consent judgment on 18.1.1991, the said consent was never entered on his instructions and the contents of the consent were wholly inconsistent with the statement of Defence filed in the suit and the position consistently taken by him that he never obtained a loan from the Plaintiff. Further, that pursuant to an order of this court issued on 0.7.2009, the Plaintiff was ordered to file a detailed bank statement in respect of the Defendants' accounts and to file details of all executions levied against the Defendants. That in purported compliance thereof, the Plaintiff filed certain documents (annexture "MMO -1") and according to the 1st Defendant the following facts would emerge from them;

i. ***"That no bank statements have been filed or served upon [him]; only letters written under cover of a letter by one David K. Muthika dated 3.8.2009. (sic)***

ii. ***That the documents do not show at all when the debt conveniently been made to start from 31.1.1989 instead of when the debt was allegedly incurred;***

iii. ***That the document relating to Account no. 072-284683800 does not show the details but arbitrarily starts with a debit balance of KShs.849,712/=. It also uses an unexplained phrase "ERROR CORRECTED", an entry allegedly made on31.3.1989 for credit of KShs.830,000/=.***

iv. ***The documents purport to have a fixed rate of interests at 18% for the lat 20 years without any basis for it.***

v. ***The documents also confirm that [he] never agreed to pay the decretal amount herein since]he] did not borrow any money from the Plaintiff. According to the statements, the Defendants never made any payment towards the liquidation of the decretal amount after the judgment was entered on 18th January 1991. Deposits of a total of KShs.80,000/- were made (according to the statements supplied) on 28.2.1989, 31.2.1989 and on 30.4.1989, before the suit was filed.***

vi. ***The statements, assuming that they are correct (which is not) indicate that as at May 1990 when the suit was filed, the alleged debt was, as per the two documents, KShs.228,892.40 and KShs.41,059.40 for the two accounts respectively, thereby meaning that the total claim by then could only be KShs.1,269,951.68. However the Plaint herein, filed on 24.5.1990, claimed total of KShs.1,957,631.40 plus interests at 19.5% (the rate of interests has now been confirmed by the Plaintiff that it was not 19.5% but 18%) the excess sum claimed in any event translates to KShs.687,679.72. This is something that was concealed by the Plaintiff until the court ordered it to disclose, and [he] believes this justifies a review of the consent judgment notwithstanding any other ground raised herein.***

vii. ***According to the Plaintiff's letter to its advocates dated 31.7.2009, and filed in court on 4.8.2009, sales of the defendants properties were seven in total, realizing the total of KShs.1,814,216.30. Paragraphs 2 of the said letter by Mr. Muthika (dated 31.7.2009) states that the total credit was KShs.1,276,968.90, meaning that the sum of KShs.587,247.40 was appropriated by the Plaintiff's agents (auctioneers and advocates without basis or accountability to the court or to myself.***

viii. ***The debits effected by the Plaintiff upon the defendants' account, amounting to KShs.256,322.50 do not arise from the decree of court and do not, and cannot, form part of the decretal sum either as principal or interests."***

5. Further, that the execution process was therefore unlawful as the Auctioneers never served him with any notices for the sales later conducted on his properties and no valuations were done prior to the sale and in the end, the properties were sold at throw away prices and each property was sold at less

than 20% of its proper value. At paragraph 13 of his Affidavit and in furtherance of this point, the 1st Defendant had deponed as follows;

i. ***"That there are no valuations on record of the properties sold, contrary to Rule 11 (1) (a) (x) of the Auctioneers Rules, 1997 which provides the letter of instruction or court warrants with respect to immovable property shall show "the reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale."***

ii. ***That a decree of the court cannot be executed after the expiry of 12 years from the date the decree was passed and this is expressly provided for under Section 4(4) of the Limitation of Actions Act, Cap 22 Laws of Kenya, a provision which has been affirmed by the Court of Appeal in the case of Malakwen Arap Maswai vs Paul Kosgei, Civil Appeal No. 230 of 2001, [2004] eKLR.***

iii. ***That interest on the decretal amount cannot be levied, in any event, after six (6) years from the date of the decree (after 17.1.1997) (see section 4 (4) of the Limitation of Actions Act);***

iv. ***That the Court has powers to review a decree or judgment where new and important evidence has emerged which could not, with reasonable diligence be produced at the time the decree was passed. The evidence that has been disclosed recently include:***

- ***The fact that the claim in this suit was not backed by records or evidence of the Plaintiff and is merely a fictitious claim;***
- ***The fact that the claim in the Plaint was exaggerated in any event;***
- ***The fact the parcels of land sold were sold at throw-away prices and without valuations in accordance with the provisions of Rule 11 (1) (a) (x) of the Auctioneers Rules, 1997. A valuation to be relied on must not be more than 12 months old (this was upheld by the High Court – Ombija J. – in [2002] 2 KLAR 489 Gichora versus FamilyFinanceBuilding Society);***

v. ***That where a decree is at least one year old, the same cannot be executed without first the judgment debtor being issued with a notice to show cause under Order XXI Rule 18 of the Civil Procedure Rules;***

vi. ***That the Court has powers under Section 34 of the Civil Procedure Act to hear and determine all questions or issues arising in execution of a decree and the issues raised in this application are within the court's jurisdiction. That further, Section IB (1) of the Civil Procedure Act allows the court to determine dispute by providing: "For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-***

(a) ***the just determination of the proceedings," (emphasis added).***

vii. ***That section 143 (1) of the Registered Land Act, Cap 300 Laws of Kenya, empowers this Court to reverse the titles already transferred back to the First Defendant because the transfers were in contravention of the Law (the purchasers are presumed to know the law and ought to have ascertained, for example, that the decree on whose authority the Auctioneers were purporting to act was not by then valid);***

viii. ***That the advertisements made by the Auctioneers herein did not specify whether the sales were subject to reserve price, contrary to the provisions of Section 21 (3) of the Auctioneers Act, 1996. This opened opportunity for the fraud complained of herein.***

ix. ***That I am entitled to seek the orders to set aside the auctions within the meaning of Rule 79 of Order XXI of the Civil Procedure Rules.***

x. ***That the court can also make any other order in this suit to ensure that justice is done, including an order for compensation for the loss I have suffered over the years as a result of this case."***

6. That for the above reasons, the Defendants plead that the Application be allowed as prayed.

7. The response by the Plaintiff to the Application is contained in two Affidavits sworn on 30.6.2010 and 14.7.2010 by one David Muthike, a Credit Support Manager with the Plaintiff and the gist of the Plaintiff's case is that the Application is incompetent and should be struck off. That it has been brought after unreasonable delay, and that the execution process complained of was sanctioned by this court and that the suit is not predicated on a loan advanced to the Defendant but a fraud committed by them and their acceptance that monies were indeed due from them to the bank. Further, that the Applicants have become frivolous parties to the suit and have consistently frustrated the Plaintiff and grant of the orders now sought will cause great injustice to the Plaintiff.

8. Regarding the consent order, it is the Plaintiff's case that it was entered into voluntarily and an attempt at reviewing the said consent order was refused on 12.7.1991. An attempt at staying execution

was also denied and on appeal to the Court of Appeal, the Applicant was granted sixty days to pay the arrears of installments and when he failed to do so, execution commenced and thereafter the Applicants embarked on a series of suits to frustrate execution. At paragraphs 6 and 7 of the Replying Affidavit sworn on 14.7.2010, it is deponed in that regard as follows;

6. "That ***the Applicants also having known their application to the Court of Appeal had lapsed and also having known that the High Court had ordered execution by sale of their properties knew that the execution was proceeding but they did not only stop there they embarked upon an abuse of the court process in the following ways:-***

(a) ***After losing out in the High Court in Kakamega they went to Nairobi High Court and filed a H.C.Misc. Application No.706 of 1991 through their advocates C. Bakhoya & Company Advocates to challenge the decision and orders in Kakamega HCCC No.179 of 1991 and to seek injunction orders against the orders of sale issues in Kakamega HCCC No.179 of 1990 (amended herein marked "DM8" are the Nairobi HC Misc. Application No.706 of 1991).***

(b) ***That they also filed application in the suit O S No.706 of 1991 to seek injunction orders against the orders of sale issued in Kakamega HCCC No. 171 of 1990 (annexed herein marked "DM9" is the temporary orders).***

(c) ***The applicants also further went and filed a suit at Butere Senior Resident Magistrate's Court and obtained an order on 8/10/2001 to stop sale by the High Court at Kakamega in case No.179 of 1990 and succeeded to stop the sale of land parcel numbers-***

- ***BUNGOMA/NAITIRI/386, 387 AND 388***
- ***E. BUKUSU/S.KANDUYI/1031***
- ***NDIVISI/MUCHI/2672 and E. BUKUSU/S.KANDUYI/475 (annexed is a copy of the court order from Butere RMCC court marked "DM10") a letter from the Plaintiff marked "DMII").***

(d) ***The Applicants in 2002 proceeded to Bungoma High Court and filed Civil Suit No. 125 of 2002 and obtained an irregular ex-parte order from the Deputy Registrar of the court dated 2nd December 2002 that stopped execution of the decree in Kakamega HCCC No.170 of 1990) and this enabled the applicant to stop sale by Lifewood Auctioneers of Public Auction issued by Kakamega High Court (copy of the order by the Deputy Registrar Bungoma is annexed marked "DM12").***

7. ***That the applicants have also on several occasions after court orders were given by the High Court resorted to administrators such as the District Commissioners of Bungoma District to put off the sale of their property duly advertised under court order as follows:-***

(i) A letter dated 31/10/1991 written by their lawyers to stop sale of all properties in Kakamega HCC No.179 of 1990 (annexed marked "DM13").

(ii) A letter by District Commissioner dated 2nd October 1991 to order the District Land Registrar Bungoma to Restrict any transfer of land parcels in Kakamega HCCC No. 179 of 1990 (herein annexed marked "DM14").

9. Further, that the Applicants are dishonest in that upon the consent judgment being entered, only KShs.80,000/= was paid in compliance thereof and having done so, they cannot now deny that the consent order was voluntarily entered.

10. On valuation of the properties, it is the Plaintiff's case that;

"That it is also not true that the Respondent/Bank did not value the various properties involved in this application infact the Bank did various valuations at various times as follows:-

i. ***On 18/8/1991 before the applicants brought his titles to the Bank in July 1989 and when the court ordered execution to proceed the various properties were valued by ELIS OMINDE a Registered Value Surveyor (annexed herein marked "DM15 A, B, C,D, E, F").***

ii. ***On 30/7/1992 CHRISCA REAL ESTATES Values valued the various properties involved in this application. (Their Reports are annexed marked "DM16 A, B, C, D, E")***

iii. ***On 6/6/2002 the Respondents/Bank valued the properties again and Valuation Reports done by Obutu L. J. & Co. Valuers & Estate Agents and sent to Lifewood Auctioneers who had been given warrants of sale by the Kakamega High Court. (The Reports relating to the properties are annexed marked "DM17 A, B, C, D")***

iv. ***That as for land parcel No. E. BUKUSU/S. KANDUYI/1031 the Valuation was done by ADOMAG VALUES AND ASSOCIATES and their Report dated 4/4/2006 is annexed marked "DM18" and the same was given to the Lifewood Auctioneers to guide them on the value of the attached property and this valuation showed the land parcel on question as having a forced sale value of Shs.380,000/=."***

11. Lastly, that the Applicants were always served with notices of sale and that they are only intent on using all manner of methods to block execution without making any payments and the application should be dismissed with cost.

12. I have taken into account the submissions by both Mr. Kuloba and Mr. Onyinkwa appearing for the Applicant and Respondents respectively and I note that what is substantially in contest is the consent judgment record on 18.1.1991 by Osiemo J. The record would show as follows in that regard;

"18.1.91

Coram: J.L.A. Osiemo, Judge
Mr. Onynkwa for the plaintiff
Mr. Ogada for defendant
c/clerk – Chesang

court: By consent judgment for the plaintiff as prayed in the plaint. The defendant to pay the decretal amount by monthly installments as follows: Shs.20,000/= at the end of this month and thereafter Shs.30,000/= in each succeeding month until payment in full. In default of any one installment on its due date execution to issue.

J.L.A. OSIEMO, JUDGE
18/1/91"

13. The above order and its validity or otherwise would in effect determine prayers 4, 5 and 6 of the Application because if I sustain it, then it would impact on the validity of the other prayers.

14. In that regard, I wish to opine as follows; first, that ***section 67 (2)*** of the Civil Procedure Act provides as follows;

"S.67 (2) – ***No appeal shall lie from a decree passed by the court with the consent of parties."***

15. The above section was quoted in Munyiri vs Ndunguya [1985]KLR at page 370 where it was held as follows;

"**1**. ***The parties had entered into what amounted to a consent order from which no appeal is allowed by section 67 (2) of the Civil Procedure Act (Cap 21).***

2. ***The remedy that was open to the parties was to set aside the consent order either by review or by the bringing of a fresh suit as a court can only interfere with a consent judgment in such circumstances as would afford a good ground for varying or rescinding a contract between parties.***

3. ***(Obiter) It would be wiser to obtain the signatures of the advocates or the parties to the consent judgment and orders.***

Appeal dismissed."

16. I wholly agree and the point I am making is that the Applicant, once the consent order was recorded, could not appeal and the only remedy available to him was that found in Order XLIV Rule 1 of the Civil Procedure Rules which provides as follows;

Order XLIV - (1) ***Any person considering himself aggrieved –***

(a) ***by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***

(b) ***by a decree or order from which no appeal is hereby allowed,***

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

17. The Applicant has sought setting aside of the Consent order as opposed to a review but I agree with Chesoni J. (as he then was) in Ngure vs Gachoki Gathaga [1976-1980] 1 KLR 1269 at 1270 where the learned judge at page 1270 para. 20-24 stated as follows;

"The most important point about this application is that Mr. Kariithi asks the court to set aside a consent order. There is no provision in the Civil Procedure Act not is there any in the rules for an application of this nature. I can find no authority and no precedent has been cited for me to set aside an order made by the parties' consent in their presence. As to review powers, Order XLIV, rule 1 (1), provides as follows:-

1(1) ***Any person considering himself aggrieved – (a) by a decree or order from which an appeal is***

allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order.

In the first instance, a party cannot consider itself to be aggrieved by an order it requested the court to make by consent; so the defendant is in this application not an aggrieved party in the sense of Order XLIV, rule 1."

18. I agree wholly and turning to the question of review,, it has been argued by the Respondent, that the matter is res judicata because the Applicants have previously sought to review the consent order but failed to do so as their prayers were refused. I have read the record in this matter and I note that on 17.7.1991, the Applicants had made an Application to review the consent order and prior to that date, Osiemo J. in a Ruling dated 4.7.1991 stated as follows;

"RULING

On the 18/1/91 the parties entered a consent judgment in the following terms:-

"***By consent judgment for the plaintiff as prayed in the plaint. The defendant to pay the decretal amount by monthly installments as follows: Shs.20,000/= at the end of this month and thereafter Shs.30,000/= in each succeeding month until payment in full. In default of any one installment on its due date execution to issue"***

The defendant J/D paid the first two installments of Shs.20,000/= and Shs.30,000/= respectively through his counsel Mr. Ogada. He paid the 3rd installment of Shs.30,000/= directly to the counsel for the plaintiff on 3rd April, 1991. He has then defaulted.

It was the condition of the consent judgment that if the defendant defaulted in any one installment, execution to issue. He has defaulted. I allow the application for execution of decree. The properties mentioned in the application be sold by Public Auction . But part of the proceeds of the sale of land parcel No. BUNGOMA/NAITIRI/387 to be used to settle the debt with Settlement Fund Trustee.

It is so ordered.

J. L. A. OSIEMO
J U D G E
4/7/91"

19. In another Ruling dated 30.7.1991, Osiemo J. delivered to set aside the consent judgment because in his view, the matter before him related not to indebtedness but the amount due and there being no counter-claim by the Applicants, the judge saw no reason to overturn the consent judgment and added that *"the Applicant, is at liberty to file a suit against the respondent for recovery of any sums that they were claiming from the Respondents."*

20. The Applicants attempt at reviewing the Ruling delivered on 4.7.1991 (above) failed when Osiemo J. dismissed the Application on 20.9.1991. On 10.3.1992, on an appeal against that Ruling, the Court of Appeal in C.A.174/1992 gave the following order;

"**IT IS ORDERED THAT**:-

1. A Stay of Execution is granted on condition that all the arrears of installments are paid up within six (6) months from the date of this ruling.

2. Thereafter future installments are paid on the due dates as agreed in the consent judgment.

3. If the applicant fails to pay the arrears or fails to maintain the payment of installments this order of stay will lapse.

4. Liberty is granted to each party to apply.

5. The costs of this motion will be costs in the intended appeal.

Dated this 10th day of March, 1992

DEPUTY REGISTRAR
KISUMU"

21. It is now admitted that the above order was not complied with and Mr. Kuloba stated as

follows;
"**That appeal was never pursued**."
22. If that be so, can the present Application be said to be res judicata? I don't think so. I note that the issues raised in the present application arise from the Statement of Account given pursuant to the Ruling given on 9.7.2009 and to the Applicant "**new matters**" had come to light necessitating a review have arisen. Those matters were neither canvassed nor decided upon in 1991 and to that extent only, the matters before me cannot be res judicata.
23. Secondly, and having so said, there is one issue which has been made by the Respondent; that of delay in making the Application. Order XLIV Rule I allows a party seeking a review the right to do so, "**without unreasonable delay.**" In the instant case, the delay is one of close to twenty years but I also note that the issue of the Statement of Account was only raised a year ago and the review is sought on its basis. It matters not, the delay is unreasonable because in the Ruling delivered by Osiemo, J. in 1991 (all set out above), the issue of the exact amount owed at the time of the consent judgment were canvassed. The Applicants then claimed that they owed **KShs.831,506.50** and not **KShs.1,875,000/=.** Osiemo J. addressed the matter when he held that he could not set aside a consent judgment voluntarily entered merely because one party in hind sight found that he may have been short-changed. In any event, the Applicant had the perfect chance to address that issue in the Court of Appeal where the matter finally ended but on obtaining favourable orders in 1992, the Applicants abandoned that appeal and begun a series of cat and mouse games by filing multiple suits in Nairobi, Bungoma and Butere in an attempt at frustrating execution of the decree. Further, I am certain that there is no law that allows the review of a consent order, close to twenty years after the fact. A consent order is akin to a contract and surely it cannot be that a party should move to nullify a contract two decades after the fact. A party coming to court with unreasonably delay cannot expect a hearing as his conduct would amount to abuse of court process.
24. Thirdly, I have gone through the record in this matter. The applicants have consistently and faithfully challenged any attempt at execution. They have used courts and the provincial administration to do so but they have consistently failed. They have failed because the courts have consistently upheld that the consent judgment was entered into voluntarily. I have read that consent order and the record. The Applicants did not just allow Mr. Ogada to consent to it. It was done pursuant to instruction and it was done pursuant to an Application to strike out their defence and clearly having admitted that they owed the Plaintiff the money, a consent on how to repay it was entered. In compliance, the Applicants paid KShs.80,000/= and Osiemo J. was aware of that payment when he declined to set aside the judgment on 4.7.1991. I also take a very dim of a party that enters into a consent judgment through its advocate, makes part payment there of, files a number of Applications centered on that judgment, fails to obtain favourable orders and never once states in those Applications that the advocate had no instructions to enter into a consent and then close to two decades later, wakes up and suddenly remembers that he had not given instructions to the advocates to compromise the suit.
25. An advocate is deemed to be a party's agent and is allowed to compromise the suit on instruction and in this instant, Mr. Ogada is consequently innocent.
26. Fourthly, having shown that the consent judgment should not be reviewed, is there anything left to be said on the valuation and execution process? I think not. The execution was done pursuant to court orders. All the sales were conducted in public auctions. So far as I know once the hammer has fallen, and transfer is made to third parties, then the auction and transfer can only be challenged in separate proceedings because the cause of action would be wholly different from the one in the present suit.
27. In the end, the Applicants must be told this; lose of hard earned property is painful but multiple suits, and myriad applications to stem the inevitable cannot assist their cause. They have become vexatious litigants and they have convoluted their cause and as regards the Application before me, they have come too late in the day as the horse has already bolted. Further, the consent judgment with all its consequences remains intact.
28. Lastly, the remedy for their perceived or real losses lies elsewhere than in the present proceedings.
29. I completely fail to see any merit in the Application dated 10.11.2009 and will instead dismiss it with costs to the Plaintiff.
30. Orders accordingly.
Delivered, dated and signed at Kakamega this 16th day of November, 2010

ISAAC LENAOLA
J U D G E