



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**Civil Suit 140 of 1999**

**MAWJI PATEL .....PLAINTIFF/RESPONDENT**

**VERSUS**

**TONY KETER .....DEFENDANT/APPLICANT**

**R U L I N G**

Before me is an application by way of Notice of Motion brought by the Defendant under Order XXI Rule 63 (1) and Order XX Rule II of the Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Act seeking orders:-

- (a) That service be dispensed with in the first instance and this application be certified urgent.
- (b) That there be a temporary stay of sale of all those parcels of land known as LR. No. 9399/29 NANDI SOUTH DISTRICT AND LR. NO. 7741/149, KITISURU ESTATE NAIROBI pending the hearing and determination of this application inter partes.
- (c) That this Honourable Court be pleased to remove LR. No. 7741/149 KITISURU ESTATE, NAIROBI from the schedule of properties belonging to the Defendant/Decree-holder available for alienation as per the directions issued by the Deputy Registrar on 9-6-2009.
- (d) That the Defendant/Judgment Debtor be allowed by this Honourable Court to liquidate the decretal sum by way of periodical instalments.
- (e) That in the alternative to prayer (d) above the Defendant/Judgment debtor be allowed by this Honourable Court to sell LR. No. 9399/29 NANDI SOUTH DISTRICT by way of private treaty and the proceeds therefrom be applied to liquidate the decretal sum due.

In support of the application TONY KIPLIMO KETER has

sworn an affidavit giving grounds. He avers that the decree holder has initiated execution proceedings; that pursuant to directions given by the Deputy Registrar on 9-6-09' two properties namely LR. NO. 9399/29 NANDI SOUTH DISTRICT and LR. NO. 7741/149 KITISURU ESTATE NAIROBI were identified as properties belonging to me and available for alienation in execution of the decree herein; that the property LR. NO. 7741/149 KITISURU ESTATE NAIROBI though registered in my name was disposed off by myself to SAMUEL OMUKOKO OPEMPE and SALIM SULEMAN on 26-10-07 and 31-10-07 respectively before execution proceedings were ordered by this Court; that the two sub-titles to the above named purchasers are still awaiting issuance at the Land Titles Registry Nairobi and the Register of the original title still bears my name but the legal ownership vests upon them; that as a sign of my commitment and willingness to liquidate the decretal due owing to the Decree-holder, I am ready and willing to make an initial deposit of Shs. 2,000,000/= to the Decree-holder; that in the alternative to payment of the decretal due via periodical instalments, I humbly pray that this Honourable Court to order that I be allowed to dispose off LR. NO. 9399/29 NANDI SOUTH DISTRICT via private treaty and the proceeds therein be applied to liquidate the decretal sum; that should land parcel No. 9399/29 NANDI SOUTH DISTRICT be disposed off via private treaty the same shall not prejudice the Decree-holder in any way but in fact fetch a better price as opposed to sale by public auction which is based on the highest bidder and not on the prevailing market prices which would go a long way in liquidating the entire decretal amount due to the Plaintiff/Decree-holder and that in the interest of justice this application be allowed as prayed.

The application is opposed by the Plaintiff/Decree-holder who has sworn an affidavit. He says that the decretal sum currently stands at Shs. 27,887,746.13 exclusive of costs and further interest; that the proposal to pay the sum of Shs. 2,000,000/= is too low considering the amount due and the time taken; that he is advised by his Advocate on record that any party who desires to pay a decree by instalments must satisfy the following conditions:-

- (a) He must explain why he is not able to pay the decretal amount at once.
- (b) He must demonstrate good faith by paying or offering to pay a substantial amount of the decretal amount at once.
- (c) The subsequent instalments must be reasonable;

that the Defendant has not demonstrated any of the above; that in the event that the Court allows payment by instalments the Court should take into account the interests of both parties and the history of the litigation between the parties; that on the proposal that he be allowed to sell the land parcel LR. NO. 9399/29 NANDI SOUTH DISTRICT by private treaty, the Defendant has not informed the Court what steps he has taken towards securing buyers or within what period such a sale will be concluded; that the offer is therefore vague; that the defendant concedes that land parcel No. LR. NO. 7741/149 KITISURI ESTATE NAIROBI is registered in his name; that I am aware of my own personal knowledge that interest in land can only pass onto a third party upon the registration of such a person as the owner of the land under the provisions of the Registration of Titles Act; that no transfer has been effected in the names of the purported purchasers; that it is the purported purchasers who should have objected to the intended sale of the land; that I have looked at the two agreements annexed to the application; that the completion and transfer of the said parcels of land was conditional upon payment of the balance of the purchase price which has not been shown to have been done; that there is no evidence that the balance of the purchase price has ever been paid; that I produce and annex herein a certified copy of the land title for the parcel of land which shows that the land has been the subject matter of Court orders since 23-2-2004 to 22-2-2008; that there is no evidence to show that those prohibitory orders have been removed; that any purported agreement entered into when the orders of the Court were in force amounts to contempt of Court and that the Defendant's application should therefore be dismissed with costs.

This application came to Court under Certificate of Urgency on 14-7-09 when it was certified urgent and fixed for inter partes hearing on 28.7.09. In the meantime a temporary injunction was granted staying the sale of the said property until the inter partes hearing of the Notice of Motion.

The Respondent/Defendant was served with the hearing notice accordingly. When the matter came up on 28-7-09 for the inter partes hearing both Counsel for the parties recorded a consent order in the following terms:

“By consent the Court to determine the Notice of Motion dated 14-7-09 based on the affidavit evidence filed herein i.e. the affidavit in support of the Notice of Motion sworn by Tonny Kiplimo Keter on 14-7-09 and Replying Affidavit sworn by Mawji Patel on 23.7.09.”

In this application the Defendants seeks the following prayers:-

- (1) That this Court do remove land parcel LR. NO. 9399/149 KITISURU ESTATE as part of his properties in the schedule available for alienation in execution of a decree herein as per the directions of the Deputy Registrar issued on 9-6-09.
- (2) That he be allowed to liquidate the decretal sum by way of periodical instalments.
- (3) That in the alternative to prayer (2) above, he be allowed to sell LR. No. 9399/29 NANDI SOUTH DISTRICT by way of private treaty and the proceeds therefrom be applied to liquidate the decretal sum due.

Having considered the application in light of the affidavit evidence on record I make the following findings. First the Applicant applies to have land parcel LR. NO. 9399/149 KITISURU ESTATE as part of his property in the schedule available for alienation pursuant to the order made by the Deputy Registrar issued on 9-6-09 because the same had been sold before the said order was made. But there is no evidence that the same had been sold and no evidence of transfer to the alleged purchasers who had a right to come in as Interested parties to protect their rights. This prayer is not tenable. The second prayer sought by the Defendant is that he be allowed to liquidate the decretal sum by periodic instalments. Any party who desires to pay the decretal sum by instalments must explain why he is not able to pay the decretal amount at once and he must also demonstrate good faith by paying a substantial amount of the decretal amount at once and the subsequent instalments must be reasonable. The outstanding amount being over twenty seven million shillings an offer of two million does not demonstrate good faith.

Further, the offer that he pays the outstanding amount by periodic instalments is not definite. The Applicant ought to have indicated whether the instalments would be monthly or quarterly. This prayer also fails. Lastly, the Defendant has sought leave of this Court to be allowed to sell one of the attached properties namely LR. NO. 9399/29 NANDI SOUTH DISTRICT by way of private treaty and the proceeds be applied to liquidate the decretal sum due. The outstanding amount due from the Defendant is Shs. 27,887,746.13 exclusive of costs and further interest. While the two attached properties were valued as follows, LR. NO. 7741/149 KITISURU ESTATE NAIROBI valued as of 5<sup>th</sup> June, 2009 at Shs. 70,000,000/= open market value and Shs. 52,000,000/= forced market value; while LR. NO. 9399/29 NANDI SOUTH DISTRICT was valued as of 8<sup>th</sup> June, 2009 at Shs. 8,000,000/= open market value and Shs. 4,000,000/= forced market value. That being the position it was not necessary to attach both properties while the value of LR. NO. 7741/149 KITISURU ESTATE NAIROBI is more than enough to cover the decretal amount due to the decree-holder.

That being the view I have taken it follows therefore that in all fairness the NANDI SOUGHT DISTRICT ought to be discharged.

Accordingly, I decline to grant the order for stay of sale sought by the Defendant but order that Nandi property being LR. NO. 9399/29 NANDI SOUTH DISTRICT be discharged and the order by the Deputy Registrar for the attachment in respect of the same is hereby reviewed and set aside.

Those are the orders of this Court.

**DELIVERED AND DATED AT ELDORET THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2009.**

**J. L. A. OSIEMO**

**JUDGE**