



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
COMMERCIAL DIVISION, MILIMANI  
CIVIL CASE NO. 914 OF 2002**

**SHAKESPERE INVESTMENTS.....1ST PLAINTIFF**

**DONALD B. KIMUTAI .....2ND PLAINTIFF**

**VERSUS**

**PAUL KIPSANG KOSGEI ..... DEFENDANT**

**RULING**

This is essentially an application (by Chamber Summons dated 13/09/04) under sub rule (2) of rule 11 of Order XX of the Civil Procedure Rules (the Rules). The Defendant/Judgment – Debtor seeks an order to pay the decretal sum herein by monthly instalments of Kshs.100,000/00. That decretal sum now probably stands at about Kshs.5,000,000/00. Judgment was entered by consent on 25/10/2002 for the Plaintiff in the sum of Kshs.3,912,008/05 with costs and interest. The decretal sum was to be liquidated by payment of Kshs.3,000,000/00 on or before 31/01/2003 and the balance on or before 30/04/2003. As it happened the Judgment-Debtor did not pay the decretal sum as agreed or at all, and the Decree-Holder applied for execution by attachment and sale of the Judgment-Debtor’s land parcel LR UASIN GISHU/AINABKOI NORTH/62. It is to be noted that the Judgment-Debtor bought the land by borrowed funds payment of which the Decree-Holders had guaranteed. Judgment-Debtor did not fully pay the loan and the Decree-Holders were forced to pay off the outstanding loan and interest by the sums they claimed in this suit. The Judgment-Debtor denied liability. But eventually consent judgment was entered as already noted.

The Judgment-Debtor put up a spirited effort to prevent sale of the land in execution of decree. These efforts were not in the form of payment towards the decretal sum. They were in the form of various applications before the court. Ultimately the court (Ibrahim J.) permitted the land to be sold in execution of decree, subject to the highest bid being approved by the court. This was by order dated 16th June 2004. On 16th July 2004 an auctioneer conducted a public auction of the land. The Decree-Holders sought mention of the case for purposes of approval of the sale by the court. The Judgment-Debtor then brought the present application. He wants that sale not to be approved and for him to be permitted to pay the decretal sum by monthly installments as already noted.

The application is opposed by the Decree-Holder. I have read the affidavits sworn in support of the application and those sworn in reply. I have also given due consideration to the submissions of the learned counsels appearing. The Judgment- Debtor seeks the indulgence of the court. He must show sufficient reason for the indulgence sought. In this regard the court will take into consideration the particular circumstance of the case, including the financial position, conduct and bona fides of the Judgment-Debtor. See the case of ALIDINA –VS- ALIDINA [1961] EA 565. The Judgment-Debtor’s bona fides is the most important consideration when the court considers whether some indulgence can be fairly given to the Judgment-Debtor without unreasonably prejudicing the Decree-Holders. See also the case of KESHAUJI JETHABHAI & BROTHERS LTD –VS- SALEH ABDULLA [1959] EA 260.

What has the conduct of the Judgment-Debtor been like in this matter? It is clear from the record that he has constantly tried to avoid or delay meeting his obligations to the Decree-Holders. The suit itself became necessary because the Judgment-Debtor did not meet his obligations to the Decree-Holders, even after they assisted him so much in acquiring and retaining the parcel of land in question. After suit was filed he denied liability. Eventually consent judgment was entered and he undertook to liquidate the

decretal sum by stated instalments and dates. By the time the Decree-Holders applied for execution of decree he had not paid a single cent towards the decretal sum. As already noted he put up a spirited effort to prevent sale of his land in execution of decree, not by payment towards the decretal sum, but by filing applications in court. The present application is the latest in that effort.

The Judgment-Debtor has now paid some Kshs.200,000/00 towards the decretal sum. But for a debt of about Kshs.5,000,000/00 that keeps attracting interest that really is a paltry sum. He says that the Decree-Holders have accepted through their advocate that he liquidates the debt by monthly installments of Kshs.100,000/00. This has been denied by the Decree-Holders. There is nothing in writing to the effect that the offer was accepted. The advocate alleged to have verbally accepted those instalments has denied under oath that he did so. He has stated further that he was not the one dealing with the matter and could not have given such consent. I do not accept that the Decree-Holders have, through their counsel or otherwise, consented that the Judgment-Debtor do liquidate the decretal sum by monthly instalments of Kshs.100,000/00. As the offer was made in writing one would expect that any acceptance thereof would also be in writing and not verbal as alleged.

In summary, I hold that the conduct of the Judgment-Debtor has been such as to make him unworthy of any indulgence by the court. I will refuse his application. It is hereby dismissed with costs. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2004.**

**H. P. G. WAWERU**

**JUDGE**