



**Nyariki v Mogusii Farmers Group Company Limited & another; Hezron Getuma  
Onsongo trading as Hegeons Auctioneers (Proposed Interested Party) (Civil  
Case 2 of 2019) [2023] KEHC 23116 (KLR) (Civ) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 23116 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL CASE 2 OF 2019**

**WA OKWANY, J  
MARCH 2, 2023**

**BETWEEN**

**WESLEY MOKUA NYARIKI ..... PLAINTIFF**

**AND**

**MOGUSII FARMERS GROUP COMPANY LIMITED ..... DEFENDANT**

**AND**

**NEW OSHWAL DISTRIBUTERS ..... RESPONDENT**

**AND**

**HEZRON GETUMA ONSONGO TRADING AS HEGEONS  
AUCTIONEERS ..... PROPOSED INTERESTED PARTY**

**RULING**

**Introduction**

1. The plaintiff herein sued the defendant through the plaint dated the 28<sup>th</sup> of February, 2019 seeking the payment in the sum of Ksh. 28,387,579.60/= being the cost of architectural services which he had allegedly offered to the defendant.
2. The defendant did not enter appearance or file a defence within the stipulated timelines and the plaintiff sought and obtained default judgment as against the defendant for the claimed sum of Ksh. 28,387,579.60/=.
3. On becoming aware that a default judgment had been entered as against it, the applicant filed an application dated 14<sup>th</sup> November 2019 seeking to set aside the default judgment.



4. While the application dated 14<sup>th</sup> November 2019 was still pending hearing and determination, the plaintiff herein proceeded to execute the decree and advertised the defendant's parcel of land being L.r. Kisii Municipality/block 11/79 for sale through a public auction.
5. The auction was conducted on the 29<sup>th</sup> November, 2019 wherein the defendant's land parcel L.r. Kisii Municipality/block 11/79 was sold to New Oshwal Distributors Limited At Ksh.34 Million.
6. ON 6<sup>th</sup> February 2020, Justice E. Maina rendered a ruling on the defendant's application Dated 14<sup>th</sup> November 2019 wherein the court set aside the default judgment which had been entered on 17<sup>th</sup> Day Of May, 2019 together with all the consequential orders.
7. Aggrieved by the said ruling, the plaintiff preferred an Appeal to the Court of Appeal at Kisumu and also filed an application to the same court seeking to stay the ruling. The said application was however dismissed.
8. New Oshwal Distributors Limited Filed An Application On The 18<sup>th</sup> Of January, 2022 Seeking To Have The Sale By Public Auction Carried Out On The 29<sup>th</sup> Of November, 2019 Made Absolute.
9. Vide a Ruling rendered on the 6<sup>th</sup> of July, 2022, this Court, differently constituted, allowed the said application, thus precipitating the filing of the application that is the subject of this ruling.

### **Application**

10. This ruling is in respect to the application dated 28<sup>th</sup> September 2022 wherein the Defendant/Applicant seeks the following orders: -
  - (i) Spent.
  - (ii) Spent.
  - (iii) Spent.
  - (iv) The Honourable Court Be Pleased To Admit Hezron Getuma Onsongo T/a Hegeons Auctioneers As An Interested Party In The Proceedings Herein.
  - (v) The Honourable Court Be Pleased To Set Aside The Purported Sale Of The Defendant's Property, The Same Being L.r. No. Kisii Municipality/block 11/79 And The Buildings Thereon By Hegeons Auctioneers To New Oshwal Distributors Limited Vide A Public Auction Purportedly Conducted On The 29<sup>th</sup> Day Of November, 2019.
  - (vi) The Honourable Court Be Pleased To Discharge, Set Aside, Vary And/or Discharge The Orders Made And/or Issued By The Honourable Justice Fred A. Ochieng Vide A Ruling Rendered On The 6<sup>th</sup> Day Of July, 2022 Directing Inter Alia That The Sale By Public Auction Of The Defendants Parcel Of Land L.r Kisii Municipality/block 11/79 And The Building Erected Thereon, By Hegeons Auctioneer To New Oshwal Distributors Limited On The 29<sup>th</sup> Day Of November, 2019 Be Made Absolute, Together With All The Consequential Orders Arising Therefrom.
  - (vii) The honourable court be pleased to order that this matter be heard and determined on merit.
  - (viii) The Honourable Court Be Pleased To Issue A Mandatory Order Of Injunction Compelling Hezron Getuma Onsongo T/a Hegeons Auctioneers To File Before This Court The True And Just Accounts Of All Proceeds Received As A Result Of The Purported Auction Conducted On The 29<sup>th</sup> Day Of November, 2019 And How The Balance Was Utilized.



- (ix) The Honourable Court Be Pleased To Issue A Mandatory Order Of Injunction Compelling Hezron Getuma Onsongo Hegeons Auctioneers To File Before This Court Details Pertaining To The Public Auction, Including But Not Limited To The Date, Time And Records Of The Alleged Auction, Copies Of Bids Received, Notification Notices Served Upon The Defendant Prior To The Sale Of L.r Kisii Municipality/block 1 1/79.
  - (x) The Plaintiff Herein, Wesley Moki-ja Nyariki Be Ordered To Deposit The Entire Decretal Amount Received From The Public Auction Purportedly Carried Out On The 29<sup>th</sup> Day Of November, 2019 In Court, Pending The Hearing Of The Main Suit.
  - (xi) The Honourable Court Be Pleased To Set Aside, Cancel And Or Nullify The Transfer (if Any) Of L.r Kisii Municipality/block 11/79 To New Oshwal Distributors Limited And Revert The Same To Its Original Status.
  - (xii) Costs of and incidental to this Application be borne by the Respondents herein.
11. The application is supported by the affidavit of Applicant's Director Mr. Steve Orina Okerio and is premised on the grounds that: -
- “(1) The respondent had filed an application dated 11<sup>th</sup> January, 2022 which was allowed by this honourable court in a ruling delivered on 6th July, 2022 which the applicant was in the process of executing as notices had been issued to the defendant's tenants on the suit premises.
  - (2) The ruling was obtained on account of non-disclosure of the fact that the decree informing the auction which took place on 29th November, 2019 had been set aside because the default judgement had itself been vacated on 17th March, 2019.
  - (3) The ruling was the culmination of distortion and suppression of facts as the court was not treated to facts which were relevant i.e. that the auction on 29th November, 2019 was a sham.
  - (4) An appeal against the ruling on the default judgement was dismissed by the court of appeal.
  - (5) Auction was undertaken on the basis of a Decree which had been set aside.
  - (6) Prerequisites on the basis of which the auction was conducted i.e. an application for execution was not made to court.
  - (7) There was a gross undervalue of the suit premises. no public auction took place.
  - (8) The auctioneer who conducted the auction never followed the law.
  - (9) The applicant is bound to suffer irreparably as it will be disposed of the suit premises.
  - (10) The court has discretionary powers to grant the orders sought.
12. The Plaintiff and New Oshwal Distributors Limited (Respondent), opposed the application through their respective replying affidavits wherein they make averments that can be summarized into the following grounds: -



- (1) Oshwal has locus standi to be named as a respondent in the application because it is not a party to the suit between the plaintiff and the defendant herein.  
Its interest in the suit terminated after the application dated 11<sup>th</sup> January, 2022 was on 6<sup>th</sup> July, 2022 decided by the ruling of this honourable court – meaning that for the purpose of the application presently before court, Oshwal should have been specifically enjoined as a party.
  - (2) Oshwal presented the application dated 11<sup>th</sup> January, 2022 in the capacity of a purchaser, which status has since changed because it was now a registered proprietor of the suit premises.
  - (3) The application is resjudicata in so far as the applicant is seeking to re-litigate issues which have been entertained by this honourable court and which were settled vide the ruling of 6<sup>th</sup> July, 2022.
  - (4) The court has no jurisdiction as it is functus officio on the issues raised in the application.
  - (5) The applicant having filed a notice of appeal and thereby invoked the jurisdiction of the court of appeal, all issues disclosed in the said application are the subject of the jurisdiction of the court of appeal and cannot be presented to this honourable court for adjudication.
  - (6) The application was both sub judice and an abuse of due process because a similar application for stay of execution was pending undetermined before the court of appeal.
  - (7) The application has been overtaken by events because Oshwal has already obtained title to the suit premises and has entered into lease agreements with tenants on the premises whose rights may be curtailed without hearing them were the application to be allowed.
  - (8) The title held by Oshwal with respect to the suit premises is indefeasible<sup>as</sup> the same was issued upon observation of due process.
  - (9) The application before court seeks orders whose effect is to curtail the enjoyment of the title held by Oshwal.
  - (10) This is a court of record - the argument that there was fundamental non-disclosure, distortion and/or suppression of material and/or relevant facts by Oshwal is a red herring and has no foundation in law and practice.
  - (11) The application is an affront to section 48 of the *Civil Procedure Act* – Cap 21 of the Laws of Kenya as the title the suit premises vested in Oshwal on 29<sup>th</sup> November, 2019 when its bid was accepted at the auction sale which took place on the said date.
  - (12) The application before court has been presented so late in the day without any plausible explanation.
  - (13) The application before court flies in the face of the proceedings and orders of the Court of Appeal in Kisumu Court of Appeal Civil Appeal No. 32 of 2020 as Counsel then representing the current applicant had informed the court of appeal that execution (by the public auction of 29<sup>th</sup> November, 2019) had been completed – meaning he acknowledged the fact that an auction had indeed taken place on 29<sup>th</sup> November, 2019.
13. The Interested Party, Hegeons Auctioneers, filed a response to the application wherein it states that this court lacks the jurisdiction to entertain and grant the orders sought. According to the Interested Party, the orders sought can only be granted by the Environment and Land Court (ELC).



14. The Interested Party further states that the application has been overtaken by events following the public auction whose outcome has been made absolute through this court's Ruling of 6<sup>th</sup> July 2022.
15. It is further, the Interested Party's position that the application seeking to set aside the default judgment of 17<sup>th</sup> May 2019 came too late in the day after the execution of the judgment in question had already taken place. The Auctioneer states that he duly received the Plaintiff's instructions to execute the decree and auction the Defendant's property on 16<sup>th</sup> September 2019 after which he issued notification of sale on 14<sup>th</sup> October 2019 before scheduling the sale for 29<sup>th</sup> November 2019. He confirms that the suit property was sold on 29<sup>th</sup> November 2019.
16. Parties canvassed the application by way of written submissions, which I have considered.
17. The main issues that require my determination are as follows: -
  - a. Whether this court has jurisdiction to hear and determine the application.
  - b. Whether the Applicant has made out a case for the granting of the orders sought in the application.

### **Jurisdiction**

18. The Plaintiff and the Auctioneer challenged the jurisdiction of this court to deal with the application on two fronts. Firstly, that the Applicant ought to have approached the ELC Court in view of the fact that the dispute revolves around sale of land and secondly; that the Applicant has already lodged an appeal before the Court of Appeal.
19. In a rejoinder, the Defendant/Applicant submitted that this court has the requisite jurisdiction to hear and determine the application as it seeks to set aside the sale of the suit property in execution of this court's decree.
20. My reading and understanding of the instant application is that it seeks, inter alia; to set aside the sale of the suit property, to set aside, vary and/or discharge this court's orders of 6<sup>th</sup> July 2022. My finding is that since the present application challenges the execution of the decree of this court, this court has the requisite jurisdiction to hear and determine the application.
21. It is instructive to note that the Plaintiff's appeal, before the Court of Appeal, challenges this court's Ruling of 6<sup>th</sup> February 2020 setting aside the default judgment. I find that neither the Court of Appeal nor the ELC Court is seized with the execution proceedings that are the subject of the instant application. I find that the Court of Appeal and the ELC Court cannot therefore be the correct forum to institute the application.

### **Merits of the Application**

22. The issue that this court has to grapple is whether, having regard to facts of this case, it can set aside the sale of the suit property, discharge, set aside or vary this court's orders of 6<sup>th</sup> July 2022 making the sale of the suit property absolute and issue orders directing the auctioneer to file true accounts pertaining to the auction, and lastly; issue orders directing the Plaintiff to deposit the entire decretal amount received from the public auction in court.
23. The following facts were not disputed: -
  - a. That on or about 28<sup>th</sup> February 2019 the Plaintiff sued the Defendant for the payment of Kshs. 28,387,579.60 and obtained a default judgment for the said sum.



- b. The Defendant became aware of the default judgment and sought to set it aside through an application dated 14<sup>th</sup> November 2019.
  - c. That as at the time of filing the said application dated 14<sup>th</sup> November 2019, the Plaintiff had already instructed the auctioneers to initiate with the execution process.
  - d. That on 29<sup>th</sup> November 2019 the suit property was sold to one New Oshwal Distributors Limited (the purchaser) for Kshs. 34 million.
  - e. That on 6<sup>th</sup> February 2022, E. Maina J. rendered a ruling on the Defendant's application dated 14<sup>th</sup> November 2019 wherein she set aside the default judgment. The Plaintiff's application, to the Court of Appeal; to stay the setting aside the said Ruling was not successful. An appeal against the said setting aside ruling is however still pending.
  - f. On 6<sup>th</sup> July 2022, this court, differently constituted, allowed the purchaser's application to make the sale conducted on 29<sup>th</sup> November 2019 absolute.
24. From the above narration of the undisputed facts of this case, it is clear that as at the time that the sale of the suit property was conducted, there was neither a stay of execution of the decree order nor had the default judgement been set aside. In my considered view nothing stood in the way of the auctioneer in executing the decree through the public auction.
25. I note that the order setting aside the default judgment was made in February 2020 almost 3 months after the sale by public auction. In essence therefore; the order of 6<sup>th</sup> February 2020 can be said to have been superfluous and of no consequence as it sought to set aside a judgment that had already been executed through the sale.
26. It is curious to note that the Defendant/Applicant herein despite having been aware that the sale was slated for 29<sup>th</sup> November 2019, did not take any precipitate action to set it aside in time or at all and did not take any concrete measures to stop the tide against until 28<sup>th</sup> September 2022, almost 3 years after the sale, and long after the purchaser had obtained orders for vacant possession and perfection of the sale.
27. This court is of the view that the Applicant is guilty of laches as it sat on its laurels until it was too late in the day. The Applicant had ample time to move the court to set aside the sale which action it did not take. Order 22 Rule 77 of the Civil Procedure Rules stipulates as follows: -
- 77.
- (1) Where no application is made under rule 74, rule 75 or rule 76, or where such application is made and disallowed, the court shall make an order confirming the sale, and thereupon the sale shall become absolute in so far as the interest of the judgment-debtor in the property sold is concerned.
  - (2) Where such application is made and allowed and where, in the case of an application under rule 74, the deposit required by that rule is made within thirty days from the date of sale, the court shall make an order setting aside the sale: Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.
  - (3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.”



28. From the above provision, it is clear that the Applicant herein could still challenge the sale before it was made absolute an opportunity that it squandered. The Applicant has not tendered any reasons for the delay in applying to set aside the sale.
29. My finding is that it is not in the place of this court to set aside the sale outside the set time limits and after it has been made absolute. In the same vein, this court lacks the power to set aside the orders of 6<sup>th</sup> July 2022 making the sale absolute as doing so would be akin to sitting on appeal on the decision of a Judge of concurrent jurisdiction.
30. Turning to the prayer to enjoin the Auctioneer to these proceedings and for the deposit of the proceeds of the sale in court, I find that the Auctioneer became functus officio the moment the sale was made absolute and the proceeds of the sale transmitted to the decree holder. The decree holder similarly received the proceeds of the sale pursuant to decree that was valid at the time the sale was conducted.
31. Consequently, I find that there is no basis for the prayer that the proceeds of the sale be deposited in court.
32. In sum, I am not persuaded that the instant application is merited and I therefore dismiss it with costs to the Respondents.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 2<sup>ND</sup> DAY OF MARCH 2023.**

**W. A. OKWANY**

**JUDGE**

