

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

**AT NAIROBI
H.C. CIVIL SUIT NO. 3154 OF 1989**

BANK OF CREDIT & COMMERCE

INTERNATIONAL (OVERSEAS) LIMITED PLAINTIFF

BANK OF CREDIT & COMMERCE

INTERNATIONAL (OVERSEAS) LIMITED.....PLAINTIFF

V E R S U S

SUN PRODUCE EXPORTERS LIMITEDFIRST DEFENDANT

PHILIP ARAP KIRUI..... SECOND DEFENDANT

STANLEY K. KURGAT..... THIRD DEFENDANT

CECILIA NDUTA KABAYA FOURTH DEFENDANT

R U L I N G

This is an application by the Judgment Debtor against whom decree is pending since 1991. The application is really brought under the ground that the notice of public auction is made under the statutory power of sale which is not in existence and thus the notice is bad in law. That may be so and I shall not go into the details whether it is just a semantic or the procedural defect. What I have noticed is that the applicant has come before this court without disclosing the material facts arising to the result of the public auction of his property. He has definitely come at the 11th hour of the sale despite the earlier notification. The notice in question was published in the News paper (name not disclosed) on 21st February, 2002.

The applicant has also filed an earlier application of 14th December, 1999 to stop the sale of the very property which culminated into the consent order extracted on 9th March, 2000. Obviously the payment as per consent order is not made and hence the public auction.

There has been settlement of the terms of the sale of the property by the court itself. The applicant has been aware of all the previous proceedings in the matter.

All these material facts are not disclosed in this application. As per the dicta of Caltex Oil's case, it is clear that the applicant who seeks to get an ex-parte order has to disclose all the relevant facts to entitlement of an equitable remedy. The court shall not grant the equitable remedy to the applicant who does not disclose those facts and loses that right despite the fact that he could have been successful in the final event. Here is the case where the Decree holder has the unsatisfied decree over a long time.

The applicant intends to resurrect the dead body. In view of the circumstances, aforesaid, I think this court shall not be justified in granting the application. The application is dismissed but I shall not order the costs as the decree holder in any event shall proceed with the auction.

Dated and delivered at Nairobi this 22nd day of March, 2002.

K. H. RAWAL

JUDGE.