



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**HIGH COURT CIVIL SUIT 154 OF 2018**

**ABDIKADIR ARAB MOHAMUD.....1<sup>ST</sup> PLAINTIFF**

**MOHAMMED ISSA BARE .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**FIRST COMMUNITY BANK.....DEFENDANT/RESPONDENT**

**RULING (2)**

**APPLICATION**

The Applicant(s) filed Certificate of Urgency dated 26<sup>th</sup> October 2020

Seeking this Court to correct the error apparent on the face of the record as follows;

a) This Court's Ruling of 7<sup>th</sup> February 2020 in its Order 4 read as follows;

***“The statutory power of sale shall exclude the Flat Numbers 101,201,104,202,301,304,403,303,301 & 302 purchased by 3<sup>rd</sup> parties bona fide purchasers who were not served with statutory notices or heard on protection of their proprietary interest in the suit property.”***

b) The net effect is that this Court repeated Unit 301 twice; referred to 201 instead of 102; omitted unit numbers 204,402 & 404 and included Unit Numbers 403 & 303 among the flats purchased by 3<sup>rd</sup> Parties.

c) The Defendant by order of the Court sold 19 units and not 18 units as inferred by the Court.

**d) The correct numbers of the 10 Units sold are 101,102,104,202,204,301,302,304,402 & 404.**

e) The Parties/Counsel Consent of 4<sup>th</sup> April 2019 filed in Court and adopted as an order of this Court also included the following units belonging to the Plaintiffs to be excluded **G1, G2, G3 & G4** which ought to have been included in the Court orders from Ruling of this Court delivered on 7<sup>th</sup> February 2020.

The application was/is supported by Affidavit by Abdikadir Arab Mohamud of 26<sup>th</sup> October 2020.

The Parties' through Counsel filed Consent on 20<sup>th</sup> November 2020 to amend, vary and/or correct the Court Ruling of 7<sup>th</sup> February 2020. This Court declined to adopt the Consent as order of the Court as the law envisages such situations and prescribes **Sections 99 & 100 of CPA** and/or **Order 45 CPR 2010** for review of Court Judgment/Ruling /Decree/Order where there is an error on the face of the record.

The Respondent /Defendant filed Replying Affidavit to the Applicant's application and reiterated the Applicant's case.

The Court perused the Court record and finds that the orders of the Court in relation to the Units were with reference to the Plaintiff /Applicants annexures to the Complaint filed on 18<sup>th</sup> April 2018 save for the Unit 301 that was referred to twice.

**Pgs 70-79** of Plaintiff's Complaint annexures refer to Payment Plans for Units sold as follows;

Flat 101, 102 (also scribbled on top 201),104, 202, 301, 304, 402 (also scribbled on top 403), 404 (also scribbled on top 303), 301(again) and 302 (scribbled asking for refund)

The Consent by parties/Counsel of 4<sup>th</sup> April 2019 is on record and refers to the agreed 10 Units pleaded as sold to 3<sup>rd</sup> Parties.

By virtue of **Sections 99 & 100 CPA** provides;

**“Amendment of judgments, decrees or orders**

*Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.*

**General power to amend**

*The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”*

In light of the issues raised above by the Applicant and supported by the Respondent I find that there is an error apparent on the Court record specifically with regard to the **Ruling of this Court of 7th February 2020, specifically Pgs 21,21, & 23 of the Ruling** with regard to the Units excluded from the statutory power of sale the Respondent is entitled to execute on the suit property due to Plaintiff’s outstanding debt.

**ORDER 4 of Ruling of 7<sup>th</sup> February 2020** is hereby amended and shall now read;

*“The statutory power of sale shall exclude the Flat Numbers/Units 101,102,104,202,204,301,302,304,402 & 404 purchased by 3rd parties’ bona fide purchasers who were not served with statutory notices or heard on protection of their proprietary interest in the suit property and Units belonging to the Plaintiffs to be excluded also are G1, G2, G3 & G4.”*

**DELIVERED SIGNED & DATED IN OPEN COURT ON 8<sup>TH</sup> FEBRUARY 2021(VIDEO CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**M/S OCHIENG’ K. & ASSOCIATES ADVOCATES FOR PLAINTIFF**

**M/S OMUSOLO MUNGAI & COMPANY ADVOCATES FOR DEFENDANT**

**COURT ASSISTANT: TUPET**