



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**

**Civil Case 933 of 1996**

**CONTINENTAL DEVELOPERS LTD..... PLAINTIFF**

**VERSUS**

**SAUTI HOUSING CO-OPERATIVE SOCIETY..... DEFENDANT**

**RULING**

This is the Decree holder's application dated 3.9.97 for an order that Watts Enterprises be authorised to sell L.R No. Nairobi/Block/82/4264 by Public Auction for recovery of the decretal sum of shs 41,665,857.70 plus interest at the rate of 18% p.a on terms that a sum not exceeding shs 34,600,000 be secured from the proceeds of the sale in favour of Co-Operative Bank of Kenya Ltd. The circumstances of the application are as follows:

Plaintiff agreed to sell the land the subject matter of this application to the defendant - a Co-Operative Society. The land is 83.1 acres and the agreed purchase price was shs 86,839,500. The defendant borrowed shs 60,000,000 from the co-operative Bank Ltd on the security of its other properties and on the security of the land the subject of this matter. It was agreed that a charge to secure the payment of shs 34.6 million would be registered against L.R No. Nairobi 82/4264. Plaintiff agreed to transfer the land to the defendant before it was fully paid on condition that out of the loan of shs 60,000,000 to the defendant it would be paid shs 50,000,000. It was agreed that defendant would pay the balance of the purchase price from the monies which it would be receiving in its bank account with the bank and defendant gave *an* irrevocable authority to the bank to that effect. The bank by a letter dated 15.5.95 confirmed to plaintiff's advocates that it had such irrevocable authority. Plaintiff then transferred the land to the defendant and the defendant charged the same property to the Bank for shs 34.6 million. The charge in favour of the Bank was registered against the title on 29.5.95. The balance of the purchase price was shs 28,155,550. Mrs Alice Mumo the Chief Manager of the Co-operative Bank admits that when the Bank registered the charge, it was aware that plaintiff the owner of the property had not been fully paid. When defendant defaulted in the payment of the balance of purchase price for a long time plaintiff filed the present suit and a consent judgement was entered. According to the consent letter dated 18.7.96, signed by the defendant and the plaintiff's advocates, the judgement sum was for shs 36,812,972 with interest at 18% p.a. costs of shs 750,000 and 15% Vat.

By the time the application for execution of the decree was filed on 5.3.97, the decretal sum was shs 44,018,864. The court ordered the attachment of the property to satisfy the decree and a prohibitory order

in terms of order XXI Rule 49 CP Rules was registered against the title. By that Rule, the attachment is complete and effective upon the registration of the prohibitory order. What remains is the issuance of warrants of sale by public auction. When the application came for hearing before me I thought it just to order that the Judgment debtor be served with the application. On the hearing date, counsel for the Bank attended and the Bank was joined as a party to the execution proceedings. The bank has filed grounds of opposition and a replying affidavit of Alice Mumo sworn on 17.9.97 shows that the defendant owes the bank shs 74,211,598 and not shs 34,600, as stated in the application. In para 7 of the replying affidavit, she states that the Bank is apprehensive that plaintiff cannot be relied upon to secure and protect the interest of the bank in the property fully and that the bank should be allowed to sell the property and realise its security first and then release the balance to the plaintiff. In the course of these proceedings the Bank has put it on record that it has no objection to the property being sold by Public Auction or by private treaty on condition that:

1. The bank lawyers to act in the matter subject to strict accounts
2. Proceeds of sale to be paid to bank's lawyers in the first instance. Proceeds of sale be paid out on the as follows:
  - (a) Full payment to the Bank
  - (b) Balance to the plaintiff
  - (c) Any further balance to the defendant

As for the defendant, the record shows that it bought the property for sale. The defendant lawyer has put it on record that a defendant intends that property be sold. In fact defendant applied for time to sell the property. The court has given defendant time to sell the property since last year but it has not succeeded.

Plaintiff has offered to sell the property at a reserve price of shs 130,000,000 and gives an undertaking that the Bank will be paid first. It is submitted that plaintiff knows the property intimately and it will be able to generate interest among the purchasers. On the other hand, as the bank's Counsel has put it, the bank cannot be ordered to sell the property at any fixed price. It can sell at the market price so long as it acts in good faith.

It has turned out from the evidence of Mrs Alice Mumo that the interest - claimed over the shs 34.6 million is on consolidated debts which defendant has with the bank. She is unable to calculate the accrued interest on the shs 34.6 million because the charges were consolidated. At the same time, she admits that according to the charge the Bank cannot recover more than shs 34.6 million plus interest.

It is clear from the evidence of Alice Mumo that though the defendant defaulted in the repayment of the loan since May 1995 and has not paid any money or interest to the Bank since then, the Bank has not taken steps to realise the charge. The result is that interest has accumulated enormously.

The strongest objection to the application is that the bank has priority and statutory right to sell the property which right cannot be taken away. It is true that the Bank as a chargee has a statutory right to realise the security in case of default by the chargor. But it should be remembered that the charge does not give the Bank any proprietary right over the property. The charged property still belongs to the defendant and the charge is a mere encumbrance on the property which encumbrance is required to be disclosed in the notification of sale (see Order XXI Rule 61(2) CP Rules). As section 73 (c) of the Registered Land Act shows any creditor of the chargor who has obtained a decree for sale of the charged land, lease or charge may require the chargee to transfer the charge to him on his tendering to the chargee the sums payable under the charge. The fact that a charge exists as an encumbrance on the property does not stop the owner from selling the property subject to the charge or stop any creditor of the chargor from obtaining a decree for attachment of the charged property. It is lawful for the court to make an order that any charged property be sold subject to the charge - (see for instance section 96 of the Transfer of the Property Act). If the charged property is sold subject to the charge what the chargee is entitled to is a first priority on the

proceeds of sale after payment of the expenses of the sale. Plaintiff has obtained a decree for the sale of the charged property. The bank has not applied for an order to raise the attachment in accordance with Rules of procedure (see order XXI Rule 55 to 58 CP Rules). As the attachment still stands the application and the bank's objection to the sale is in the nature of proceeding to settle the terms of sale of the attachment property. In conclusion, there is nothing in law to stop the court to order the sale of the attached property subject to the charge.

Moreover, this is a case where the court has to protect three competing interests - the interest of the chargee, the interest of the plaintiff and the interest of the defendant. None of the three interested parties can be trusted to protect the interest of the others. If the Bank has to sell the property, it will take longer to sell the property than if the property is sold through the order of the court because the bank will have to give the chargee three months notice. It is unlikely that the property will be sold at its true market value because the bank is not required to sell at any price so long as it acts in good faith. The Bank has consolidated the charges and calculated interest due not on the principal sum of shs 34.6 million but on the consolidated charges thereby showing that if the bank is allowed to sell the property, it will first recover all the debts owed to it by the defendant and not merely the sum secured by the charge. In that event, it is unlikely that the bank will leave any balance to be paid to the plaintiff. The Bank has no authority to consolidate the charges except in cases provided in S.84 of the Registered Land Act. We have not received any evidence that the consolidation of the charges in this case is lawful.

In the circumstances of this case it is just that the attached charged property be sold by public auction subject to the charge. Consequently, I allow the application with costs to the extent that and I order that:

1. The attached property be sold by public auction subject to the charge by co-operative Bank by Watts Enterprises subject to a reserve price of shs 140,000,000/-
2. The whole of the proceeds of sale be paid into court and distributed as follows:
  - (a) First, to the auctioneer for the expenses of the sale and auctioneer's charges which shall be assessed by court if not agreed
  - (b) Second, to Co-operative Bank for the amount secured by the charge - that is to say
    - (i) The principal sum of shs 34.6 million plus interest as agreed in the charge and any other bank charges related to the charge
    - (ii) The interest on the amount secured by the charge to be calculated on the principal a sum of shs 34.6 million and not on the consolidated charge, (iii) The amount secured by the charge to be determined by the court if not agreed
  - (c) Thirdly - to the plaintiff for the decretal sum plus interest and costs to date
  - (d) Fourthly - Balance, if any, to the defendant (J.D)
3. Liberty to any party to apply in respect of any of the above orders.

*E.M. GITHINJI*

JUDGE

1/10/98

Mr. Rachi present

Mr. Gatonye present

Mr. Rao present