**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA AT KISII**
**CIVIL SUIT NO.8 OF 2002**

**HEZEKIEL OIRA …….. PLAINTIFF**

**VERSUS**

**GILBERT JOEL MAINYE …… 1ST DEFENDANT**

**KISII FARMERS CO-OPERATIVE UNION ……..…… 2ND DEFNDANT**

**RULING:**

The applicant/defendant Gilbert Joel Mainye made the following prayers to this court:

1. Application be certified urgent and be heard ex parte.

2. Pending the hearing of application there be order of stay of execution of decree, notification of sale dated 2/4/04 and warrants of attachment and sale for L.R. NO. CENTRAL KITUTU/MWABUNDUSI/766 and NGONG/NGONG/16784.

3. The court do review, quash and vary the orders made on 18th March 2004, issuing prohibition and restriction in respect of L.R. NO.CENTRAL KITUTU/MWABUNDUSI/766 and NGONG/NGONG/16784.

4. Court to declare the intended sale of the two properties illegal, null and void.

5. Court to recall notification of sale dated 2/4/04 together with warrants of attachment and annul them. 6. Costs of the application.

7. Any other relief.

This suit was filed on 16th January 2002. On 21st July 2003 the following consent was recorded:

> "By consent the defendant shall pay the plaintiff the Principal sum of shs.2.5 million plus disbursement incurred in filing the suit herein with interest at the court's rates. The repayment of the entire sum be effected within 6 months from today. In default of payment being so made the plaintiff shall be at liberty to execute for the decree. Each party shall bear its costs. The interest to be charged shall commence from today henceforth. Judgment entered in terms herein above stated."

By an application dated 26th January 2004 and filed in court on 27th January 2004 the respondent/plaintiff applied for a prohibitory order to issue restraining the applicant/respondent from transferring or charging the two properties. In effect he started execution process. That application was heard on 11/3/04 and ruling delivered on 18th March 2004 when the court granted the application. The applicant had also filed form Civil 5D requesting the execution of the decree by having the two properties

sold by way of public auction. The decree and order were extracted. Warrants of attachment were issued to M/s Omwoyo Auctioneers to sell the Kisii property and M/s Jenan Marpa auctioneers to sell the Ngong property. The sale is scheduled for tomorrow 30th June 2004.

Mr. Oguttu for the applicant submitted at length and told the court that on 11th March 2003 when the application dated 26/1/04 was heard counsel for the applicant was not present. He had not been served and though the applicant was present his counsel should have been served. Thus he submitted was an error and the court was not informed that counsel had not been served.

Further it was submitted that application dated 26th January 2004 was brought prematurely as the 6 months given in the consent judgment had not elapsed. He referred court to order 49 rule 1 CPR which defines what a month is.

Further it was submitted that the manner in which notification of sale was issued contravened provisions of order 21which governs execution. The court had not given direction on the mode of sale. Order 61 rule 5 CPR was not complied with. Notification of sale was issued before the warrant of attachment were issued.

Applicant also raised issue with the fact that two auctioneers have been appointed to execute the same decree. One is in Nairobi and the other in Kisii.

Further there was issue of whether notification of sale was served on the applicant. The auctioneers have not sworn affidavits to confirm this. Service to Mrs Mary Kerubo Mainye was not proper, as it was not said that they were unable to trace the applicant. There was no notice in writing as per Rule 15 of the Auctioneers Rules giving the applicant time to redeem his property. No value is assigned to the properties.

Further it was said that there are three decrees. Application was opposed. It was submitted that the hearing on 11/3/04 was proper. The applicant had been served and was present.

Further it was submitted that application is defective, as it does not comply with s.80 CPA. The order, which seek to be reviewed, was not extracted and annexed.

I will deal with the issue whether the application is fatally defective or not for failure to annex the order which applicant seeks to be reviewed. I don't think this is so. Indeed it has been held time and again that a party seeking to have the order reviewed should ensure the order is extracted. However there has been no mandatory provision that it must be annexed to the application. In the case of G.M. JIVANI & ANOTHER –VS.- JIVANI & ANOTHER (1929-30) KLR 44 the Court of Appeal found that there was no formal decree which was in existence. In this case however the respondent had extracted the decree and the same is in court file. The case is therefore clearly distinguishable from the other cases cited. There is a decree and that is enough.

I now turn to the issue of reviewing, varying or setting aside this court's order made on 18th March 2004. The main complaint is that counsel for the applicant then on record was not served. This was a mistake, it was submitted. Indeed the firm of M/s Oguttu Mboya & Co. were on record for the applicant/defendant. They were not present in court. It seems that they may not have been served. Order 5 rule 9(1) CPR provides as follows:

> "Where it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service to the agent shall be sufficient."

While I accept that the practice has been to serve the advocate who is on record, there is nothing wrong to serve the litigant himself. The applicant on 11th Marc when the application was heard appeared in person. He applied for adjournment only on the ground that he was not properly served. The court considered the issue and concluded that he was properly served. Applicant did not at all raise any issue that his advocate was absent and was not served. As it was submitted he is an advocate and came all the way from Nairobi.

The lack of service on the advocate does not make the proceedings of 11th March 2004 and the consequent orders made on 18th March 2004 irregular at all. There was no mistake made. These were execution proceedings and infact service to the litigant himself is more desirable. I therefore decline to vary, set aside or quash the orders made on 18th March 2004 as prayed. They are proper orders.

The other issue was that the application was brought prematurely. The consent order was entered into on 21st July 2003. Court was told that as per provisions of order 49 rule 1 a month means a calendar month. Thus time would have expired at end of January 2004. The application was filed on 27/1/04 about 4 days ahead of time. I do concur with the submissions but I don't think this alone makes the application fatal. The application itself was heard on 11/3/04 and orders made on 18/3/04 which was almost 2 months after the expiry of the six months. In the submissions it was implied that the applicant who says he was making arrangements with his bank to get a facility to pay the decretal sum was prejudiced and that is why he was not able to get the loan. This could not be true. The prohibition and restriction orders were issued on 18/3/04. By then he had not gotten his loan. He cannot therefore blame the filing of the application for his not fulfilling the consent order of 21/7/03. He cannot hide behind the fact that application was filed 4 days before the expiry of 6 months. If it was heard before the six months were over the issue would be different. The argument that application was premature is rejected.

t was submitted on length that the procedures used to issue the notice of attachment and warrant of sale was wrong. I have considered these submissions and the provisions of order 21. I find the procedure was properly followed. The respondent made an application for orders of prohibition and restriction. He filed form 5D, which clearly shows that the application was for sale of the two properties by way of Public Auction. Nothing else could have been more clear. The Deputy Registrar went ahead and issued the warrants of sale. I don't find anything which can be said to make that process fatal. The issue of two auctioneers was also raised. However as submitted one auctioneer is based and has jurisdiction in Nairobi.

The other has jurisdiction in Kisii. There can't be an auctioneer who can execute court warrant who has jurisdiction in Nairobi and Kisii as the two are far apart. The respondent was therefore in order to instruct two auctioneers. The application of 26/1/04 was in respect of the two properties.

Lastly the issue of the auctioneer's service to the applicant. I concur that the auctioneers had the duty to serve the applicant with notification of sale. There is evidence that M/s Omwoyo Auctioneers served Mrs. Mary Kerubo Mainye with the notification. She acknowledged and endorsed on the papers acknowledging receipts. Though no party came out clearly I believe the said Mrs. Mary Kerubo is the wife of the applicant. There was no denial that she is an adult member of the applicant's family. In any case it is clear that she passed the notification to him and that is why he has annexed a copy of it to his affidavit. That service was proper and enough.

As for JENAN MARPA Auctioneers who are to sell NGONG/NGONG/16784 there is no evidence that they served the applicant. This is not proper and it makes the intended auction of NGONG/NGONG/16784 on 30/6/04 irregular for the failure of effecting service. They should repeat the whole exercise by fulfilling all the requirements.

From the foregoing therefore I find the applicant's prayer that there be a review of the order made on 18/3/04 without any merit and the same is dismissed. I also find that the warrants of attachment and notification of sale were properly and regularly issued as such the prayer to recall and annul them fails.

I however find that M/S JENAN MARPA AUCTIONEERS who are to sell land No.NGONG/NGONG/16784 did not serve the applicant as required and order of stay of the said sale until proper procedures are followed. I however find the intended sale of KITUTU CHACHE/MWABUNDUSI/1766 proper and decline to order a stay. The costs of the application will be in the cause.

**KABURU BAUNI**

**JUDGE**

**29/1/04**

Signed, dated and delivered on 29th June 2004 in presence of Mr. Oguttu for Applicant and Mr. Ondari holding brief for Mr. Mogikoyo for Respondent.

**KABURU BAUNI**

**JUDGE**

**29/6/04**