



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMNI LAW COURTS

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 416 OF 2008

SAMUEL MWAMBA AMBUNDO.....1ST PLAINTIFF

EPHRAIM KAMOTHO WAMBUGU.....2ND PLAINTIFF

PURITY KINYA MACHARIA.....3RD PLAINTIFF

ELIZABETH ACHIENG OCHIENG.....4TH PLAINTIFF

JOHN KIILU SAMBO.....5TH PLAINTIFF

JULIET NJERI KARANJA.....6TH PLAINTIFF

FREDRICK KIRIMA KIHARA.....7TH PLAINTIFF

PRISCILLAH GAKII MBUTURA & 380 OTHERS.....8TH PLAINTIFF

VERSUS

SPELL INVESTMENT COMPANY LIMITED.....1ST DEFENDANT

CONSOLATA NABWIRE ASEMBO.....2ND DEFENDANT

CONSOLIDATED BANK OF KENYA LIMITED.....3RD DEFENDANT

FRANSISCAH ADIKINYI ASEMBO.....4TH DEFENDANT

ROBERT AKUMU ASEMBO.....5TH DEFENDANT

RULING

1. On 19th March, 2021, this Court issued a stay of execution against the 3rd Defendant for a period of twenty-one (21) days to enable valuation of **Title No. Dagoretti/Riruta/1254** and **L.R. No 3734/114** in terms of the judgment delivered on 22nd October, 2019.

2. Upon the directions of this Court, the Plaintiffs filed a Supporting Affidavit sworn on 13th May, 2021 by their Advocate, **Charles Oyoo Kanyangi**. Annexed to it was a Valuation Report prepared by **M/s Seven Degrees North** in respect of all those properties known as **Dagoretti/ Riruta/ 1254 (Muslim Area) Kawangware- Nairobi county** (hereinafter the “Dagoretti property”) and **LR No.s 3734/1142/ 1-2 (Tende Drive) Lavington- Nairobi County** marked “**COK1 (a) (b)**” (hereinafter the “Lavington property”).

3. **Mr Kanyangi** urged this Court to order the release of Kshs. 17,258,000/- to **Kanyangi & Company Advocates** for onward transmission to the Plaintiffs/ Decree Holders and that **M/s Seven Degrees North**’s fees be defrayed from that amount. He also urged this Court to give an order that the Dagoretti property be sold by Public Auction without the necessity of filing another suit. He deposed that **M/s Seven Degrees**

North established that the Dagoretti property was transferred to **Robert Akumu Asembo**, the 5th Defendant, in 2009 despite a Court Order and a caveat that was filed in the Land Registry.

4. The 3rd Defendant filed a Further Affidavit sworn on 17th May, 2021 by its Legal Manager, **Albert Anjichi**. Annexed to it were a copy of the valuation report by **Hillscape valuers** dated 24th April, 2021 in respect of the **Dagoretti property** marked **AA1** and a copy of the invoice and payment confirmation marked **AA2**. He deposed that the **Hillscape valuers** was denied access to the **Lavington property** by security guards who were under firm instructions not to allow any visitors into the property.

5. **Mr. Anjichi** also deposed that a valuation of the **Dagoretti property** returned the following figures:-

a. L. R. Number 3734/1142 –	Kshs. Not valued
b. Dagoretti/Riruta/1254 Kawangware –	Kshs. 16,000,000.00
c. Add the amount deposited in Court	
by Equity Bank Limited-	Kshs. 17,285,250.95
TOTAL	Kshs. 33,285,250.95

6. Additionally, **Mr. Anjichi** averred that the net value of the **Dagoretti and Lavington Properties** when added to the amount deposited in Court far exceeds the amount payable by the 3rd and 4th Defendants by Kshs. 30,191,120.95 made up as follows:-

Value of properties + amount in court-	Kshs. 84,285,250.95
Less amount decreed against the 3 rd Defendant-Kshs.	54,094,130.00
EXCESS AMOUNT	<u>Kshs. 30,191,120.95</u>

7. It was further deposed that there is no amount recoverable from the 3rd Defendant since the value of the two properties far exceeds the sum of Kshs. 54,094,130.00 that the 3rd Defendant was liable to pay as per the ruling of 19th March, 2021; that by the time this Honourable Court issued Stay of Execution orders, the Plaintiffs' auctioneers had attached the 3rd Defendant's assets in purported execution of the Decree and had been paid Kshs. 1,500,000/- being part payment of the decretal amount; that since the Court found that the purported execution was in contravention of the clear terms of the Decree, it is only fair and just that the 3rd Defendant be refunded the full amount of Kshs. 1,500,000/- paid to the Plaintiff's Auctioneers/ agents as part of the decretal amount. Therefore, the 3rd Defendant urged this Court to order that Kshs. 1,500,000/- paid to the Plaintiffs' Auctioneer be deducted from the Kshs. 17,285,250.95/- currently held in Court and paid to the 3rd Defendant's Advocates on record and the balance released to the Plaintiffs' advocates on record for onward transmission to the Plaintiffs.

Determination

8. I have considered the parties' respective affidavits. The purpose of the valuation of the two suit properties was to determine the sum recoverable from the 3rd Defendant to enable the Plaintiffs proceed with execution.

9. At para 33 to 35 of the Ruling dated 19th March, 2021, I observed as follows:-

“33. The next issue for determination is whether the court should bar the Plaintiffs from executing the decree until after the valuation of Title No. Dagoretti/Riruta/1254 and L.R. No 3734/114 in terms of the judgment delivered on 22nd October, 2019. In my considered view, this issue does not require much deliberation. Order (c) of the Decree is glaringly clear that the sum recoverable from the 3rd and 4th Defendants would be the remaining balance AFTER the Plaintiffs have recovered the sum of 17 million from Equity bank which was deposited in court together with amount obtained after the sale or valuation of the suit properties.

34. It is not disputed that the 17 Million shillings is in court and can be disbursed to the Plaintiffs at any time. However, the value of the two properties is unknown and a valuation must be undertaken to determine the same. Only then can the Plaintiffs know how much is remaining to be recovered from the 3rd Defendant, if at all to enable them proceed with execution.

35. In the interests of justice therefore, I will issue a stay of execution against the 3rd Defendant for a period of twenty one (21) days to enable a valuation of two properties. The matter shall be mentioned soon after to confirm if the same has been undertaken and for further orders and directions. It is so ordered.”

10. The subject Decree reads thus:-

“a) THAT Judgment be and is hereby entered against the 1st and 2nd Defendants for the sum of Kshs, 82, 623, 350.

b) THAT a declaration is issued that the 3rd Defendant bank was negligent and breached its professional and fiduciary duty to the Plaintiffs as a bank.

c) THAT there is evidence that, a certain sum of money was recovered from; Equity Bank limited and deposited in court. There is further evidence that there is property suspected to have been bought with the subject sum therefore, the sum recoverable from both 3rd and 4th Defendant (if any), is the sum unrecovered after recovery of the sum at Equity Bank Limited and disposal and/or valuation of the suit property. The sum recoverable shall attract interest at court rates from the date of filing the suit to payment in full.

d) THAT the Plaintiffs are entitled to the sums of money presently being held at; KNUT House and Harambee Avenue Branches of Equity Bank.

e) THAT the properties Nairobi L.R. No. 3734/1142 Lavington area and Dagoretti/Riruta/1254 be declared to have been purchased using the money the Plaintiffs invested with the 1st Defendant and same to be forfeited to the Plaintiffs.

f) THAT costs of this suit in favour of the Plaintiffs.”

11. The valuation reports produced by the parties put the market value of the Dagoretti property at Kshs. 17,000,000 and Kshs. 16,000,000 respectively. The valuation report by **M/s Seven Degrees North** put the market value of the Lavington property at **Kshs. 50,000,000/-**. I find that the valuation reports are realistic. Therefore, upon execution, the Plaintiffs stand to recover up to Kshs. 67,000,000/- from the suit properties. This exceeds the outstanding judgment sum of 54,094,130/- plus interest thereon *against the 3rd and 4th Defendants, that can be executed against the 3rd Defendant entirely, if at all.*

12. As to the Plaintiffs' prayer that the Dagoretti property be sold by Public Auction without the necessity of filing another suit, it is my considered view that the Plaintiffs ought to formally move the Court. I reiterate that:- *“Indeed, there are several channels availed by the law that the Plaintiffs can follow in tracing the 1st and 2nd Defendants and it is now up to them to seek the relevant legal advice from their counsel to enable the Plaintiffs execute against the them.”*

13. I disallow the 3rd Defendant's claim for a deduction of Kshs. 1,500,000/- from the Kshs. 17,285,250.95/-. It is my considered view that the Kshs. 1,500,000/- auctioneer's charges paid by the 3rd Defendants was not part of the decretal sum. The amount did not go to the Plaintiffs and therefore cannot be offset from the Kshs. 17,285,250.95/- which was an amount deposited in Court and awarded to the Plaintiffs in the Judgment of 22nd October, 2019.

14. Therefore, I order that the Kshs. 17,285,250.95/- deposited in Court be released to **Kanyangi & Company Advocates** for onward transmission to the Plaintiffs/ Decree Holders and that **M/s Seven Degrees North's** fees be deducted from that amount.

DATED AND DELIVERED AT NAIROBI THIS 17TH JUNE, 2021.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

- 1. Mr. Njeru for the 3rd Defendant/ Applicant.**
- 2. Mr.Kanyangi for the Plaintiffs/ Respondents.**
- 3. Mr. Mureithi h/b Njeru Mucheru for the Intended Interested Party.**