



THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 186 OF 2010

BETWEEN

TRIPPLE EIGHT CONSTRUCTION LIMITEDPLAINTIFF

AND

CHINA PETROLEUM LIMITED 1ST DEFENDANT

KENYA PIPELINE COMPANY LIMITED2ND DEFENDANT

RULING

1. The application before the court is the Notice of Motion dated 11th March 2020 filed by the 1st defendant who is the Judgment Creditor. It is supported by the affidavit of Peter Gichuki King'ara, its advocate on record, sworn on 11th March 2020. The application is made under **Order 22 rule 48** of the **Civil Procedure Rules** and it seeks the following relief:

[2] That this Honourable Court do issue a warrant of attachment by way of Prohibitory Orders prohibiting the Plaintiff/Judgment Debtor either by itself or its agents from Transferring or charging Land Reference No. 37/256/3 or any of the Apartments therein, and this order be registered by the Chief Land Registrar in the relevant Land Register pending further orders.

2. In substance, the application is for execution of a decree issued in favour of the 1st Defendant on 25th March 2013 for Kshs. 10,763,544.00 with interest thereon at court rates from the date of filing suit until payment in full. The 1st Defendant now claims Kshs. 21,312,616.00 now due which remains unsatisfied. It seeks to execute the decree against the property known as LR No. 37/256/3 situated on Kisauni Road, Nairobi West within Nairobi County ("the subject property") registered in the Plaintiff's name.

3. The Plaintiff has opposed the application through the affidavit of its director, Hon. Rigathi Gachagua, sworn on 21st May 2020. The thrust of the deposition is that the subject property is the matter in dispute in **HCCC No. 1506 of 2000 consolidated with HCCC No. 993 of 2002, Tripple Eight Investments (Kenya) Limited v City Finance Bank and Another**. It contends that counsel for the 1st Defendant was aware of and failed to disclose to this court that the matter was pending judgment. In that case and by an order issued on 9th April 2008, the court appointed a receiver to manage the subject property, collect rents and deposit the money in a joint account in the names of the advocates for the parties. The Plaintiff accused the 1st Defendant of acting in bad faith as its advocate was one of the signatories of the joint account and that it pre-empted the pending suit by filing this application.

4. In his further affidavit sworn on 2nd June 2020, Mr King'ara contended that subject property is the only property owned by the Plaintiff and that the 1st Defendant only seeks to preserve it. He deponed that that the court in the pending matter did not issue any injunctive relief and that the subject property was not encumbered. He further deponed that, "All the Decree holder seeks is to safeguard the property to ensure that it is not transferred during pendency of the suit."

5. Both sides filed brief written submissions in support of their respective positions which I have considered. The application is premised on **Order 22 rule 48** of the **Civil Procedure Rules** which provides as follows;

48. Where the property to be attached is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from

transferring or charging the property in any way and all person from taking any benefit from such purported transfer or charge, and the attachment shall be complete and effective upon registration of a copy of the prohibitory order or inhibition against the title to the property.

6. The objection raised by the Plaintiff to the application is that the ownership of the subject property is disputed in a pending case. That the application is brought in bad faith as counsel for the Plaintiff was always aware of the dispute and that in any case, the 1st Defendant would have recourse to an account in which rent has been collected since 2008 and to which the Mr King'ara is a signatory.

7. While I accept there is a dispute regarding ownership of the subject property, a copy of the certificate of title shows that the Plaintiff is the registered proprietor. The subject property remains unencumbered as things stand and it is a property owned by the Plaintiff capable of being attached. A Judgment Creditor has the right to select the mode of execution it deems fit and cannot be directed to forebear execution merely because an alternative mode is preferred by the Judgment Debtor.

8. I do not see any reason why the Judgment Creditor should be denied the fruits of its judgment by the issue of a prohibitory order. Since the subject property is unencumbered, a party prejudiced by attachment is entitled to apply for interim order of relief in the pending case. Further, any party with a legal or equitable interest in the subject property attached has the right to lodge objection proceedings under **Order 22 rule 52** of the **Civil Procedure Rules**.

9. I allow the Notice of Motion dated 11th March 2020 and order as follows:

(a) A Prohibitory Order be and is hereby issued prohibiting the Plaintiff/Judgment Debtor either by itself or its agents from transferring, charging or in any way dealing with **Land Reference No. 37/256/3** or any of the Apartments thereon and this order be registered by the Chief Land Registrar in the relevant Land Register pending further orders of this court.

(b) Costs of the application be in the cause.

DATED and DELIVERED at NAIROBI this 21st day of AUGUST 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Wambugu instructed by Njoroge Regeru and Company Advocates for the plaintiff.

Mr King'ara instructed by Gichuki King'ara and Company Advocates for the 1st defendant.