



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 103 OF 2015

NYAKINYUA MUGUMO TREE CO. LTD.....PLAINTIFF

VERSUS

JOSEPH MWANGI GICHUHL.....1ST DEFENDANT

AARON MIARE NJOGU.....2ND DEFENDANT

JAMES NDUNG’U KERO.....3RD DEFENDANT

ABED K. MALWA.....4TH DEFENDANT

MAURICE M. LISHENGA T/A

MALI SURVEY SERVICES.....5TH DEFENDANT

DIRECTOR OF SURVEY.....6TH DEFENDANT

CHIEF LAND REGISTRAR.....7TH DEFENDANT

RULING

1. The Application by Motion on Notice is dated **11/02/2021**. The same is filed by the Plaintiff seeking the following reliefs:

(1) ...spent.

(2) THAT this Honorable Court be pleased to stay the intended sale of land parcel registration number 1803;

(3) THAT this Honorable Court be pleased to issue an order for opening of a joint account by the Applicant’s Advocates and Respondents’ Advocates where the funds collected by members in the said land be deposited for ease of transition to the Respondents;

(4) THAT this Honorable Court be pleased to order that the Applicants be given payments for a period of 6 months thereof to make payments;

(5) THAT costs of the Application be provided for.

2. The Application is supported by the grounds on the face of it and by the further Affidavit of **Mary Wangare Githu**, Chairlady of the Plaintiff/Judgment-Debtor. In summary, it is deposed that the Applicant’s members occupy and own parcels of land in registration numbers **1803** and **7393**; that the said parcels of land are homes to more than **4,000** people; that on **06/02/2021**, strangers entered the said land purporting to be buyers of the land at an intended auction; that the Defendants were awarded costs in the sum of **Kshs. 18,355,825.00**; that the Applicants have so far raised **Kshs. 5,000,000.00** towards settlement of the decretal sum; that the land would be sold at a public auction on **30/09/2020**; that the applicants are intent on settling the decretal sum but the COVID-19 pandemic has rendered many members unable to source for income and thus a 6 - month window should be granted to settle the full decretal sum.

3. In opposition thereto, the Advocates for the Decree-Holders who are the Defendants herein swore an Affidavit on **16/02/2021** and filed on even date. It is deposed that the taxed party and party costs in the sum of **Kshs. 18,355,825.00** is not disputed; that there is no pending appeal to warrant an opening of a joint account; that no money has been received by the said firm from the auctioneers from the sale of the property;

that the Respondents shall accommodate the Judgment-Debtors for a period of 3 months should the sum of **Kshs. 5,000,000.00** be paid immediately to the Decree-Holder's Counsel; that auctioneer charges must be settled; that no bank statements have been attached demonstrating that there are funds in the bank to underpin their assertions that a sum of money has been collected towards settlement of the decree.

4. In a further Affidavit, the Applicant deposes that the 1st, 2nd and 3rd Decree-Holders are signatories to **FAULU BANK ACCOUNT** under the name **NYAKINYWA FARM COMMITTEE, ACCOUNT NO. 1018692202** and **KCB BANK ACCOUNT** under the name **NYAKINYWA KARARA FARM, ACCOUNTNO. 1281991139**; that several direct deposits have been made to the said accounts and which money has been used to offset the decree; that they have settled fees for the auctioneers; that the Court should consider granting the Judgment-Debtor leave to settle the sum of **Kshs. 5,000,000.00** within **30 days** and settle the balance within **6 months**.

5. Pursuant to the Court's directions issued on **11/02/2021**, parties were directed to argue the Application by way of written submissions. The Applicant's submissions dated **23/02/2021** were filed on **24/02/2021**. The Respondent's submissions dated **24/02/2021** were filed on **23/03/2021**.

6. The Application invokes the provisions of **Sections 1A, 1B, 3 and 3A** of the **Civil Procedure Act** and **Order 51 Rule 1** of the **Civil Procedure Rules**. According to the Applicant, the Court must address itself to whether the Application meets the threshold for grant of stay, whether the Applicant has the ability to settle the decretal sum and whether the Applicant is positively making efforts in settlement of the decretal sum. The Applicant asserts that if the suit land is sold, that will occasion irreparable loss on the occupants; they have since dismissal of their erstwhile application been making deposits; a committee in which the 1st, 2nd and 3rd Defendants are signatories was formed. To the Applicant, this is an indication of the members' willingness to settle the decretal sum. The Applicant further states that the opening of a joint interest earning account is calculated for answerability purposes.

7. On the part of the Respondents, it is submitted that the 2 bank accounts listed do not belong to the Applicant; further it is thus submitted that the court ought to order that monies be paid to the Respondents' Counsel on account of the outstanding taxed costs. The Respondents further submit that no evidence has been proffered to establish that the Applicant has made concerted efforts to raise any sums towards settlement of the decretal sum. In the upshot, the Respondents submit that they shall be bound by the orders of the court deemed fit and just.

8. I have considered the Application and respective Affidavits of parties herein. I have also considered the respective written submissions by parties. I now wish to address the Application as hereunder:

(a) Whether Stay of Execution ought to be granted

9. The Applicant states that without a stay, it will suffer irreparable loss that cannot be compensated by an award of damages. The Applicant for this contention relies on the case of **Stephen Wanjohi -vs- Central Glass Industries Limited Nairobi HCCC No. 6726 of 1991** for the holding that an Applicant must demonstrate sufficient cause, substantial loss, no unreasonable delay and security, a grant of stay being discretionary.

10. I am inclined to look at an antecedent Application by the Judgment-Debtor which was made reference to hereon. The Application dated **25/08/2020** was filed on **27/08/2020**. Under **prayer 3** of the Application, the Judgment-Debtor sought:

THAT this Honorable Court be pleased to stay the intended sale by way of a public auction of the suit land LR No. 1803 registered in the Plaintiff's name.

11. In a ruling delivered on **15/10/2020**, the Court found the Application lacked merit and dismissed it in its entirety. The prayer has been previously heard and determined. I therefore find that the prayer for stay of execution in the present Application is a crafty machination on the part of the Applicant by importing other prayers to hoodwink the Court. The prayer is *res judicata* and on this ground alone must fail. Under **Section 7** of the **Civil Procedure Act**;

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

12. The Court of Appeal in **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others Civil Appeal No. 36 of 1996[1996] eKLR** held:

The doctrine of *res judicata* applies in a similar manner to applications and there had to be an end to applications otherwise courts would be inundated by new applications filed after the original one was dismissed.

13. Be that as it may, I find that the said suit property, that is Parcel No. **1803**, appears to have been sold by way of public auction on **05/11/2020**. In a letter by the auctioneers addressed to the Court, the contents confirm that the purchase has since changed hands. Attached to the said letter is a Certificate of Sale by Lifewood Auctioneers, Notification of Sale, Warrant of Sale for Immovable Property, Public Auction Notice, excerpt from the dailies inviting prospective buyers, identification of the successful purchasers as well as copies of cheques. No objection as to the process and outcome has been raised. I therefore find that the subject parcel of land was already disposed of.

14. Even if I were to look at the substantive prayer on its merits, the Applicant has not demonstrated that the grounds in support of the Application have chances of success; that the Applicant shall suffer irreparable harm since the property is already in the hands of third parties and that the balance of convenience tilts in favor of the Applicant. I further find that the applicant was only galvanized into action by the actions of the purchasers visiting the suit property. Judgment was entered on **06/09/2016** when the suit was dismissed with costs. I therefore

find inordinate delay.

Opening a Joint Account

15. The Applicant submits that an order should be directed at the respective parties' Counsel to open a joint account and grant the Applicant 6 months to settle the decretal sum. The Applicant further contends that it has been sending deposits to the account in the names of the 1st, 2nd and 3rd Defendants and has with it a sum of **Kshs. 5,000,000.00**. Once ordered by the Court, it shall deposit the sum in favor of the Respondents and settle the balance within 6 months. On the part of the Respondents, the Applicant has not demonstrated with cogent evidence that it has the said money. The Respondents are willing to indulge the Applicant to settle the sum within 3 months less the **Kshs. 5,000,000.00** to be paid immediately.

16. According to the Applicant, money has been deposited in the accounts mentioned. I however note that no evidence has been attached to demonstrate the veracity of such averments. I therefore take those statements with a pinch of salt.

17. Turning to the sale that was conducted on **05/11/2020** by **Lifewood Traders Auctioneers**, it appears that a sum of **Kshs. 8,800,000.00** was settled at the fall of the hammer by the purchasers **Njorkakia Investments** and **Nyakinyua Karara**. This accounted for 25% of the purchase price. In a subsequent letter by the Auctioneers dated **20/01/2021** and filed on **21/01/2021**, a confirmation on the balance of the purchase price in the sum of **Kshs. 26,400,000.00** being settled is made.

18. Under **Rule 18 (4) of the Auctioneers (Auctioneers Rules 1997) Act Cap 526 Laws of Kenya**, the Auctioneer shall remit the proceeds of sale less his charges to the court or the instructing party, as the case may be, accompanied by an itemized account in the case of movable property within fifteen days of the sale and in the case of immovable property as provided in the **Civil Procedure Rules (Cap. 21, Sub. Leg.)**. Indeed, the Respondents were the instructing client. Thus it is the duty of the auctioneers to present the same to its instructing client or the court as the case may be.

19. This Court felt the need to address these issues as the decretal sum in this matter appears to have been realized. According to the auctioneers, a sum of **Kshs. 35,200,000.00** has been recovered from the sale of the subject property. In the circumstances, it would therefore be prudent for the Respondents to demonstrate whether then the decretal sum was satisfied and account for the said balance. This facts are presumed on the strength of the auctioneer's obligation to forward the sums collected in the sale less its fees and account.

20. According to the Respondents, the auctioneer charges ought to be taken into account since the property has been put up for sale. They further state that they are yet to receive the decretal sum from the auctioneers. To my mind, this confirms the actions of the auctioneers as per the letters referenced herein that a sale of the property took place. The decretal sum was to the tune of **Kshs. 18,355,825.00** while the sum collected was **Kshs. 35,200,000.00**. I therefore find that sale in realization of the decretal sum is *fait accompli*. The rationale behind opening a joint account is for the Applicant to settle the decretal sum. I find that in the circumstances, the prayer is untenable.

Settlement of Decretal Sum by Installments

21. The Applicant prayed for an extension of 6 months to settle the decretal sum. It cannot be gainsaid that the decretal sum is not disputed. The Applicant only prays for 6 months to settle the decretal sum. It is trite practice that upon entry of judgment, the Judgment-Debtor is required to settle the sum immediately unless by consent of parties or order of the court, the mode of payment is varied.

22. A cursory reading of **Order 21 Rule 12** of the **Civil Procedure Rules** empowers the Court to order settlement of the decretal sum by instalment or postponement thereof. The Court in **Keshvaji Jethabhai & Bros Limited V Saleh Abdulla [1959] EA 260** laid down the principles that should guide the Court in the exercise of discretion in such matter and states as follows:

(a) whilst creditors' rights must be considered each case must be considered on its own merits and discretion exercised accordingly;

(b) the mere inability of a debtor to pay in full at once is not a sufficient reason for exercise of the discretion;

(c) the debtor should be required to show his bona fides by arranging prompt payment of a fair proportion;

(d) Hardship of the debtor might be a factor, but it is a question in each case whether some indulgence can fairly be given to the debtor without prejudicing the creditor.

23. Further, in **Hildegard Ndalut v Lelkina Dairies Ltd & Anor. (2005) eKLR**, the Court observed that:

"... That case followed the principles laid down in the Indian case of Sawatram Ramprasad -vs- Imperial Bank of India (1933) AIR Nag. 33 - that a defendant should be required to show his bona fides by arranging fair payment of the proportion of the debt – in persuading the court to allow payment by way of installments. This, in my view, is the proper test to apply in granting orders for payment of a decretal amount by way of installments. A judgment creditor is entitled to payment of the decretal amount, which he should receive promptly to reap the fruits of the judgment. The judgment creditor might genuinely be in a difficult position in paying the decretal amount at once. However, he has to show seriousness in paying the amount. In that event he should show his bona fides by arranging fair payment proposals to liquidate the amount".

24. The Applicant states that in light of the COVID-19 pandemic, it has been unable to settle the decretal sum accordingly. While noting that no evidence was attached in support of their claim that sums of money have been deposited to the favor of the 1st, 2nd, and 3rd Respondents,

the Applicant contends that it has been settling the sum. Furthermore, the Applicant has emphasized its possession a sum of **Kshs. 5,000,000.00**. I thus take their claim of depositing money in favor of the Respondents with great circumspection.

25. I further note that no evidence has been laid to demonstrate that the sum of **Kshs. 5,000,000.00** is within their reach. A Judgement-Debtor is not furthermore at the hands of the court to seek leave to deposit the decretal sum. It is emphatic that the party must do so at the earliest for the benefit of enjoyment of the Decree-Holder's fruits of the judgment. I am further alive to the consequential effects the pandemic has had at home and the world over. For the foregoing reasons, I grant them the benefit of doubt insofar as their intentions are concerned.

Consequential Orders

26. The facts and evidence before this Court put this Court in an awkward position. On one hand, the Applicant is of the belief that the decretal sum has not been realized and is willing to settle the full sum within 6 months. On the other hand, the auctioneers upon the behest of the Respondents appear to have sold the subject parcel **No. 1803**. In seeking to harmonize the consequence of the present Application, I exercise my discretion and make the following orders:

(1) Lifewood Traders Auctioneers shall deposit before this Court a statement of accounts together with an account of the proceeds of the sale within 30 days from the date of this order;

(2) Parties herein shall fix a mention date after 30 days of this order for further directions.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 3RD DAY OF MAY 2021.

MWANGI NJORGE

JUDGE, ELC, KITALE.