



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**  
**LAND CASE CIVIL APPEAL NO. 84 OF 2005**

**JANEDRA RAICHARD SHAH & 2 OTHERS.....PLAINTIFF**

**VERSUS**

**MISTRY VALJI NARAN SAMAT.....DEFENDANT**

**RULING**

[1] This court is called upon to determine the applications by either side of the litigation. The defendant being the judgment debtor filed a Notice of Motion dated 5<sup>th</sup> August and urged the court to grant to him orders as follows:

***(i)(Spent)***

***(ii) (Spent)***

***(iii) That the warrants issued to Autoland Auctioneers be recalled.***

***(iv) That the costs of this application be born by the plaintiff.***

[2] The gist of the application and its sole foundation is that pursuant to the decree issued in favour of the plaintiff the Deputy Registrar issued a warrants of attachment and sale dated 26.2.2016 to Ms.Jakima Auctioneers. Those warrants appear to have expired on their due date disclosed as 26.5.2016.

[3] There are other warrants issued to the same auctioneer and dated 7.6.2016 apparently issued pursuant to the request by the Auctioneer by the letter dated 31.5.2016. There is nothing to show that these were extended warrants or reissued.

[4] That reissue is of course the genesis of the application now before court. The request was merely made by the auctioneer in person and without reference to the plaintiffs advocate who by a letter of 14.6.2016 wrote to the Deputy Registrar protesting the issue and requesting the court to cancel warrants as another auctioneer had been preferred after JAKIMU failed to execute the warrants dated 26.2.2016.

[5] That controversy as to which of two warrants found itself before the Deputy Registrar who on 20.7.2016 commented and found that the decree holder was within its rights to withdraw the instructions to JAKIMU AUCTIONEERS and to appoint another auctioneer in his place. He therefore validated the warrants issued to autoland auctioneer to the proceed with the attachment by granting orders to brake into the judgment debtor premises for purposes of seizing the proclaimed goods.

[6] To this court that history seems sufficient to dispose of the applications before the court regarding the validity of the warrants issued on 17.6.2016 to autoland Auctioneers. I say it is sufficient to dispose of the dispute in that under Order 49 Rule 7(2) Civil Procedure Rules, a party aggrieved by a decision of the Deputy Registrar has a recourse to the court by way of a Appeal. My reading of the court file reveal with no such Appeal has been filed. I am therefore not mandated to interfere otherwise until properly moved.

[7] There being an order by the Deputy Registrar that the warrants are valid which order remains to be upset, I hold the view that the application seeking to have the same warrants cancelled is misconceived. It lacks merit and is therefore dismissed. Having been so disposed off, the orders ground upon it must go with it.

[8] There is however the second application by the Decree-holder dated 8.8.2016 which the parties agreed to be considered as an opposition to the judgment debtors application. That application seeks orders that:-

***(i) The Applicants seek to obtain the sum of ksh.20,318,675.00 deposited in court in settlement of the decretal sum herein.***

***(ii) The amount ought to be released forthwith since it neither serves any purpose remaining in the court's bank account nor does it attract any interest therein, a situation which is prejudicial and a loss to the Applicant.***

***(iii) It is on the basis of the deposit of the sum in court that the Defendant obtained stay of sale of his immovable assets in execution of the judgment which was due to take place on 06/08/2016.***

***(iv) There is neither an order to deposit the decretal sum in court nor an order to retain it there.***

***(v) The Defendant had been denied stay order both in this court and the court of appeal.***

***(vi) Unless this application is certified urgent and the money released instantly, the Plaintiffs/Applicants will suffer irreparable loss and damage.***

[9] In the court's opinion the only prayer that merits consideration by the court is prayer No.2.

[10] I say only it merit consideration because the other prayers being expressed as alternatives can only be granted as such alternatives and not in conjunction with the prayer for release of the funds deposited in court. Additionally prayer 3 is the antithesis of the outcome of the judgment debtor's application. If the judgment debtors application were to succeed, that prayer would fail without the need to say so. Now that the judgment debtor's application has failed, it goes without saying that to grant the prayer would be to be superfluous.

[11] Equally prayer No.4 would only be relevant if there was any other substantive matter to be determined in the file which I doubt now that the judgment debt has been settled by payment into court. However more substantively we now have the right to access to justice under Article 48 of the constitution. That right to this court is so profound and like other fundamental freedom should not be limited lightly highly by anybody including the court unless reasons for such limitation were to find a justification under Article 24.

[12] For the instant case, I have seen nothing about the judgment debtor's conduct that is so loathful and detestable as to warrant the drastic order to bar it from filling other applications. I say he should not be garged because, the duty of the court is to do justice and should the judgment debtor come back to court with an application which the court, at the time, finds unmerited there is also the remedy in the Decree holder being compensated by an award of costs.

[13] Now back to the prayer for the release of the sums deposited in court. Order 22 Rule 1 of the Civil Procedure Rule provides that one way of settling a decree is by payment of the decretal sum into court.

The law provides:-

Order 22 Rule 1

ORDER 22 – EXECUTION OF DECREES AND ORDERS

*Modes of paying money under decree [Order 22, rule 1.]*

*[1] All money payable under a decree or order shall be paid as follows—*

*(a) into the court whose duty it is to execute the decree;*

*(b) direct to the decree-holder; or*

*(c) otherwise as the court which made the decree directs.*

[14] The court takes the view that when the Judgment debtor effected the **Reatime Gross Transfer Settlement (RTGS)** of the sum of Kenya Shillings twenty million, three hundred and eighteen thousand, six hundred and seventy five [2,318,675] on 3.8.2016 it did so pursuant to the cited provision of the law. He in doing so settled the sum under the decree in favour of the applicant. He cannot be faulted neither can it be saddled with the burden of further attachment thereafter. The parties and their counsel are bound to assist the Court meet its objective of proportionate and timely disposal of cases. To hold the deposit into court without an application for stay and in the absence of any appeal as known by law would be to counter overriding objective of the court and thus unlawful. To this court even if there was to be an application for stay pending appeal, such would not justify being granted because, as yet there is no appeal filed in the Supreme Court.

[15] The upshot of all the foregoing is that, the judgment debtor application dated 5.8.2016 lacks merit and is dismissed with costs. Being standing so dismissed, the decree holder's application dated 8<sup>th</sup> august, 2016 is allowed in terms of prayer 2 and 5 on terms that the sum deposited in court be released to the decree holders Advocate forthwith. The costs of that application by the decree holder are awarded to the decree holder.

[16] It is so ordered.

**Dated, signed and delivered at Mombasa this 19<sup>th</sup> day of August, 2016.**

**P. J. O. OTIENO**

**JUDGE**

19/8/2016

Before P. J. O. Otieno J

Court assistant- Linda

Court

Ruling read and delivered in the presence of Mr. Khatib for the judgment debtor and Mr. K'Bahati for the decree holder.

**P. J. O. OTIENO**

**JUDGE**

Mr. Khatib

We apply to be supplied with copies of ruling and the proceedings. We equally seek leave to appeal if it be necessary.

We also apply that the auctioneer files their bill in court for assessment by the taxing officer.

Mr.K'Bahati

We have no objection to the proceedings and ruling being supplied. For the application for leave to appeal, we submit that a formal application to enable us respond, there being no right of appeal.

On the application for the auctioneer to file his bill, it is not for the court to order parties to file bills.

Mr. Khatib

We fear that another attachment will issue. We still fear that unless the court orders otherwise the auctioneer will attempt to attach.

### **Court**

1. Let the typed and certified copies of proceeding and judgment be availed to the judgment debtor upon payment of the requisite court fees.
2. I agree with the decree holder that it will be desirable that a formal application for leave to appeal be made to enable them respond thereto. I order that if the judgment debtor desires to appeal, a formal application be filed and served.
3. Having said that the decretal sum has been deposited in court in settlement of the decree, any question that may arise as to additional costs by the parties or the auctioneer can only be determined by the court being moved appropriately. For avoidance of doubt, to this court the decretal sum has been tendered and it would be unjust to have any execution issue against the judgment debtor, just now even on account of unascertained auctioneer fees.

**P.J.O.OTIENO**

**JUDGE**