



Regional Container Freight Station Limited & 2 others v Zum Zum Investment Limited (Civil Case 116 of 2016) [2023] KEHC 20196 (KLR) (3 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20196 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 116 OF 2016
DKN MAGARE, J
JULY 3, 2023**

BETWEEN

REGIONAL CONTAINER FREIGHT STATION LIMITED 1ST PLAINTIFF

AKABA INVESTMENT LIMITED 2ND PLAINTIFF

TRANSOUTH CONVEYORS COMPANY LIMITED 3RD PLAINTIFF

AND

ZUM ZUM INVESTMENT LIMITED DEFENDANT

RULING

1. The application dated 22/6/2023 was filed by the decree holder claiming the following prayers: -
 - A. That this Honourable Court be pleased to grant leave to the Plaintiffs/Decree Holders to sell and/or continue with the intended sale of the parcels of Land known as Plot No 5905, Section I/MN; CR No 19849, located in Shanzu Area, Mombasa, and parcel LR No 1482/II/MN and the resultant subdivisions as detailed in the valuation reports dated August 6, 2021 prepared by M/s Musyoki & associates.
 - B. That this Honuorable Court be pleased to grant an Order setting the terms of sale as follows: -
 - a) M/s Moran Auctioneers, KTDA Plaza, 6th Floor, Moi avenue Nairobi, be appointed to dispose of the subject properties;
 - b) A notification of sale be issued to M/s Moran Auctioneers to conduct the sale of the subject properties with due regard to applicable laws;
 - c) That the subject properties be disposed of by way of public auction guided by the valuation reports dated November 25, 2022 prepared in respect of the subject properties by M/s Musyoki & Associates.



- d) In the event the public auction fails for the first time, M/S Moran Auctioneers be allowed to proceed and re- advertise the sale of the subject properties, and thereafter proceed to dispose off the same by way of public auction with due regard to all applicable laws;
 - e) In the event of a second or any subsequent sale by public auction, the Plaintiffs/Decree holders be allowed to place their bid (if they so wish) whether singularly or jointly;
 - f) In the event the Decree Holders bid is deemed to be a successful bid, the court to allow a set off the bid amounts as against the decretal sum, and any excess amounts realized be deposited in court for onward transmission to the defendant/Judgment debtor.
 - g) Any other term and/or condition that this Honourable Court may deem fit and /or appropriate to impose.
2. The grounds are that there was a decree entered in 2019 for Ksh 903,008,308.39 which as at October 2021 had accumulated interest and was standing at Ksh 1,457,064,334. 71. The amount must be accruing interest. According to Abdulkarim Saleh Muhsin the judgment debtor has not paid.
 3. The Application was not opposed by the defendant. Parties also did not file submissions. I therefore proceeded on the basis of the evidence of the Applicant on record and appraising the law.
 4. To be able to deal with this issue, I need to be satisfied that I have jurisdiction to make the orders sought. The orders sought are for attachment of movable property details of which are given.
 5. Initially the Applicant had sought to have the deputy registrar sign for the transfer, which she declined and I gave directions on the way forward.
 6. I had noted as I do now that sale of immovable property cannot be done without leave of the court.
 7. Order 22 rule 68 (Sale of immovable property) provides as follows: -

“Rule 68- Sale of immovable property in execution of decrees may be ordered by any court.
 8. My understanding and considered view is that, that order has to be made by the court upon making ascertaining any claims on the register. This application was thus filed and I gave directions. When the matter came up, I noted that another Application had been made, by the intended interested parties.
 9. I did not find it useful to have both applications heard at the same time. The position of interested parties is settled. Further there are procedures within the [Civil Procedure Rules](#) on claims related to objectors. I therefore separated the two applications without prejudging the position.
 10. In respect to the matter before me, that is the application dated 22/6/2023, the same seeks to execute a decree already in situ. The decree is against the Defendant herein. Consequently, I must be so satisfied on the same before I proceed.
 11. In [Owners of the Motor Vessel “Lillian S” v Caltex Oil \(Kenya\) Ltd](#) [1989] eKLR.

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:



“By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”

12. As earlier stated Order 22, rule 48 provides for attachment of immovable property. The compliance required to perfect attachment is set out in order 22 rule 48 which provides as doth: -

“48. Attachment of immovable property [Order 22, rule 48.]

(1) Where the property to be attached is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such purported transfer or charge, and the attachment shall be complete and effective upon registration of a copy of the prohibitory order or inhibition against the title to the property.”

(2) A copy of the order shall be affixed on a conspicuous part of the property.

13. The sale of attached immovable property is governed by Order 22 rules 68 and 69. Rule 69 provides as doth: -

“69. Deposit by purchaser and re-sale on default [Order 22, rule 69.] (1) On every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per centum on the amount of his purchase- money to the officer or other person conducting the sale, and, in default of such deposit, the property shall forthwith be re-sold.

(2) Where the decree-holder is the purchaser, and is entitled to set off the purchase money under rule 61, the court may dispense with the requirements of this rule.”

14. In *Manso Enterprises Ltd v Kenya Commercial Bank Ltd & another* [1989] eKLR, the High Court, justice E.M Githinji, as then he was, sitting in Mombasa had this to say: -

“As regards ground No 4, it is true that the rules do not provide that the Decree Holder state the value of the property. However, rule 61(2) (d) provides that everything material for the purchaser to know in order to judge the nature of the property should be stated.

Commentary 3 to Indian Order 21 rule 66(e) (similar to Kenya rule 61(2)(d) in Mulla’s Code of Civil Procedure 13th Edn. Vol. II page 1130, shows that value of property is a very material fact for the purchaser to know. The same commentary however indicates that there



had been divergent decisions in the Indian courts as to who should provide valuation and as to whether value should be inserted in the proclamation of sale until some amendments were made to the rule. Those amendments relieved the court the burden of assessing the value of the property and left it to the Decree Holder and Judgment Debtor to state the value.”

15. The court was referring to the old rules. It means that the law has since evolved and all required safeguards are to be given. This ensures equity in disposal of property. However, the substantive law regarding safeguards in the auctions is still the land statutes and the *auctioneers Act*.
16. In *National Housing Corporation v Lawi Kiplagat* [2017] eKLR

“ 6. The procedure for execution is provided for in Order 22 Rule 13(4) of the *Civil Procedure Rules*. The said position was reiterated in the case of *Mandavia v Rattan Singh* Civil Appeal No 27 of 1967 [1968] EA 146 as follows:

“The words “formal order for attachment and sale of property may be made by the Registrar” in Order 48, rule 3 must mean that the Registrar has to actually consider the application before him and then make the necessary orders to effect the attachment of the sale. Formal order here does not mean that the registrar has only to prepare and issue a formal order which has in fact already been made by the judge, as for instance where he draws and signs a decree after the judgment or as in this case an order after the judge has decided an application. In such cases, the registrar does not “make” the order, he only prepares the order already “made” by the judge. Rule 3 must empower the Registrar to consider the proceedings before him and then in his discretion himself make an order. In a sense this will usually only be a formal order as a judgment has already been obtained and, if not settled, execution against the judgment debtor’s property will follow as a matter of course without dispute, and the rule goes on to make it clear that if any dispute arises, then on the objection being taken in the manner provided, the matter will be taken over and dealt with by a judge. Order 48, rule 4 provides that for the purposes of rules 2 and 3 the registrar shall be deemed to be civil court, so that in effect a registrar sitting to deal with applications or proceedings under rule 3 would be the presiding officer of a civil court, and a civil court here must mean a tribunal where civil issues are settled and not just a body that is only going to put into formal phraseology an order already made on an issue tried and disposed of by a judge. Form 27 in Appendix D of the schedule to the rules sets out the form of the notification of sale under rule 61 and this does provide for the signature by “judge” but in this connection it is to be noted that judge is defined in section 2 of the *Civil Procedure Act* as meaning “the presiding officer of a civil court” and this would include the deputy registrar when he is acting under the provisions of Order 48 rule 3...It is clear that Order 48 rule 3 confers on the registrar not merely the power to make formal orders of attachment and sale, but also to conduct ‘proceedings thereunder’, at any rate until some formal objection is taken by motion on notice whereupon all further proceedings are to be before a judge. This must be the position here since the intention of this rule is to allow the registrar to conduct the necessary proceedings, and issue the appropriate directions and orders so as to carry out an execution by way of attachment and sale of property, provided that the proceedings are not contested. Therefore the expression “formal orders for attachment and sale of property” include not



only the actual orders for the attachment and sale but any other consequential orders, which are necessary to effect this purpose, and this includes an order made under rule 61.”

17. In *Data Guard Distributors Limited v Virginia Njeri Kigo & 3 others* [2019] eKLR, Justice GL Nzioka, stated as doth: -

“ 11. I have considered these provisions of law and I find that indeed under Rule 68 referred to above, an immovable property may be sold by an order of the court in execution of a decree. However, this sale must be under the supervision of the court. The general conduct of a sale would require that, the property be first valued to ascertain whether it is viable to order for a sale taking into account the amount of the decree.

12. The Applicants have sought that the Honourable court do issue the prohibitory order issued over property known as Nairobi Block 76/516 Buruburu. They have then sought that the court sets a date for sale of that property alongside two others known as Nyandarua/Tulaga/1893, LR No 12715/8854 Syokimau. However, they depose that any property that a prohibitory order was issued against was Nairobi Block 76/516 Buruburu. In that case, the only property that can become a subject of attachment is the one against which the prohibitory order was issued.

13. In that regard, I allow the application herein in terms of prayer (1) and order that the property Nairobi Block 76/516 Buru Buru be subjected to evaluation by each party independently and/or jointly to enable the court give further orders as to, the manner of the sale and the dates thereof.”

18. In a nutshell there can be no sale without:-

- a. An order given by the court for attachment of property, pursuant to Order 22 Rule 48
- b. An order of the court supervising the sale
- c. An order for sale of immovable property
- d. Safeguards to the judgment debtor and third parties.
- e. Existence of a valid decree.

19. I am satisfied there is a valid decree as set out in the Applicant’s application. A decree for Ksh 903,008,308.39 together with costs of 12,248,092.71 with interest accruing is due and owing.

20. The Defendant has not denied that they have not settled the decree. There is no application under order 22 rule 1 that the decree is settled. I therefore find that the decree is still due and owing.

21. There is no order of stay of execution or any order forbidding the transfer or sale of the suit property. In the circumstances the court will grant an order of attachment of movable property as set out in the orders below. I only need to satisfy the following; a valid order of the court be issued which includes an order supervising the said order. The sale that is to be ordered will need some safeguards to the judgment debtor and third parties.

22. The safeguards are properly so called, settlement of terms of the sale. Terms of sale cannot be settled before the properties are attached and in the hands of the judgment creditor.



23. Therefore, whichever safeguards we put in place, there will be no settlement of terms in this order. The terms are thus settled once an order for attachment has been issued and the parties commence on the valuation.
24. It is therefore my view that the following orders service: -
 - a. The application dated June 22, 2023 is allowed
 - b. The court grants leave to the plaintiff to attach the defendant's, property in the schedule annexed hereto but being;



No	ORIGINAL PLOT No 1482/II/MN. SUB-PLOT NOS AS HEREUNDER	REGISTERED OWNER	AREA	TITLE
1	MN/II/7429	Zumzum Investments Limited	0.0371 Ha	Freehold
2	MN/II/7430	Zumzum Investments Limited	0.0371 Ha	Freehold
3	MN/II/7431	Zumzum Investments Limited	0.0371 Ha	Freehold
4	MN/II/7432	Zumzum Investments Limited	0.0371 Ha	Freehold
5	MN/II/7433	Zumzum Investments Limited	0.0371 Ha	Freehold
6	MN/II/7434	Zumzum Investments Limited	0.0371 Ha	Freehold
7	MN/II/7435	Zumzum Investments Limited	0.0371 Ha	Freehold
8	MN/II/7436	Zumzum Investments Limited	0.0371 Ha	Freehold
9	MN/II/7533	Zumzum Investments Limited	0.0371 Ha	Freehold
10	MN/II/7534	Zumzum Investments Limited	0.0371 Ha	Freehold



11	MN/II/7535	Zumzum Investments Limited	0.0371 Ha	Freehold
12	MN/II/75369	Zumzum Investments Limited	0.0371 Ha	Freehold
13	MN/II/7538	Zumzum Investments Limited	0.0371 Ha	Freehold
14	MN/II/7539	Zumzum Investments Limited	0.0371 Ha	Freehold
15	MN/II/7542	Zumzum Investments Limited	0.0349 Ha	Freehold
16	MN/II/7543	Zumzum Investments Limited	0.0385 Ha	Freehold
17	MN/II/7546	Zumzum Investments Limited	0.0349 Ha	Freehold
18	MN/II/7547	Zumzum Investments Limited	0.0349 Ha	Freehold
19	MN/II/7549	Zumzum Investments Limited	0.0348 Ha	Freehold
20	MN/II/7550	Zumzum Investments Limited	0/03449 Ha	Freehold
21	MN/II/7551	Zumzum Investments Limited	0.0349 Ha	Freehold
22	MN/II/7553	Zumzum Investments Limited	0.0348 Ha	Freehold



23	MN/II/7554	Zumzum Investments Limited	0.0349 Ha	Freehold
24	MN/II/7555	Zumzum Investments Limited	0.0410 Ha	Freehold
25	MN/II/7556	Zumzum Investments Limited	0.0288 Ha	Freehold
26	MN/II/7557	Zumzum Investments Limited	0.0308 Ha	Freehold
27	MN/II/7558	Zumzum Investments Limited	0.0400 Ha	Freehold
28	MN/II/7559	Zumzum Investments Limited	0.0400 Ha	Freehold
29	MN/II/7560	Zumzum Investments Limited	0.0297 Ha	Freehold
30	MN/II/7561	Zumzum Investments Limited	0.0475 Ha	Freehold
31	MN/II/74562	Zumzum Investments Limited	0.0400 Ha	Freehold
32	MN/II/7563	Zumzum Investments Limited	0.0400 Ha	Freehold
33	MN/II/7638	Zumzum Investments Limited	0.0427 Ha	Freehold
34	MN/II/7639	Zumzum Investments Limited	0.0427 Ha	Freehold



35	MN/II/7640	Zumzum Investments Limited	0.0730 Ha	Freehold
36	MN/II/7641	Zumzum Investments Limited	0.0426 Ha	Freehold
37	MN/II/7642	Zumzum Investments Limited	0.0427 Ha	Freehold
38	MN/II/7643	Zumzum Investments Limited	0.042227 Ha	Freehold
39	MN/II/7644	Zumzum Investments Limited	0.0519 ha	Freehold
40	MN/II/7645	Zumzum Investments Limited	0.0519 ha	Freehold
41	MN/II/7646	Zumzum Investments Limited	0.451 Ha	Freehold
42	MN/II/8410	Zumzum Investments Limited	0.0427 Ha	Freehold
43	MN/II/7675	Zumzum Investments Limited	0.0325 Ha	Freehold
44	MN/II/7676	Zumzum Investments Limited	0.0398 Ha	Freehold
45	MN/II/7677	Zumzum Investments Limited	0.0400 Ha	Freehold
46	MN/II/7678	Zumzum Investments Limited	0.0269 Ha	Freehold



47	MN/II/7647	Zumzum Investments Limited	0./0368 Ha	Freehold
48	MN/II/7648	Zumzum Investments Limited	0.0353 Ha	Freehold
49	MN/II/7649	Zumzum Investments Limited	0.0353 Ha	Freehold Freehold
50	MN/II/7650	Zumzum Investments Limited	0.0353 Ha	Freehold
51	MN/II/7651	Zumzum Investments Limited	0.0368 Ha	Freehold
52	MN/II/7652	Zumzum Investments Limited	0.0368 ha	Freehold
53	MN/II/7654	Zumzum Investments Limited	0.0353 Ha	Freehold
54	MN/II/7655	Zumzum Investments Limited	0.0368 Ha	Freehold
55	MN/II/7656	Zumzum Investments Limited	0.036h Ha	Freehold
56	MN/II/7657	Zumzum Investments Limited	0.0353 Ha	Freehold
57	MN/II/7658	Zumzum Investments Limited	0.0353 ha	Freehold
58	MN/II/7659	Zumzum Investments Limited	0.0368 ha	Freehold



59	MN/II/7660	Zumzum Investments Limited	0.0368 Ha	Freehold
60	MN/II/7661	Zumzum Investments Limited	0.0395 Ha	Freehold
61	MN/II/7662	Zumzum Investments Limited	0.0400 Ha	Freehold
62	MN/II/7664	Zumzum Investments Limited	0.0352 Ha	Freehold
63	MN/II/7665	Zumzum Investments Limited	0.0400 Ha	Freehold
64	MN/II/7666	Zumzum Investments Limited	0.400 Ha	Freehold
65	MN/II/7667	Zumzum Investments Limited	0.0342 Ha	Freehold
66	MN/II/7668	Zumzum Investments Limited	0.0332 Ha	Freehold
67	MN/II/7669	Zumzum Investments Limited	0.0400 Ha	Freehold
68	MN/II/7670	Zumzum Investments Limited	0.0400 Ha	Freehold
69	MN/II/7671	Zumzum Investments Limited	0.0322 Ha	Freehold
70	MN/II/7673	Zumzum Investments Limited	0.0476 Ha	Freehold



71	MN/II/7674	Zumzum Investments Limited	0.0400 Ha	Freehold
72	MN/II/7679	Zumzum Investments Limited	0.0398 Ha	Freehold
73	MN/II/7680	Zumzum Investments Limited	0.661 Ha	Freehold
74	MN/II/7681	Zumzum Investments Limited	0.0400 Ha	Freehold
75	MN/II/7682	Zumzum Investments Limited	0.0400 Ha	Freehold
76	MN/II/7683	Zumzum Investments Limited	0.0400 Ha	Freehold
77	MN/II/7684	Zumzum Investments Limited	0.0400 Ha	Freehold
78	MN/II/7685	Zumzum Investments Limited	0.0400 Ha	Freehold
79	MN/II/7686	Zumzum Investments Limited	0.0400 Ha	Freehold
80	MN/II/7687	Zumzum Investments Limited	0.0400 Ha	Freehold
81	MN/II/7688	Zumzum Investments Limited	0.0400 Ha	Freehold
82	MN/II/7689	Zumzum Investments Limited	0.0400 Ha	Freehold



83	MN/II/7690	Zumzum Investments Limited	0.0400 Ha	Freehold
84	MN/II/7691	Zumzum Investments Limited	0.0400 Ha	Freehold
85	MN/II/7692	Zumzum Investments Limited	0.0400 Ha	Freehold
86	MN/II/7693	Zumzum Investments Limited	0.0400 Ha	Freehold
87	MN/II/7694	Zumzum Investments Limited	0.0400 Ha	Freehold
88	MN/II/7751	Zumzum Investments Limited	0.0358 Ha	Freehold
89	MN/II/7752	Zumzum Investments Limited	0.0402 Ha	Freehold
90	MN/II/7753	Zumzum Investments Limited	0.0379 Ha	Freehold
91	MN/II/7754	Zumzum Investments Limited	0.0363 Ha	Freehold
92	MN/II/7756	Zumzum Investments Limited	0.0379 Ha	Freehold
93	MN/II/7757	Zumzum Investments Limited	0.0379 Ha	Freehold
94	MN/II/7758	Zumzum Investments Limited	0.0363 Ha	Freehold



95	MN/II/7759	Zumzum Investments Limited	0.0363 Ha	Freehold
96	MN/II/7760	Zumzum Investments Limited	0.0379 Ha	Freehold
97	MN/II/7761	Zumzum Investments Limited	0.0379 Ha	Freehold
98	MN/II/7762	Zumzum Investments Limited	0.0363 Ha	Freehold
99	MN/II/7763	Zumzum Investments Limited	0.0363 Ha	Freehold
100	MN/II/7764	Zumzum Investments Limited	0.0363 Ha	Freehold
101	MN/II/7765	Zumzum Investments Limited	0.0379 Ha	Freehold
102	MN/II/7766	Zumzum Investments Limited	0.0363 Ha	Freehold
103	MN/II/7777	Zumzum Investments Limited	0.0523 Ha	Freehold
104	MN/II/7779	Zumzum Investments Limited	0.0405 Ha	Freehold
105	MN/II/7780	Zumzum Investments Limited	0.0405 Ha	Freehold
106	MN/II/7784	Zumzum Investments Limited	0.0405 Ha	Freehold



107	MN/II/7785	Zumzum Investments Limited	0.0405 Ha	Freehold
108	MN/II/7855	Zumzum Investments Limited	0.0363 Ha	Freehold

- c. The plaintiff to propose the terms of settlement within 14 days from today to the defendant for settlement. In default, the court shall settle the same. The matter shall be fixed for directions after the Ruling of 25/7/2023.
- d. When the terms are settled, the sale shall be as individual units and not as per plot.
- e. The valuation used must be valid as required under the *Land Act*.
- f. The sale must be subject to reserve price which shall not be less than 80%. Should the judgment creditors be allowed in terms of settlement, to take part in the auction, the purchase price to be paid by the judgment creditor shall not be less than 100 of the current market value as per valuation no less than 1 year old at the time of sale.
- g. Each party to bear its costs

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 3RD DAY OF JULY, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Peter Munyoki for the applicant

No Appearance Defendant

No appearance for proposed Interested Party

