



REPUBLIC OF KENYA

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

Civil Appeal 535 of 2006

KOINANGE INVESTMENTS AND DEVELOPMENT LTD APPLICANT

VERSUS

NAIROBI CITY COUNCIL RESPONDENT

AND

D. N. NJOGU & COMPANY 1ST INTERESTED PARTY

REGENT AUCTIONEERS (N) LTD 2ND INTERESTED PARTY

CREATIVE HOMES DEVELOPER LTD 3RD INTERESTED PARTY

RULING

The application before me is a Notice of Motion dated 11th December, 2006 and is brought under sections 3A and 63(e) of the Civil Procedure Act and Order XXI Rules 22 and 79, Order L Rules 2 and 17 of the Civil Procedure Rules. The applicant is seeking the following prayers:

“1. ... (*spent*)

2. *THAT pending the hearing and determination of this application, the Honourable Court be pleased to grant a stay of the entire Order made and/or issued by the Resident Magistrate’s court of Kenya at City Court Nairobi (the Hon. Magistrate Thomas Obutu) on 25th October, 2006, particularly the part thereof directing that the purported sale of 0.4047 hectares out of L. R. No. 209/9099 by Regent Auctioneers (N) Limited to Creative Homes Development (sic) Limited on 17th October, 2006 be made absolute, together with all consequential orders arising therefrom;*

3. *THAT pending the hearing and determination of this application, this Honourable Court be pleased to grant a stay of any further proceedings in the Resident Magistrate’s Court of Kenya at City Court Nairobi Civil Suit No. 14 of 2002;*

4. *THAT pending the hearing and determination of this application, this Honourable Court be pleased to grant a stay of all steps in further execution of the decree, more specifically, the disposal of, alienation, transfer, charging, and/or howsoever interfering with the Applicant’s interest in its parcel of land known as L. R. No. 209/9099.*

5. **THAT this Honourable court be pleased to set aside the purported auction of the Applicant's property, that is all that parcel of land known as L. R. No. 209/9099, by Regent Auctioneers (N) Limited to Creative Homes Development (sic) Limited on 17th October, 2006.**

6. **THAT this Honourable Court be pleased to discharge, set aside, vary and/or vacate the entire Order made and/or issued by the Resident Magistrate's Court of Kenya at City Court Nairobi (the Honourable Magistrate Thomas Obutu) on 25th October, 2006, particularly the part thereof directing that the sale of 0.4047 hectares out of L. R. No. 209/9099 by Regent Auctioneers (N) Limited to Creative Homes Development (sic) Limited on 17th October, 2006 be made absolute, together with all consequential orders arising therefrom.**

7. ... (spent)

8. **THAT costs of and incidental to this application be borne by the respondent and/or interested parties in any event."**

The application is founded on the **grounds** that:-

1. By a consent order recorded before this Honourable Court (The Hon. Justice Visram) on 16th October, 2006 in the presence of Counsel for both the Applicant and Respondent herein, the execution of the Respondent's decree was stayed and a time-frame and procedure for the settlement of the decretal amount, auctioneer's costs as well as other costs was fixed, which time and procedure was flagrantly and most callously breached when the Respondent proceeded to auction the Applicant's property known as L.R. 209/9099 on **17th October, 2006.**

2. Subsequently, the Respondent through its servants and/or agents filed an *ex-parte* chamber summons application under a certificate of urgency in RMCC No 14 of 2002 on 23rd October, 2006 (four days later) seeking various orders inter alia, that the purported sale of 0.4047 hectares out of L.R. No.209/9099 by Regent Auctioneers (N) Ltd to Creative Homes Development Ltd on 17th October, 2006 be made absolute. Upon hearing the application *ex-parte* the Hon. Resident Magistrate Mr Obutu issued the order as prayed on 25th October, 2006.

3. The entire order made and or issued by the Resident Magistrate's Court of Kenya at City Court Nairobi (the Hon. Magistrate Thomas Obutu) on 25th October, 2006, particularly the part thereof directing that the sale of 0.4047 hectares out of L.R. No.209/9099 by Regent Auctioneers (N) Limited to Creative Homes Development Limited on 17th October, 2006 be made absolute was issued:-

(i) On the basis of a fundamental non-disclosure of the existence and/or terms of the order of this Honourable Court (The Hon. Justice Visram) made and or issued on 16th October, 2006, whereas the consent order was made in the presence of counsel for both parties herein. Had the Respondent's servants and/or agents disclosed and availed to that Honourable Court the true and full facts, it is unlikely that the court would have made the order.

(ii) On the basis of concealment, distortion and/or suppression from the attention of the court of facts relevant and material to the circumstances leading to and indeed the auction itself by the respondent, its servants and/or agents, and by failing to discharge that duty owed to that Honourable Court to place before the court at *ex-parte* hearing all such material, both within their knowledge or material that would have been obtained through reasonable diligence, which would assist the court to do justice to all the parties concerned, the aforesaid parties abused the process of the Honourable Court.

(iii) On the basis of fundamental misapprehension of the law relating to execution of decrees and orders as contained in order XXI of the Civil Procedure Rules.

(iv) Contrary to all fundamental rules of natural justice, as the order was issued without giving

the Applicant herein an opportunity to be heard.

4. The respondent has, in effect, conceded that its servants and/or agents namely Regent Auctioneers (W) Limited and M/s D. Njogu & Co. Advocates, acted urgently, unprocedurally and in excess of their authority by purporting to auction the said property in defiance and/or complete disregard of the respondent's express intention to the contrary.

5. Unless the order made and/or issued by the Resident Magistrate's Court at City Court Nairobi (the Hon. Magistrate Thomas Obutu) on 25th October, 2006 is set aside in toto and all the consequential proceedings and orders arising therefrom declared a nullity, there is a real danger that the Applicant's right to redeeming the property will be extremely prejudiced as the transfer to the purchaser can be effected any time on the basis of a flagrant and most callous disregard of an order of this Honourable Court.

6. It is imperative that orders of this Honourable Court must be obeyed as a cardinal basis for the endurance of judicial authority and dignity. Unless the court protects its ability to function by setting aside the order made and/or issued by the Resident Magistrate's Court of Kenya at City Court Nairobi (the Hon. Magistrate Thomas Obutu) on 25th October, 2006 and all the consequential orders arising therefrom, its failure will lead to an erosion of public confidence by reason of concern that the court's process may lend itself to injustice by rewarding the guilty parties for such a grave contempt of court.

7. It is in the wider interests of justice that the entire order made and/or issued by the Resident Magistrate's Court of Kenya at City Court Nairobi (the Hon. Magistrate Thomas Obutu) on 25th October, 2006 be set aside and all consequential proceedings and orders arising therefrom be declared a nullity.

The application is grounded upon the supporting affidavit and further affidavit of Eddah W. Koinange. The applicant was represented by Mr Gatonye and Mr Kimani, Advocates. The respondent supports the application and it was represented by Mr Omotii, Advocate.

The 1st Interested Party has opposed the application and relies on the replying affidavit sworn by David Njogu on the 22nd January, 2007. He is represented by Mr Njenga, Advocate.

The 2nd Interested Party has also opposed the application herein and has filed a replying affidavit sworn by Peter Muchume Gachie on the 19th December, 2006.

The 2nd Interested Party was represented by Mr Kanyi, Advocate. The 3rd Interested Party opposed this application and relied on the replying affidavit sworn by Mr Pheroze Nowrojee on the 9th February, 2007. Mr Pheroze Nowrojee is the advocate for the 3rd Interested Party.

The application herein is vehemently contested. Most of the parties have filed bulky skeletal submissions supported by avalanches of authorities. I must thank all the counsels on record for their industry which has helped provide a sense of direction on the contentious issues, although I must note that some arguments are purely academic and devoid of pragmatism. What is before the court is a real life problem which calls for a practical solution rather than academic engagement and scholarly contest.

In a nutshell, the applicant contends that by a consent order recorded before this Honourable Court on 16th October, 2006, in the presence of the counsel for both the applicant and the respondent, the execution of the respondent's decree was stayed and a time-frame as well as procedure for settlement of the decretal amount, auctioneer's costs and other costs also fixed. The respondent vide a letter dated 17th October, 2006 addressed to Waruhiu & Gathuru Advocates which is an annexure marked EWK8, confirmed that the auction of the applicant's property scheduled to take place on the same date had been suspended on the basis of the court order. Similarly, the 2nd Interested Party (Regent Auctioneers) by its letter dated 16th October 2006 addressed to the respondent confirmed the cancellation of the sale. The letter is annexed as EWK-9.

The applicant contends that it was shocked to receive a copy of a letter dated 15th November, 2006, addressed to the Chief Magistrate's Court by the respondent's advocates ("EWK-14) stating that the suit property LR 209/9099 (hereinafter "the suit property") had been disposed of by way of a public auction contrary to the Order of this Honourable Court.

The applicant further contends that the purported auction of the suit property on 17th October, 2006 was unlawful and done in flagrant and most contemptuous disregard of a valid order of this Honourable Court made on 16th October, 2006 in the presence of Counsels for the applicant and the respondent staying the sale of the suit property.

The applicant submits that the exceptional haste and covert manner in which the auction was undertaken by the 1st and 2nd Interested Parties is indicative of ulterior motives to deprive the applicant of its prime property in that:-

(i) The court order was made in the presence of the respondent's counsel on record and as such service was not necessary as the terms of the order were within its knowledge.

(ii) It was within the knowledge of the 1st Interested Party that M/s E. M. Omotii was on record for the respondent in the intended appeal and application for stay and any enquiries as to the terms of the consent order of 16th October, 2006 should not only have been directed to the said Advocates but also to their principal, the respondent.

(iii) The 1st Interested Party was aware that there was in the High Court an application for stay of execution pending and did not make any efforts to clarify the position with either the respondent or its counsel on record.

(iv) The 2nd interested Party blatantly ignored express and unequivocal instructions from the respondent's authorized officer to stop the sale.

(v) It is the height of insubordination by the 1st Interested Party to brazenly ignore written instructions from the respondent – the decree holder and without obtaining clarification regarding the stay of execution proceed with the auction.

(vi) The 1st and 2nd Interested Parties were under common duty to act in the best interest of the principal seeking instructions from the respondent and further ascertaining whether or not there was indeed a court order stopping the sale. The 1st Interested Party's advice to the 2nd Interested Party to ignore instructions of the respondent decree holder is tantamount to not only breaching the duty of care to the respondent but also abetting the contempt of a lawful and valid order of the High Court of Kenya.

The Applicant has cited the Court of Appeal decision in the case of *Omega Enterprises (K) Ltd vs KTDA 1993 LLR 2525 (CAK) at page 3-4* where it was held:-

“It is the plain and unqualified obligation of every person in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends to cases where the persons affected by an order believe it to be irregular or even void... A party who know of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it ... It would be most dangerous to hold that the suitors or their solicitors could themselves judge whether an order was null or valid, whether it was regular or irregular. That they should come to court and take it upon themselves to determine such a question. That the course of a party knowing of an order, which whether null or irregular, and who might be affected by it, was plain. He should apply to court that it be discharged. As long as it existed, it must not be disobeyed.”

The applicant urges the court to find that the purported auction of the suit property, by the 2nd Interested

Party to the 3rd Interested Party on 17th October, 2006 was unlawful and in breach of this court's order of 16th October, 2006 and therefore null and void and to set aside the purported auction.

The applicant further argued that the 1st and 2nd Interested Parties were actuated by ulterior motive to deprive the applicant of its prime property for the following reasons:-

a) On or about 23rd October, 2006, the 1st Interested Party filed an *ex-parte* Chamber Summons application dated 19th October, 2006 in the Resident Magistrate's C.C. No. 14 of 2002 seeking to have the sum of Kshs.1,691,641.55/= being auctioneer's costs and scale fees released to the 1st Interested Party with respect to the auction of the suit property successfully held in this matter pursuant to court warrants issued on 20th July 2006. It is alleged that the said application which was supported by the affidavit of the 2nd Interested Party has not been determined.

b) On or about 23rd October, 2006, the 1st Interested Party also filed another *ex-parte* Chamber Summons application dated 19th October, 2006 in Resident Magistrate's C. C. No.14 of 2002 seeking among other orders that the sale of 0.4047 hectares out of LR No.209/9099 by the 2nd Interested Party on 17th October, 2006 to the 3rd Interested Party or its nominee be made absolute. The application was supported by the affidavit of the 2nd Interested Party and was made *ex-parte*.

c) The applicant submits that the application was not served upon the Judgment debtor contrary to the proviso to order XXI Rule 81(2). The said proviso states as follows:-

“provided that no order shall be made unless notice of the application has been given to all persons against whom such order is made.”

d) The respondent was kept in the dark not only as to the sale of the suit property but also of all subsequent applications to the court affecting the proceeds of the sale which had been deposited into the court.

The applicant further submits that the suit property was sold at a grossly undervalued price as the respondent was not aware and did not even revise the reserve price which had earlier been fixed. The applicant maintains that failure to serve the applications aforesaid and/or give the applicant an opportunity to be heard was in breach of the mandatory provisions of law as well as the rules of natural justice; hence a nullity in law. The applicant relies on the decision in the case of *Ali Bin Khamis vs Salim Bin Khamis [1956] 23 EACA 195* at page 1198-199 where it was held:-

“The line between the orders of court which are merely irregular and those should on proper proceedings for that purpose be treated as nullities cannot be drawn with precision, but where a special jurisdiction is created by statute, certain principles may, I think, be laid down. The rule *audi alteram partem* is generally absolute. If as in partition actions, it is relaxed by statute *ex necessitate res*, the court must observe strictly the limits of its power to dispense with the attendance of parties otherwise necessary, and if it oversteps those limits, it will exceed its jurisdiction conferred. In this case, the limits laid down by statute and case law were wholly ignored ...

Where an order is improperly made without serving a person known to be affected by it and having a statutory right to be served before it can be made, the order is a nullity in the sense that it must be set aside *ex debito justitiae*, and that in cases of nullity procedure is unimportant since the court has inherent jurisdiction to set aside its own order ... The question we have to deal with is whether the admitted failure to serve summons upon which the order in this case was based was a mere irregularity or whether it was something worse, which would have given the defendant the right to have the said order set aside. In my opinion, it is beyond question that failure to serve process where service of process is required, is a failure which goes to the root of our conceptions of proper procedure in litigation. Apart from proper *ex-parte* proceedings, the idea that an order can validly

be made against a man who has no notification of any intention to apply for it is one which can never be adopted in England. To say that an order of this kind is to be treated as a mere irregularity, and not something which is affected by a fundamental vice, is an argument which, in my opinion cannot be sustained.”

The applicant further relies on the decision in the case of *Omega Enterprises (K) Ltd v KTDA (supra)* where it was held:-

“If an act is void, then in law it is a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court declare it so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

The applicant contends that the affidavit sworn by Mr Pheroze Nowrojee on behalf of the 3rd Interested Party is fatally defective and should be struck out *in limine* as it contains information not within his knowledge in contravention of Order XVIII Rule 3(1). The said Rule states:-

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”

The applicant has further contended that even assuming that the affidavit by Mr Pheroze Nowrojee is proper, it is not relevant as it addresses **RMCC No 14 of 2002** as opposed to the present application. The said affidavit also addresses an issue that is already moot as per the ruling of this court dated 19th July, 2007.

Agreeing substantially with the applicant, the respondent on its part contends that the 2nd Interested Party was aware of the court order of 16th October, 2006 and duly confirmed in writing that the auction had been called off. The subsequent decision to proceed with the auction in a most callous and blatant disregard of the orders of this court was done in bad faith.

The respondent argues that the 2nd Interested Party was under a legal obligation both as an officer of the court and an agent of the respondent to act in the best interest of the respondent by preserving the suit property pending further orders of the court or instructions from the respondent.

The respondent submits that at all material times, the 2nd Interested Party was aware or ought to have been aware that to proceed with the sale of the suit property in spite of the court order was illegal. The respondent relies on *Halsbury's Law of England 4th Edition Vol. 1* at p.444 which addresses the illegal acts by an agent as follows:-

“By virtue of general rules of the common law, no authority can be given to do an illegal act, and no agent can recover remuneration or indemnity against the principal for performance of an act known by him to be illegal. Powers ... given for illegal purposes; for example in general restraint of trade, or to prevent penal legal proceedings, are void.”

The respondent further submits that proceeding with the sale of the suit property in contravention of a valid court order made the sale a *nullity ab initio*. The 1st Interested Party is precluded from relying upon his alleged own ignorance of the notification of the order of this court as he could have sought clarification from the respondent if he was in doubt so as to act in the best interest of the respondent. The 1st Interested Party acted in contravention of the orders of this court and contrary to express instructions of the respondent.

In opposition to the application herein the 1st Interested Party contends that the auctioneer, 2nd Interested Party was duly instructed by the respondent to conduct the sale of the suit property and pursuant to those instructions “took out all the necessary processes incidental and attendant to the sale of the suit property on 17th October, 2006.”

The 1st Interested Party argues that no order for stay of the sale of the suit property by way of public auction on 17th October, 2006 was ever served upon the 1st and 2nd Interested Parties on or before the date of the public auction. The auction was therefore carried out and the 3rd Interested Party became the highest bidder at Kshs.113,000,000/=.

The 1st Interested Party further argues that any order of this Honourable Court ought to have been served as of necessity upon the court executing the decree (that is the RM’s court) and further upon the 1st and 2nd interested parties and failure to do so left no other choice other than to execute the decree in **RMCC No. 14 of 2002**. The 1st Interested Party has cited **Order XLVII Rule 2** of the Civil Procedure Rules which provides:-

“All orders, notices and documents required by these rules to be given to or served on any person shall, save where other provision is made, be served in the manner provided for the service of summons.”

The 1st Interested Party contends that the sale of the suit property would be impeachable, only if it can be shown that the 1st and 2nd Interested Parties deliberately acted against a valid and subsisting court order or that they acted in contempt of a court order. The 1st Interested Party has relied on the decision of **Kariuki & 2 Others vs Minister Of Gender, Sports, Culture & Social Services & 2 Others [2004] 1 KLR 588** where the court held *inter alia*:-

“.....in England, as a general rule, no order of court requiring a person to do or restrain from doing any act may be forced unless a copy of the order has been served personally on the person required to do so or abstain from doing the act in question. The copy of the order served must be endorsed with a notice informing the person on whom the order is served that if he disobeys the order, he is liable to the processes of execution to compel him to obey it... service on the alleged contemnor’s advocates did not constitute personal service and even if the alleged contemnor had knowledge of the court order, he would not be liable for contempt....”

The 1st Interested Party argues that the justice and equity of this instant application and the circumstances demand that it be dismissed and the sale of 17th October, 2006 be confirmed as having been a proper sale capable of passing title and interest to the 3rd Interested Party – the purchaser.

The 2nd Interested Party contends that he is neither in contempt of the order of 16th October 2006 nor in disobedience of the same. He maintains that before the court can set aside the auction, there must be contempt or disobedience of the said court order by the auctioneer or one of the Interested Parties.

The 2nd Interested Party submits that no court order was served on him by the applicant or its advocates or those of the respondent. He maintains the following:-

(a) The letter of 16th October 2006 by the respondent quoted RMCC No. 14 of 2006 as the case through which the sale was postponed. It was not copied to the 1st Interested Party.

(b) In the circumstances, despite the 2nd Interested Party’s receipt of the said letter and reply thereto as stated by the applicant, the 2nd Interested Party acted prudently, and to avoid possible fraud or acting on a fake order, together with the 1st interested Party perused the court file in RMCC No. 14 of 2002 and no court order was found.

(c) Subsequently, the 2nd Interested Party received the letter dated 16th October, 2006 from the 1st Interested Party advising him to proceed with the sale.

(d) The 2nd Interested Party on 16th October, 2006, wrote to the respondent advising of the position in the matter and that in the absence of any served court order or payment of the entire decretal sum and costs, the sale would proceed.

The 3rd Interested Party agrees that the court has inherent jurisdiction to set aside transactions as null and void which are in contempt of the court's orders and are in disobedience of it, but denies that it is in contempt or disobedience of the court's order of 16th October 2006.

The 3rd Interested Party contends that the following facts have not been controverted by the applicant:-

1. That no announcement was made at or during the auction regarding the court order of 16th October, 2006.
2. The 3rd Interested Party was never served with any court order.
3. No other communication of the said court order was made to the 3rd Interested Party.
4. The said court order did not forbid the 3rd Interested Party from doing anything.
5. The purchaser was not a party to the proceedings before the High Court.
6. The 3rd Interested Party was not in court on the 16th October 2006 when the consent or court order was made.
7. No court order was ever extracted to be served on anybody.
8. No penal notice was ever served on anyone.
9. The 3rd Interested Party did not disobey any order of the court.
10. There is no contempt of court on the part of the 3rd Interested Party.
11. There is no allegation that the 2nd Interested Party informed the potential buyers that the auction had been postponed.

The 3rd Interested Party maintains that it is a *bonafide* purchaser for value without notice and property passed to it at the fall of the hammer. The 3rd Interested Party submits that the RM's court having confirmed the sale of the suit property the order of that court is valid and subsists until it has been set aside by that court or on appeal. There is no such appeal from that order.

In not extracting and serving the court's order of 16th October, 2006 on all the parties concerned, the 3rd Interested Party contends the Applicant did not act diligently and is not entitled to the court's discretion.

The 3rd Interested Party further contends that the court has no appellate jurisdiction to grant the prayers sought as it became *functus officio* upon adopting the consent order.

The 3rd Interested Party submits that the application before the court is an abuse of court process. It is an attempt to by-pass the provisions of **Order XXI Rules 78, 79, 80 and 81** of the Civil Procedure Rules. The applicant has admitted that a similar application as the one before this court is still pending in the Resident Magistrate's Court and concurrent applications should not be entertained.

Those are the submissions that were made before this court. In addition, I have carefully gone through the pleadings and the skeletal arguments filed by all the parties. I have also perused the authorities cited. The application herein involves a valuable and prime property in the city of Nairobi. Upon my careful examination of the application, I wish to outline what in my view are the **issues** that the court should address. They are as follows:-

1. **Whether there was stay of execution of the respondent's decree?**
2. **Whether the 1st and 2nd Interested Parties were aware of the Court Order dated 16th October, 2006 before the suit property was auctioned?**
3. **Whether the sale by public auction of the suit property was valid or lawful?**
4. **What is the fate of the 3rd Interested Party?**

On the first issue, the applicant and the respondent appeared before this court and recorded a **consent order** marking the Appeal "settled" **and staying the execution of the respondent's decree** on the following terms:

- (i) The auctioneers and valuer's charges to be agreed or taxed, and to be settled within seven (7) days of such agreement or taxation.
- (ii) The respondent to issue the administrators of the estate of the late Mbiyu Koinange a rates clearance certificate in respect of the 294 acres in Closeburn Estate (L R No. 22) Nairobi which are subject of the sale.
- (iii) The said rates clearance certificate to be issued against the joint professional undertaking of M/s Waweru Gatonye & Company Advocates and M/s Waruhiu Gathuru & Company Advocates to settle any outstanding rates up to the date of issuance of certificate.
- (iv) The said rates clearance certificates to be issued within thirty (30) days from the date hereof and to remain valid for a period of sixty (60) days from the date of issuance and release to the Appellant's Advocates.
- (v) The decretal amount to be settled within sixty (60) days of the issuance and release to the Appellant's advocates the said rates clearance certificate.
- (vi) In default of any of the above terms, the respondent be at liberty to proceed with the execution of the said decree.
- (vii) Either party be at liberty to apply.

Clearly, under the terms of the consent, the parties intended to and did stay the execution of the respondent's decree. The question that immediately follows is, which decree? All the parties involved are not ignorant folk and indeed are represented by senior and experienced Advocates and as such, the answer to the question should not pose any difficulty. There was no decree in the High Court. The decree was in the **RMCC No 14 of 2002** and that is the decree that the applicant and the respondent stayed. The 2nd Interested Party, the auctioneer, has admitted that he received communication in the form of a letter dated 16th October, 2006 from M. N. Ngethe which advised him that the auction had been postponed. M. N. Ngethe is the Director of legal affairs at the respondent and she must have properly understood the importance of the consent order of 16th October, 2006 and indeed did not make any mistake as to which decree had been stayed. **She clearly indicated that the sale scheduled for 17th October, 2006 in reference to RMCC No 14 of 2002** had been postponed until further notice. The auctioneer knew that. There is absolutely no doubt in my mind about that, and I so find.

The 1st and 2nd Interested Parties have stated that they perused the file in the lower court and found no stay orders therein. Indeed the 2nd Interested Party has deponed in his replying affidavit that he found out that he had been “tricked” by M. N. Ng’ethe. One wonders why the 1st and 2nd Interested Parties did not seek clarification if they were in doubt. The bigger question in the mind of this court is: **So, even if these two Interested Parties had a “doubt” in their minds, why did they not give the benefit of that doubt to their principal, and simply postpone the sale?** So what possible prejudice would that have caused? In my view, I find the 1st and 2nd Interested Parties pretentious and not straight forward. They pretend to have been keen to abide by the law against clear instructions from the respondent. The respondent is the decree holder and obviously had more stake in the execution than the 1st and 2nd Interested Parties. How could they proceed with the sale against written instructions? They appear to me like *‘the outsider who cried louder than the bereaved’* in Chinua Achebe’s text **‘Things Fall Apart’!** In whose interest were the 1st and 2nd Interested Parties acting? It was certainly not in the interest of their principal, the respondent.

The second issue is whether the 1st and the 2nd Interested Parties were aware of the court order of 16th October, 2006 before the sale of the suit property. It is not disputed that the order was not extracted and not served on the 1st and 2nd Interested Parties. I should not speculate the reason but clearly a lot happened on that day, and the day that followed, and the parties were racing against time. However, the consent order was entered into by advocates in good faith and as officers of the court with the clear intention of abiding by, and respecting the same.

I have no doubt that the 1st Interested Party was aware of the pending appeal in the High Court. Going by his averment in paragraph 6 of the replying affidavit, the 1st Interested Party has deponed as follows:

“That it was after the extension of the auction date that the applicant filed this appeal and served us. We were instructed to act for the respondent by their letter of 22nd August, 2006. Annexed hereto is a copy of the letter by Ms M. N. Ngethe marked DN 3”.

The 1st Interested Party later ceased to act for the respondent in this appeal and was replaced by M/s Omotii & Company, Advocates. The 1st Interested Party has deponed in paragraphs 12 and 13 of his replying affidavit as follows:

“THAT on 16th October, 2006 Mr Gachie, the auctioneer, came to my office wanting to know from me whether I was aware that Ms Ngethe had stopped the auction slated for the next day and he showed me a letter from Ms Ngethe purporting to stop the auction and his reply confirming that he would comply with Ms Ngethe’s instructions.

THAT I immediately informed the auctioneer that as the Advocate on record I was not aware of Ms Ngethe’s action. The auctioneer and I went to City Court where we perused the court file for RMCC No 14 of 2002 and found that there was no order stopping the auction”.

Now here is an Advocate of the High Court (the 1st Interested Party) who is informed in no uncertain language that the auction had been stopped, and how does he react? He goes to the lower court to check the file! And why not the High Court? And why not consult his client, the respondent? His first duty is to his client, and a simple phone call would have done it. But clearly he was in too much of a hurry to have the suit property auctioned. Therefore, I find that the aforesaid averment by the 1st Interested Party is a self righteous statement, and in my view not credible. He was aware of the appeal in the High Court but he conveniently avoided perusing the High Court file and purported to have perused the lower court file where he knew he would find nothing. The 1st Interested Party duped the 2nd Interested Party “to act strictly in accordance with the law” while indeed he did absolutely the opposite.

The 2nd Interested Party has admitted that he received communication from Ms M. N. Ngethe that the auction had been postponed. In his Replying Affidavit at paragraph 5 he has deponed as follows:-

“THAT in further answer to paragraph 10 of the said affidavit, I state that before the auction sale I was never informed of or served with any court order either by Mr Omotii as alleged or any other person and state further that I only received a letter dated 16th October, 2006 from Ms M. N. Ngethe, which stated that the auction had been postponed but upon perusal of the court file and enquiry from D Njogu & Company Advocates, I discovered that there was no such order in the file”.

So, there is no dispute about the fact that the auctioneer, the 2nd Interested Party knew from his principal, the respondent decree holder, that the auction had been postponed.

Here is the letter which the respondent wrote on 16th October, 2006:

“Kindly be advised that the sale scheduled for 17th October, 2006 has been postponed until further notice.

The auctioneer’s fees and advertising charges and any other incidental costs shall be borne by the rate payer”.

The 2nd Interested Party replied to Ms M. N. Ngethe’s letter vide his letter dated 16th October, 2006 where he stated as follows:-

“...This is to confirm that we have suspended the auction until further notice and forward herewith our feenote amounting to Kshs.1,353,139/= for settlement”.

So, then, why did he proceed with the auction? Just because he “perused the court file” and found nothing of the sort? Was it his duty and function to go perusing court files against clear instructions from his principal? Does he get his instructions from court files?

In the case *Nairobi HCCC No. 1094 of 2002, Tulaga Cooperative Society Ltd & Another vs Aberdare Creameries Ltd & Another*, the court set aside a purported sale/auction of the defendants’ goods when it noted the events preceding the purported sale/auction:-

“The affidavit of Kihoro Cerere sworn on 29th November, 2004 is categorical that on 31st August, 2004, he informed the auctioneer by telephone that the consent order referred to above had been recorded and advised him to defer the auction which had been scheduled for 2nd September, 2004 until further advised. The said advocate confirmed the telephone conversation in his letter dated 7th October, 2004 and cautioned the auctioneer of the consequences of failing to comply with his instructions. Besides the express instructions given by the Plaintiff’s advocates, the auctioneer himself by telephone confirmed to the Managing Director of the defendant that the auction/sale which had been scheduled for 2nd September, 2004 had been cancelled.”

There are striking similarities between the above cited case and what is before this court. The decree holders had warned the auctioneer against proceeding with the public auction and the auctioneer had confirmed that the auction had been called off. Honesty is a great virtue and a man is as great as his word. Though honesty is not a legal principle, it would be unjust to allow a party to mislead another with a view to gaining undue advantage. The 2nd Interested Party must be held accountable for his confirmation to the respondent that he had called off the public auction.

The 2nd Interested Party claims to have written another letter withdrawing the confirmation to suspend the auction for 17th October, 2006. The sequence of events and the speed with which things were done in this case is mind boggling. As we have noted, stay orders were made on the 16th October, 2003. On the same day the auctioneers were instructed to call off the auction. The auctioneer confirmed the suspension of the auction slated for the following day, then suddenly the following day the suit property was sold in the public auction. After a few days an application was made in the lower court under certificate of

urgency to declare the sale by public auction absolute. The speed with which all this was accomplished raises the question of good faith in the mind of this court. In the case of **Jose Estates Ltd vs Muthumu Farm Ltd & 2 Others Civil Appeal No. 228 of 2000**, the Court of Appeal addressed the same issue and stated as follows:-

“The Superior Court was quite unimpressed by the manner and speed at which the sale transaction was handled and rendered itself thus: Considering the speed with which the transaction was completed, one is left with no alternative but to suspect fraud, involving both defendants.”

I had occasion to deal with a similar situation in the case of **Charles Ngare Karaya vs Florence Muthoni & Another H. C. Civil Appeal No 971 of 2005**. This is what I said then:

“The attachment took place in the early afternoon of 28th April, 2006. Because of the distance involved in serving the auctioneer in Narok the appellant took the most appropriate step of faxing the Court order staying execution at 9.56 am on 28th April, 2006 and later served the formal order, by way of personal service at 1.23 pm on the same day. The attachment took place sometime in between. These facts are not controverted in the respondent’s Replying Affidavit. The 1st Respondent simply says that the formal order was served at 1.23 pm after the attachment had taken place. But, surely the auctioneer had notice of the court order by 9.56 am when the faxed copy was served. What difference does it make that it was not the ‘original’. She knew, whether by fax or through service of original copy, that there was a stay order, so what was the big hurry in executing the same? If the auctioneer was not satisfied about the authenticity of the faxed copy, all she had to do was make phone inquiries or at worst, wait for one more day to determine the truth. But, the auctioneer was far too much in a hurry to execute”.

It is my finding that the 1st and 2nd Interested Parties had full knowledge of the court order of 16th October, 2006 before the auction took place. The 1st Interested Party deliberately misled the 2nd Interested Party to proceed with the sale. As the 1st Interested Party was aware of the Appeal in the High Court and the respondent had in no uncertain terms instructed the 2nd Interested Party to postpone the auction until further notice, they had a duty not to proceed with the auction. If they were in doubt, they had a duty to seek further clarification from the respondent. The 1st Interested Party refused, neglected or deliberately failed to peruse the High Court file or to seek clarification from the respondent over the postponement of the auction. They had absolutely nothing to lose by doing so. Their costs had been secured. The respondent undertook to pay the costs of cancellation of sale. So what really stopped them from postponing the sale? What was the rush? Clearly, one would be forgiven for imputing ulterior motives, bad faith, and possibility of personal gain in acting in the manner they did.

It is incumbent upon every person who has knowledge of an order of the court to obey it whether they have been personally and formally served with the same or not. The first duty is to obey it, and then to seek clarification, or take steps to challenge it. But without obedience, we cannot have the rule of law, and a stable society. I fully endorse the holding in the case of **Hadkinson vs Hadkinson (1952) 2 ALL ER 567** where the court held *inter alia*:-

“It was the plain and unqualified obligation for every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged.”

The 3rd issue is whether sale of the suit property by public auction on 17th October, 2006 was valid or lawful.

In view of my finding that the sale of the suit property had been stayed by an order of this court made on 16th October, 2006 and that the terms of that court order were promptly communicated to both the 1st and 2nd Interested Parties, the sale by auction that followed thereafter was in contravention of the court order. **Accordingly, it follows, and I so hold, that the sale of the suit property by auction on the 17th October, 2006 was unlawful, null and void, and of no effect whatsoever.** I reject the argument that the

“formal” and extracted order of this court was not served on the 1st and 2nd Interested Parties and so they were not bound to obey the same. There is no dispute that they had knowledge of the fact that there was such an order. That was sufficient. They were bound to follow it. To equate this situation with the requirement in contempt of court applications where it is mandatory to effect personal service of the court order is completely misplaced. There is no such requirement of personal service in situations of ordinary day to day business. “Knowledge” of the existence of the court order is sufficient. **No person who is affected by the court order and who knows of its existence can do exactly the opposite simply because he was not personally “served”.** To allow that would lead to an atrocious situation allowing people to get away “with murder”!

The final issue is the fate of the 3rd Interested Party. It has been submitted for the 3rd Interested Party that the latter is an innocent purchaser for value, and is or was not in contempt of any court order. I accept the submission that the 3rd Interested Party is not in contempt of any court order. There is no evidence that it was aware of the court order stopping the sale. However, given that it was able to purchase the property at a grossly undervalued price, the applicant has raised questions about its “innocence”. According to annexure “EWK 20” annexed to the supporting affidavit of the applicant, the suit property was given a “forced sale” value of Kshs.180 million as of September, 2006. Clearly, the **market value** was much in excess of that amount. It was sold for a mere Kshs.113 million, **without even a reserve price.** That according to the applicant brings into question the “innocence” of the 3rd Interested Party, and the “motives” of the auctioneer, the 2nd Interested Party. However, I do not wish to impute improper motives on the part of the 3rd Interested Party because there is simply no evidence linking it with any mischief that has been perpetrated by others in this case. Be that as it may, as I have found the auction sale of the suit property to have been unlawful, and in contravention of the court order, **the 3rd Interested Party could not, and did not, acquire a good title to the suit property.** I see no prejudice that this finding will occasion the 3rd Interested Party. The deposit it paid has been secured, and will be refunded. It has nothing to lose. The party that stood to lose the most is the applicant whose property worth in excess of Kshs.180 million was sold off, without even a reserve price, for only Kshs.113 million.

Finally, before I conclude, I would wish to address the court’s mind to two relatively small issues raised by counsel for the 3rd Interested Party, namely that once the consent order to mark the case as “settled” was entered, this court became *functus officio* and had no jurisdiction to grant the orders sought; and secondly that this court could not entertain this application as a similar one was pending in the lower court. **I am unable to accept either of those arguments.** With regard to the first argument, the court notes that the consent order to mark the case “settled” was entered into upon certain conditions. According to the application those conditions were breached, giving this court the right to hear the parties. In addition the consent order gave the parties “liberty to apply”. The applicant is simply invoking that “liberty”. Secondly, with regard to the pending application in the lower court, I need only say that this court is exercising its original and unlimited jurisdiction in hearing and determining this application.

Accordingly, and for the reasons outlined, I find this application has merit, and I allow the same, and make the following orders:

- 1. I set aside the purported auction of the applicant’s property, that is all that parcel of land known as L. R. No. 209/9099, by Regent Auctioneers (N) Limited to Creative Homes Developer Limited on 17th October, 2006.**
- 2. I discharge, set aside, vary and/or vacate the entire Order made and/or issued by the Resident Magistrate’s Court of Kenya at City Court Nairobi (the Honourable Magistrate Thomas Obutu) on 25th October, 2006, particularly the part thereof directing that the sale of 0.4047 hectares out of L.R No. 209/9099 by Regent Auctioneers (N) Limited to Creative Homes Developer Limited on 17th October, 2006 be made absolute, together with all consequential orders arising therefrom.**

With regard to costs, I am of the view that the parties to blame for this unfortunate litigation are the 1st

and 2nd Interested Parties. I hereby award costs of this application to the applicant, the respondent, and the 3rd Interested Party to be paid by the 1st Interested Party and the 2nd Interested Party jointly and severally. Those are the orders of this court.

Dated and delivered at Nairobi this 25th day of **May, 2009**.

ALNASHIR VISRAM

JUDGE OF APPEAL