



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL SUIT NO.192 OF 2004**

**GEORGE OMOLLO OGOMA.....PLAINTIFF**

**VERSUS**

**EAGLE MILLERS LTD.....DEFENDANT**

**AND**

**INFRASTRUCTURE-TECHNOLOGY**

**AFRICA LTD.....INTERESTED PARTY/PURCHASER**

**RULING**

1. Before me, is an application dated **29<sup>th</sup> July 2011** brought by way of Notice of Motion under **Order 51 Rule 1** and **Order 22 Rule 75** as read with **Order 22 Rule 69 (1)** of the **Civil Procedure Rules** in which the Plaintiff/Decree holder seeks orders for:

**1) The Honourable Court be pleased to set aside the sale which took place on the 17<sup>th</sup> day of April 2010 which purported to sell Plot No.1432/541 Grant No.IRN 4165 to M/S Infrastructure Technology Africa, the purchaser above.**

**2) The Honourable Court be pleased to order for a fresh advertisement and subsequent sale of the attached property plot No.LR.1432/541 Homa Bay Municipality in accordance with the law and there be set a reserve price.**

**3) The costs of this application be provided for in favour of the decree-holder.**

2. The application is premised on the grounds on the body of the application which were stated as follows:

a) The decree passed by court on 5<sup>th</sup> September 2006 was for Kshs.6,983,986/40 which sum amounted to Kshs.8,425,463/30 as at the time of first issuing warrant on Friday 14<sup>th</sup> August 2009.

b) The sale was ordered to be by Public auction in accordance with **Order XXI rules 60(1) of the Civil Procedure Rules** (now repealed).

c) No actual public auction ever took place but the property was sold to the purchaser by private arrangement at a figure lower than the decretal sum alleged to be Kshs.8 million only.

d) The estimated conservative value of the property is about Ksh.15 million shillings.

e) The person declared to be the purchaser did not pay 25% of the price at the fall of the hammer or even soon thereafter as provided by **Order XXI rule 73(1)** (now **Order 22 rule 69 (1) of the Civil Procedure Rules**).

f) The decree holder has so far been paid Kshs.5.1 million inclusive of advocate's costs and other disbursements.

g) The irregularity in the conduct of sale has occasioned substantial injury to the decree holder's estate.

3. The said application is further supported by the affidavit of HELLEN ATIENO MBOYA dated 29<sup>th</sup> July 2011 in which she repeats the grounds on the body of the application and adds that she is the administratrix of the estate of her late husband and the decree holder herein GEORGE OMOLO OGOMA.

4. In the said affidavit the Deponent/Applicant has deponed that the suit property was sold in an opaque and irregular manner, at an under value and that the bidder did not make a deposit of 25% the purchase price at the fall of the hammer. The applicant added that the sale was not conducted by way of a public auction as is required by the law but was instead, a private arrangement between the interested party and the auctioneer.

5. The applicant contended that the sum of Kshs.5,100,000/= received by the decree holder's estate from the irregular sale was inclusive of the advocate's fees and disbursements was much lower than the full decretal sum which stood at Kshs.8,425,463/40 as at 14<sup>th</sup> August 2009. In effect, the applicant deponed that the property was sold at a gross undervaluation.

6. The applicant further deponed that the decretal sum due as at 17<sup>th</sup> April 2010 would be not less than Kshs.9,099,500/50 and that the deceased's estate was likely to suffer a loss of over 4 million shillings as a result of the irregularity in conducting the sale unless the said irregular sale was set aside so that the same property could be sold at a proper public auction.

7. The application is opposed by both the auctioneer and the interested party who filed their respective replying affidavits.

8. Alfred S. Mdeizi, the auctioneer filed his replying affidavit dated 29<sup>th</sup> September 2011 on 6<sup>th</sup> October 2011 in opposition to the applicant's application. He has deponed that the suit property was sold to the interested party, who was the highest bidder, on 17<sup>th</sup> April 2011 after all the procedures established by the law had been followed and complied with.

9. He stated that the highest bidder made a down payment of the equivalent of 25% of the highest bid after which he issued him with a receipt and a certificate of sale. He added that returns of the auction were duly made to the court and that the proceeds of the sale were paid by the interested party directly to the decree holder/applicant's lawyer who received the same without any objection.

10. The auctioneer added that the applicant had not demonstrated, by way of any valuation report that the property sold at the auction was worth Ksh.15,000,000/= or that the decree holder had suffered any financial loss. It was the auctioneer's case that the applicant's application was belated, laced with witch-hunt, inspired by malice and bad faith as the decree had been fully satisfied, a certificate of sale issued and the land registrar directed to transfer the property in question to the interested party. The auctioneer urged the court to dismiss the application with costs.

11. The interested party filed grounds of opposition dated 10<sup>th</sup> February 2011 as follows:

1) THAT the application is incompetent, misconceived and an abuse of the court process and ought

to be dismissed with costs.

2) THAT the Applicant has not adduced any cogent evidence in support of any irregularities that allegedly occurred during the public auction held on 17<sup>th</sup> April 2011.

3) THAT there is on record clear evidence of compliance with **Sections 69 (1) and 70 of Order 22** of the **Civil Procedure Rules**.

4) THAT objections to alleged undervaluation of the property on sale under Rule 10 of the Auctioneers Rules is only available to the Judgment Debtor before the sale and NOT the Decree-holder. In any event no Valuation Report conducted by an independent Court appointed valuer has been exhibited herein.

5) THAT consequent upon the Vesting Order granted by the Honourable Court on 1<sup>st</sup> July, 2011 the sale became absolute and the orders sought herein are incapable of being granted without setting aside the vesting order and the Certificate of Sale of Land.

6) THAT the Applicant has failed to show that she has sustained substantial injury or loss by reason of the alleged irregularity in the sale to warrant the setting aside of the sale.

7) THAT the decree herein, not being part of the deceased Decree-Holder's estate as appears in the Grant of Letters of Administration issued to the Applicant in SRM Succession Case No.157 of 2010, the Applicant has no locus standi to pursue these proceedings.

8) THAT the application has been brought after an inordinate delay and the Applicant is guilty of laches.

9) THAT the Applicant has come to this Court of equity with unclean hands and is undeserving of any equitable relief.

10) THAT the Applicant has failed to deposit in court the purchase price paid by the purchaser as pre-condition and an act of good faith before seeking to set aside the sale.

11) THAT granting the orders sought by the Applicant would lead to the unjust enrichment of the Decree Holder contrary to the principles of natural justice.

12. The Interested Party, through its Director Mr. Erick Oduk also swore a replying affidavit dated 10<sup>th</sup> February 2012 in opposition to the application in which he deponed that he attended the public auction on 17<sup>th</sup> April 2010 upon reading an advertisement for the same in the newspaper in which his bid of Ksh.8,000,000/= for the suit property was declared the highest.

13. He stated that on the same day of the auction, he paid the sum of Ksh.2,400,000/= in cash as down payment to the auctioneer at the fall of the hammer after which he was issued with a receipt for the said amount. The Interested Party argued that he had paid the full purchase price of Kshs.8,000,000/= which the applicant and her appointed auctioneer have admitted having received and as such, the application to set aside the sale is incompetent, misconceived and an abuse of the court's process since the applicant was on one hand withholding the purchase price already paid and on the other hand asking the court to set aside the sale.

14. The interested party contended that the application is incompetent and untenable since the sale had become absolute by virtue of the court order dated 1<sup>st</sup> July 2011 and the orders sought are incapable of being granted whilst the orders of 1<sup>st</sup> July 2011 are in force.

15. The interested party deponed that the applicant had not shown that she had suffered any loss by reason of the alleged irregularity after her lawyer directly received Kshs.5,600,000/= and the appointed

auctioneer Kshs.2,400,000/= making a total of Kshs.8,000,000/=. The decree holder/applicant swore a supplementary affidavit dated 10<sup>th</sup> February 2012 in which she annexed a valuation report for the suit property which gave its market value at the time to be Kshs.18,000,000/=.

16. At the hearing of the application on 22<sup>nd</sup> September 2015, Mr. G. S. Okoth advocate appeared for the applicant while the Defendant/Judgment Debtor was represented by Mr. Sagwe advocate. Mr. Otieno advocate for the interested party did not attend despite having been duly served with the hearing notice and therefore the application proceeded for hearing in their absence.

#### **Applicant's Submissions:**

17. Mr. Okoth advocate for the applicant submitted that the court broker purported to sell the suit property for Kshs.8,000,000/= at a public auction but it later on turned out, through some email communication, that no public auction was ever conducted.

18. Mr. Okoth submitted that the property was sold at an under value as the market value stood at Kshs.18,000,000/=.

19. He concluded by stating that both the decree holder and the judgment debtor had suffered loss as a result of the irregular sale and undervaluation thereby necessitating the filing of this instant application to set aside the sale.

#### **Defendant/Judgment Debtor's submissions:**

20. Mr. Sagwe for the Judgment Debtor/Defendant did not oppose the application, and added that the sale was a mere gimmick which ought to be set aside.

#### **Analysis and determination:**

21. I have perused the pleadings filed by all the parties in support of their respective positions in this instant application. I have also carefully considered the submissions made by the advocates for the applicant and the judgment debtor.

22. The applicant has raised several complaints over the sale out of which the issues requiring this court's determination can be outlined as follows:

**a) Whether the sale became absolute by virtue of the orders of the court issued on 1<sup>st</sup> July 2011.**

**b) Whether the applicant has established that the sale of the suit land was irregularly and fraudulently conducted to the extent that it should be set aside.**

23. The provisions of the law under which this application is brought are **Order 22 rule 69 (1)** and **Rule 75** of the **Civil Procedure Rules** which state as follows:

***“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.***

***Order 22 rule 73: Where the property sold is a share of undivided immovable property, and two or more persons, of whom one is a co-sharer, respectively bid the same sum for such property or for any lot, the bid shall be deemed to be the bid of the co-sharer.”***

24. To fortify her claim that the provisions of **Order 22 Rule 69(1)** were not adhered to, the applicant has

stated in her affidavit in support of the application at paragraph 12 as follows:

**“12. That I am further informed by my advocate which information I verily believe to be true that on the 10<sup>th</sup> day of June 2011 while surfing through his e-mail messages belatedly he noticed a message forwarded to him by M/S Infrastructure-Technology Africa emanating from Alfred Mdeizi which spelt out clearly that the alleged auction sale was in fact a private arrangement and that in fact the alleged buyer did not even pay any deposit at the fall of the hammer or soon thereafter as required by law. (vide copy annexed and marked ‘HA-9’).”**

25. I have perused the said affidavit and the alleged email message alluded to and I note that first and foremost, the email communication was sent without prejudice basis which means that its admissibility as part of evidence in this court is in question. However, even assuming that the said email communication is admitted, a perusal of the same shows that it was sent on January 29<sup>th</sup> 2011 at 1:37 p.m. many months after the sale had been conducted and payments made to both the auctioneer and the decree holders advocates. In any event, the 25% referred to in the email is not on account of the 25% deposit on the highest bid, but 25% of the purchase price that the auctioneer is entitled to as his cost/fees on the transaction.

26. Furthermore, it is not clear if the said communication is in respect to this instant case/sale or in respect to another **“Homa Bay Plot”** that the auctioneer and the interested/party could have been engaged in.

27. A certificate of sale marked **“GS-3A”** to the applicant’s affidavit was issued to the purchaser on 17<sup>th</sup> April 2010 which means that for all intents and purposes, the sale had been sealed on 17<sup>th</sup> April 2010.

28. In the auctioneer’s replying affidavit dated 29<sup>th</sup> September 2011, he has outlined the entire procedure that he adhered to in conducting the sale and he has annexed documents of proof of the same as follows:

- 1) ‘ASM 1’ - **Notification of sale of immovable property.**
- 2) ‘ASM 2(a)’ - **Application for Registration of a prohibitory order at the Land’s office.**
- 3) ‘ASM 2(c)’ - **Receipt for registration of the prohibitory order.**
- 4) ‘ASM 2(d)’ & ‘ASM 6’ - **Newspaper advertisements of sale.**
- 5) ‘ASM 7(a)’ - **Receipts dated 17<sup>th</sup> April 2010 of Kshs.2,400,000/= Issued to the Interested party.**
- 6) ‘ASM 7(b)’ - **Certificate of Sale dated 17<sup>th</sup> April 2010.**
- 7) ‘ASM 7(c)’ - **Letter dated 20<sup>th</sup> April 2010 returning the warrants to Court.**
- 8) ‘ASM 8(a)’ - **Certificate of Sale of land dated 28<sup>th</sup> June 2010 issued By the Deputy Registrar, Kisii**
- 9) ‘ASM 8(b)’ - **Vesting Order dated 1<sup>st</sup> July 2011 issued by the Kisii High Court.**

29. From the above narrative and sequence of events, I find that the correct procedure was adhered in the conduct of the sale of the suit property.

30. No material irregularity or fraud has been established by the applicant so as to satisfy this court that the sale was not properly conducted.

31. Furthermore, the decree holder/applicant has not satisfied this court that she sustained substantial injury as a result of the sale. In any event, the advocate for the decree holder was paid and has conceded having received the sum of Kshs.5,600,000/= following the sale which sum, the applicant has not in good faith intimated to court what she intends to do with should the sale be set aside.

32. Most importantly, the application for setting aside the sale is coming a bit too late in the chain of events that followed the sale since the court had already as at 1<sup>st</sup> July 2011 issued a vesting order and under those circumstances, setting aside the sale would not be tenable.

33. The auctioneer has submitted in his affidavit in opposition to the application that the Vesting Order has already been issued by this court vesting the property to the purchaser.

34. I do not find any legal or plausible reason that would compel me to lift the Vesting Order already issued.

35. For the above reasons, I find no merit with the application filed by the applicant. Consequently, I dismiss the application dated 29<sup>th</sup> July 2011 with no orders as to costs.

**Dated, signed and delivered in open court this 3<sup>rd</sup> day of February, 2016**

**HON. J. OKWANY**

**JUDGE**

**In the presence of;**

- Mr. Bosire holding brief for G.S. Okoth for the Decree holder/Plaintiff.
- No Appearance for the Defendant
- Omwoyo: court clerk