



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

**MILIMANI LAW COURTS**

**CIVIL CASE NO. 329 OF 2003**

**1. MEHUBA GELAN KEUL**

**2. ISHA AWO SHARIFF**

**3. TOWHIDA AWO SHARIFF**

*(Administrators of the estate of*

*Awo shariff Mohammed (deceased) .....DECREE-HOLDERS*

**Versus**

**1. ABDULKADIR SHARIFF ABDIRAHIM**

**2. ABDINASIR ABDIRAHIM MOHAMED**

**3. T/A ABDIRAHIM ENTERPRISES.....JUDGEMENT-DEBTORS**

**AND**

**ECO - BANK KENYA LIMITED.....APPLICANT**

**AND**

**SAMKAN ESTATES LIMITED-.....INTERESTED PARTY/PURCHASER**

**RULING**

**Refund of purchase price with interest**

[1] Before me is the interested party/purchaser's Notice of Motion dated 30<sup>th</sup> June 2014. The application is seeking refund of the purchase price of Kshs. 50,000,000 together with interest at market commercial rates from the date 18.12.09 until payment in full. The purchaser paid purchase price towards purchase of property known as L.R NO 15855 L.R no. 37/26213 at a public auction from the plaintiff's/deGREE holder on 18.12.09. The applicant also seeks for inhibition order against the properties of the decree-holders. The application is expressed to be brought under Order 51 rule 1 and Order 22 rules 75 and 78 of the Civil Procedure Rules, Sections 68-70 of the Land Registration Act, sections 1A and 1B of the Civil Procedure Act, and Article 159 of the Constitution of Kenya, 2010 and all enabling provisions of the law. It is

supported by the Supporting Affidavit dated 30<sup>th</sup> June 2014. The application was canvassed by way of written submissions.

### **Purchaser's submissions**

[2] The decree holders advertised in the Daily Nation the sale of the suit property by public auction. On 18.12.2009, the purchaser participated in the auction and was declared the highest bidder for a sum of Kshs. 50,000,000/=. It immediately paid a sum of **Kshs. 12,500,000/=** (twelve million five hundred thousand) equivalent of 25% of the purchase price to the decree holder's agents, i.e. the decree holder's advocates now on record in this matter M/S F. Wamalwa & Co. Advocates and to the decree holders auctioneers JOSEPHAT MUSILA MUTUA T/A EASTERN KENYA AUCTIONEERS. Thereafter, the balance of Kshs 37,500,000/= (thirty seven million five hundred thousand) was to be paid, but before the same was paid the purchaser noticed that there was an objection proceedings filed by Eco-bank contesting the sale of the subject property at a public auction. The interest of Eco Bank was never disclosed to the purchaser during the auction. The purchaser promptly applied for leave to join the proceedings and was accordingly enjoined in the proceedings to protect its interests. It then sought refund of the purchase price paid. However before the purchaser could proceed with its application, the learned judge now Court of Appeal Judge Hon. Koome J who was handling the objection proceedings, dismissed the objection proceedings in her ruling of 10<sup>th</sup> March 2010.

[3] On the assurance that there was no objection proceedings pending, the purchaser paid the balance to the decree holder/plaintiff and proceeded to file an application for confirmation of sale as the law requires. Before the hearing of the purchaser's application for confirmation of sale, Eco-bank, filed another application under order 22 rule 75 of the Civil Procedure Rules, seeking to set aside the sale on the following grounds:-

***i. THAT prior to the public auction the subject property was charged to the applicant- Eco Bank.***

***ii. THAT there existed a valid charge entered in favour of the applicant for the advancement of the credit facility to the defendants/judgment debtors prior to the public auction, and thereafter the decree holders were not entitled to sell the property to the members of the public through a public auction, and in addition that the sale was fraudulently conducted in the sense of failure to disclose on the part of the decree holder and this amounted to fraud and concealment of essential facts to the bona fide purchaser, and as such urged the Honourable court to set aside the sale on those cited grounds.***

[5] The purchaser asserted that it was not aware of the existence of a charge and the information was not within its knowledge of the purchaser. It only noted this fact when the application was lodged, but it could not actually ascertain the veracity of the allegations of merit of the application since the decree holders/plaintiffs through their advocates had also contested and filed a response stating that there existed no valid charge entry against the property prior to the public auction. Hon. Havelock J gave a ruling on 21<sup>st</sup> November 2011, and in his ruling the learned Judge agreed with the applicant's (Eco-Bank) assertions and accordingly set aside the sale. However the judge did not order for the refund of the purchase price, instead he directed the purchaser to file a formal application on that behalf. The decree holders being aggrieved by the decision of the Hon. Court preferred a review of the decision but again pursuant to the ruling dated 12<sup>th</sup> February 2013 the Honourable court upheld its earlier decision/order/ruling. The decree holders further being aggrieved by the court's decision, moved to the Court of Appeal, the same was heard by a three judge bench consisting of Hon. W. Karanja JA, Hon. P.M Mwilu JA and Hon. W. Ouko JA, who dismissed the decree holders' application dated 15<sup>th</sup> March 2013 which sought to set aside Hon. J. Havelock's decision of **21<sup>st</sup> March 2011 and 12<sup>th</sup> February 2013**. It was now final that the sale was set aside. It appears the decree-holder had fraudulently disposed of the subject property when knowing very well that there existed a valid charge against the subject property.

[6] The remedy now available to the purchaser is the refund of the purchase price plus interest as provided in Order 22 rule **78** of the Civil Procedure Rules now that the sale was set aside under Rule **75**. The court had already granted and ordered the decree holders/plaintiffs to refund the purchase price of

Kshs. 50,000,000/= on 28<sup>th</sup> June 2014 and ordered that the parties agree on the applicable interest to be paid to the purchasers. But when the matter was slated for mention on the 8<sup>th</sup> day of October 2014 it appeared that the decree holders had not committed to or given any offer on the appropriate interest payable. This prompted **Hon. Gikonyo J** to order that the parties file their written submissions for determination of the issue on interest by the court. According to the purchaser, the court should determine:

- i. Whether the Decree holders/plaintiffs are to be held liable to pay interest on the total amount of Kshs 50,000,000/= a sum which was paid by the purchaser on 18<sup>th</sup> December 2009 (Kshs. 12,500,000) and on 21.6.2010 (Kshs. 37,500,000) respectively.
- ii. And the rate of interest payable thereof.

[7] The purchaser urged that the decree holders/plaintiffs sold the suit property I.R No 15855 L.R No. 37/26213 to the purchaser through a public auction on **18<sup>th</sup> December 2009** while knowing that the subject property had been charged to Eco-Bank. They did not disclose this material information to the purchaser or any other member of the public who participated in the public auction on 18<sup>th</sup> December 2009. This court and the Court of Appeal found that the suit property was fraudulently sold by the decree holders when there was in existence a valid charge on the property. The purchaser had borrowed the sum of Kshs. 50,000,000/= from Equity Bank to purchase the suit property. It anticipated converting the property to a commercial enterprise and earning income. But, the purchaser from 18<sup>th</sup> December 2009 up to date- has been servicing a bank loan with interest at obtaining commercial bank rates. It has been deprived of the property and the money paid. In addition, the decree holders have engaged the purchaser in length and unnecessary litigation, thus, making him to incur a lot of costs. He has paid the loan of Kshs. 50,000,000/= since 2009 and he continues to pay it to date. Therefore, the decree holders should pay interest on the sum paid together with interest at commercial rates from the period of 18<sup>th</sup> November 2009 to date. The purchaser has been paying and servicing the loan at Equity bank at an interest rate of 18% - 19% which will come to Kshs. 38,000,000/= (thirty eight million). The purchaser has been subjected to economic hardship by the decree holders. Costs should also be awarded to the purchaser. The interest of the purchaser should be secured by way of prohibitory order against the listed decree holders/plaintiff's properties. The orders herein should operate as judgment of the court to facilitate execution process owing to the fact that the decree holders have expressed their unwillingness to pay.

### **The Decree-holders opposed application**

[8] The decree-holders stated that consent order between the Purchaser and the Decree-Holders on Prayer 2 of the Purchaser's application has been recorded on refund of Kenya Shillings 50,000,000/= and that the issue of interest to be decided by the Honourable Court if parties were in disagreement. The prayer for refund sought interest on Kshs. 50,000,000/= from 18<sup>th</sup> December 2009, and yet evidence the record shows Kshs. 37,500,000/= the balance of purchase price may not have been paid any time earlier than 21<sup>st</sup> June 2010. The Honourable Court has previously been informed by Counsel for the Decree Holders that two of the 3 Administrators of the Estate of the deceased, namely Isha Awo Shariff and Towshida Awo Shariff were out of the country, Isha Awo Shariff now a married woman resident in Egypt and Towshida Awo Shariff temporary in England but was expected in the Country in December 2014. Mehuba Gelan Kelil their step mother the only other Administrator currently in the Country was in the absence of the other two Administrators incapable of making any decision. The amount involved is substantial. The court should allow for the return of Towhida Awo Shariff for negotiations to be carried through. The Purchaser's plea on interest at "commercial" rates is onerous and a form of retribution which is not in resonant with the facts of the case and certainty not in the spirit of provisions of Sections 50, 51 and 52 of Registration of Land Act. Both the Purchaser and the Decree-Holders are victims of frauds by Eco Bank K Ltd in collusion with Sasa General Investments Ltd and the Judgment Debtor: See Koome J's ruling aforesaid.

[9] For as long as the Purchaser's claim of interest is predicated on the proposition that the Decree-Holders are villains, it is misconceived as rulings by Koome J on 30<sup>th</sup> October 2009 and 5<sup>th</sup> March 2010 will show entry of a charge on the register of the title in question was subsequent to the prohibitory order

and has been found by the Honourable Court to be fraudulent i.e. invalid. The Purchaser has in the proceedings filed no less than 5 applications;

- i. In or about December 2009 for refund of the deposit.
- ii. In 2010 for confirmation of sale;
- iii. In January 2011;
- iv. On 2<sup>nd</sup> February 2012; and
- v. The current application for refund.

In none of the applications (i), (ii), (iii) and (iv) did the Purchaser demonstrate any mala fides, misrepresentation or fraud against the Decree-Holders and to do so now in total disregard of the evidence on record and the decisions by Koome J finding the charge a prejudicial fraudulent transaction may be convenient way of departure that does little to advance the course of justice.

[10] Prayer No.3 of the Application cannot be granted in view of provisions of Order 21 Rule 6 of the Civil Procedure Rules which reads:

***“6. Where there is a prayer for a judgment the grant of which would result in some alteration to the title of land registered under any written law concerning the registration of title to land, a certified copy of the title shall be produced to the court before any such judgment is delivered.”***

The Decree-Holders implored the Honourable Court to allow them a little more time to engage the Purchaser and resolve the issues at hand.

## **DETERMINATION**

[11] I wish to resolve one issue quickly, i.e. on prohibitory order. Contrary to the arguments by the decree holders, the court may issue an inhibition or prohibitory order under section 68 and 70 of the Land Registration Act in such circumstances as in this case; to prohibit for a particular time, or until the occurrence of a particular event, or generally until further order, the registration of any dealing with the land affected. And as long as the inhibition remains registered, any instrument that is inconsistent with the inhibition will not be registered. Indeed an inhibition was granted by the court with the consent of the parties. But for avoidance of doubt, I hereby formally confirm and grant an inhibition to be registered in the properties listed in the application. The conduct of the decree holders and especially the fact that they are not generally within the jurisdiction of this court, justifies issuance of inhibition against the estate property. That hurdle is gone. I will move to the next issue.

[12] The thrust of the matter is whether interest is payable on the refund of purchase-money paid to the decree holders, and if so, what rate is to be applied? By consent of the parties, it was agreed that the decree holders shall refund the sum of Kshs. 50,000,000 to the Purchaser except that the issue of interest payable was left for the court to determine. That makes my work easier. I, however, note that some of the arguments presented by the purchaser and the decree-holders hinge on substantive issues which are yet to be decided by this court as between the substantive parties in the suit. I have in mind such matters as alleged fraud by Eco Bank, validity of charge, registration of prohibitory order, sale of suit property by Eco Bank in exercise of statutory power of sale, etc. Therefore, I will not discuss these issues or express any opinion on them which could hurt the other pending applications. I will deal straight with the question; whether interest is payable on the refund of purchase-money of Kshs. 50,000,000, and if so, the appropriate rate thereto.

[13] Order 22 rule 78 of the Civil Procedure Rules is very clear that, where a sale of immovable property has been set aside under rule 75- as is the case here- the purchaser shall be entitled to an order for payment of his purchase-money, with or without interest as the court may direct, against any person to whom it had been paid. Therefore, the court has discretion to make an order for interest and the rate thereof on the purchase-money being refunded. I note that the decree holders did not really put up any formidable argument on interest except stating that; a) they were also victims of the alleged fraud committed by Eco Bank; and 2) an order of interest at commercial rate is a form of retribution on the

victim. The Purchaser has shown that the decree holders were aware of the interest of Eco Bank in the suit property but failed to disclose this information to the purchaser or any other member of the public who participated in the public auction. The purchaser has also shown that the purchase price which he paid was proceeds of a loan he had obtained from Equity Bank for that purpose. It has also shown that it has been paying on the loan an interest at the rate of between 18 and 19%. It is noteworthy that, despite the acknowledgement of the purchase price and promises to make a refund, the decree holders have not paid a single cent to the purchaser. The defiant continued even after the court formally ordered with the consent of parties for the refund to be made. This is most unfair conduct exhibited by the decree holders. All these things suggest only one way of doing justice in the matter; that is, the decree holders should pay interest on the purchase-money paid to them by the purchaser. Accordingly, I find and order that interest is payable on the purchase-money paid herein i.e. Kshs. 50,000,000. Except, the interest, shall be calculated from 18<sup>th</sup> December 2009 in respect of Kshs. 12,500,000) and from 21.6.2010 in respect of Kshs. 37,500,000 until payment in full. The interest rate applicable shall be 18.5% per annum. It is so ordered. The basis for the court's exercise of discretion is three-fold: First, the purchaser has been deprived of his money which he paid over to the decree holders for all that period it has not been refunded. Secondly, the purchaser has been subjected to repayment of a loan without the benefit of the property he was purchasing; yet the decree holders have kept this money all these years. Therefore, continued retainer of the money by the decree holders is tantamount to unjust enrichment. Thirdly, the decree holders in receiving the purchase-money concealed material information to the purchaser which resulted into economic hardship.

[14] For the avoidance of doubt, and in answer to the submissions by the purchaser, an order for refund of purchase-money with or without interest which is made under Order 22 rule 78 of the Civil Procedure Rules is for all purposes and intends an order of the court. The order receives the authority of the court and is executable as such order in the proceedings in which it is made. Therefore, the way I understanding the law, there is no legal necessity to file an independent suit for enforcement or execution of the order of refund of purchase-money made under Order 22 rule 75 and 78 of the Civil Procedure Rules. I so order and declare. The upshot is that the application dated 30<sup>th</sup> June 2014 is granted with costs to the purchaser.

**Dated, signed and delivered in court at Nairobi this 5<sup>th</sup> day of May 2015**

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**F. GIKONYO**

**JUDGE**