



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI (COMMERCIAL COURTS)**  
**CIVIL CASE 620 OF 2007**

**SHEILA AKINYI MARCO .....1<sup>ST</sup> PLAINTIFF**

**CHRISTINE WAIRIMU MBURU .....2<sup>ND</sup> PLAINTIFF**

**PAULINE NGANGA ..... 3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**SASANET LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**SASANET INVESTMENT CO-OP SOCIETY LTD. .... 2<sup>ND</sup> DEFENDANT**

**MICHAEL CHEGE NJOROGE ..... 3<sup>RD</sup> DEFENDANT**

**SAMMY GITAU NJOROGE ..... 4<sup>TH</sup> DEFENDANT**

**R U L I N G**

Notice of Motion dated 24/2/2009 under **Section 3A, 38f, 63 (e), order 21 rules 18 (2), 30, 49, 59, 60, 61, 62, 72** of the **Civil Procedure Code**. Orders sought are:-

***(a) That property of 3<sup>rd</sup> judgment-debtor, Nairobi/Block 93/1074 flats 6 and 7, already attached pursuant to order of 26/11/07 and the preliminary decree of 16/2008 be sold by public auction to satisfy decree herein;***

***(b) That properties Nairobi/Block 93/1074 flats No. 6 and 7 be sold in accordance with statement annexed to this application;***

***(c) That 45 days' notification of sale be dispensed with and the reserve prices be based on the valuation report dated 1/8/2008 in respect of identical flats 1, 2 and 4;***

***(d) That after deduction of valuers costs and the auctioneers charges the sale proceeds be paid to Barclays Bank of Kenya Ltd. and to Kenya Commercial Bank Ltd. to clear any debt that may be outstanding and surplus be paid to the decree-holders.***

The grounds on which application is brought are set out on the application and the affidavit of Sheila Marco. It is sworn that judgment was entered in favour of the plaintiffs against 3<sup>rd</sup> defendant on 16/7/2008. Pursuant to the preliminary decree dated 16/7/08, this court ordered that the 3<sup>rd</sup> defendant's immovable properties in Nairobi/Block 93/1074 1, 2, 3, 4, 6 and 7 be attached in execution of the decree.

And that the 2 properties, flat No. 6 and 7 are charged to Barclays Bank of Kenya Ltd. and Kenya Commercial Bank Ltd. Barclays Bank agree to the sale of the property if its debt of Kshs.2.7 million is paid to it. Judgment against 3<sup>rd</sup> defendant was entered in the sum of Kshs.7,148,000/=. The decree-holder obtained order for the sale of flats 1, 2 and 4 but sale was stopped by court. Also it is now sworn that flats No.6 and 7 are now available for attachment. Barclays Bank Ltd. as chargee of flat No.7 has consented to sale if its debt of Kshs.2.7 million is paid. The decree-holders are agreeable to the money due to KCB Ltd. be paid in priority to and any balance be paid to decree-holders.

This application is brought under **Section 3A, 38 (f) and 63 (e)** of the **Civil Procedure Act** which provide for inherent powers of court, procedure in execution and empowers the court to take action in order to prevent the ends of justice from being defeated. Also **Order 21 Rules 18 (2), 30, 49, 59, 60, 61, 62 and 72** which empowers the court to issue any process in execution of a decree without issuing notice if for reasons it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice, the manner of execution of decree for immovable property and the attachment of immovable property. And power to order attachment and sale of immovable property, time for sale and **Rule 72**, the sale of immovable property may be ordered by any court.

By affidavit sworn by advocate Allan W. Gichuki for the applicants, it is shown that the flats 6 and 7 are free and available for attachment in execution of preliminary decree issued herein. A statement of letter of instruction is exhibited.

In opposition, the 2<sup>nd</sup> respondent on his own and on behalf of other respondents filed a replying affidavit stating that application dated 11/11/2008 were similar to the present one and therefore the principle of *res judicata* arises. A perusal of the application indicates that the subject of that application was flats numbers 1, 2 and 4 not 6 and 7, therefore, this ground is not valid. The other point raised is plaintiff's priority under **Section 50** of the **Civil Procedure Act**.

Upon reading the said **Section**, it is clear that priority is attained at the time of filing the application of execution. The opposition states that they did make application on 14/7/2008 but nothing more is said. Judgment is said to have been obtained on 6/6/2008 in the sum of Kshs.19,727,014 against 3<sup>rd</sup> defendant. This was in **HCC No.479 of 2009** and attachment was not completed on 7/2/09 since then but the low bid was rejected. The applicant has filed a list of authorities on 17/3/2009 and submissions. **Registered Land Act, Section 30** providing for overriding interests in registered land.

Upon considering the evidence on both sides, it is clear that the applicants may attach and sell the flats numbered 6 and 7 in the property numbered Nairobi/Block 93/1074 since the provisions of **Section 50, Civil Procedure Act** is applicable. The respondents did file application earlier but the sale did not take place. The court did not receive the proceeds of sale not has it got the assets of the respondent, the 3<sup>rd</sup> defendant, in its hands. The court ordered the attachment of 3<sup>rd</sup> defendant namely; flat 1, 2, 3, 4, 6 and 7 be attached in execution of the decree.

In the suit **HCC No.479 of 2007** the court declared that the attachment of objectors No.1, 2, 3, 4 of all flats belonging to Michael Chege was a nullity. The applicants apply to attach flats 6 and 7 only. The property being charged to the Barclays Bank Ltd. and Kenya Commercial Bank Ltd., these two charges must be cleared first. It is sworn that Barclays Bank demanded some 2.7 million by 24/2/09. It is likely the sum has increased. The amount owing to KCB Ltd. is not disclosed. The two banks' loan shall be paid in priority of the decree-holders.

In the circumstances, I allow the application and grant orders as prayed namely; the immovable properties in the name of 3<sup>rd</sup> judgment-debtor, Michael Chege Njoroge being flats 6 and 7 in L.R. Nairobi/Block 93/1074, which are attached pursuant to the order of 26/11/2007 and the preliminary decree of 16/7/2008 be sold by public auction to satisfy preliminary decree herein. And that after deduction of valuers' costs and auctioneers' charges, the sale proceeds shall be paid to Barclays Bank of Kenya Ltd. and to Kenya Commercial Bank Ltd. to clear any debt that may be outstanding and any surplus be paid to decree-holders.

The notice of notification shall be served for 45 days and reserve price shall be based on the valuation of a fresh current valuation.

Costs of this application to the plaintiffs/applicants.

Orders accordingly.

**DATED, SIGNED and DELIVERED at Nairobi this 27<sup>th</sup> day of October 2009.**

**JOYCE N. KHAMINWA**

**JUDGE**