REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 634 OF 2018

BANK OF AFRICA KENYA LIMITED.......................................APPLICANT

VERSUS

MUGENGA HOLDING LIMITED.....................................1ST RESPONDENT

THE PRINCIPAL SECRETARY,

STATE DEPARTMENT OF INTERIOR....2ND RESPONDENT/GARNISHEE

HON. ATTORNEY GENERAL..3RD RESPONDENT

RULING

This Originating Summons was taken out by the applicant which is a financial institution against the respondents herein for the substantive order that a sum of USD 951, 509 Cents 14, owed by the 1st respondent to the applicant as at 21st November, 2018 be attached and released directly by the Garnishee to the applicant through its advocates. The 2nd respondent is cited as the Garnishee in these proceedings.

There is a supporting affidavit sworn by the Head of Recoveries of the applicant. There is a replying affidavit sworn by counsel appearing for the Garnishee and the 3rd respondent. The 1st Respondent does not oppose the application. The ruling herein shall be based on affidavit evidence, a fact decided upon by counsel for the parties with the concurrence of the court.

There is a judgment of this court in relation to HCCC No. 398 of 2009 in favour of the 1st respondent among others, against the 3rd respondent herein, and the Commissioner of Police who was the 1st defendant therein but whose supervision and accountability is under the Garnishee.

It is the applicant's position that it holds a mortgage over a matrimonial property registered in the name of the director of the 1st respondent, and the sum cited in the summons is owed as pleaded. This is confirmed by a copy of the debenture annexed hereto which created a charge in favour of the applicant. This has not been denied by the 1st respondent.

There is a Notice of Appeal that has been filed to challenge the judgment of this court aforesaid and also an application for stay of execution thereof annexed to the application. There are no orders issued for stay of execution and therefore the 1st respondent holds a valid judgment and decree thereunder capable of execution. I say so because once a decree has been extracted it is deemed to have crystallised for purposes of execution. There is no contention to the contrary.

The apprehension expressed by the applicant in the application is real and finds favour with the court. The 1st respondent or its directors, who are said to be Ugandans, may not have any assets in Kenya. In the event the decree is satisfied, the proceeds thereof may be out of reach of the jurisdiction of this court and the applicant shall be exposed to great loss.

On the other hand, there is a legitimate expectation on the part of the 1st respondent that whatever monies shall accrue from the decree shall be applied for its benefit. One of those benefits is the discharge of any liabilities that may follow or are to be discharged by the said applicant.

It may not be in the interest of justice for the 1st respondent to lose the property secured under the charge when there is a valid judgement in its favour and the proceeds may are sufficient for the discharge of such liabilities. Both the applicant and the 1st respondent shall be protected by the order sought.

In the circumstances, a Garnishee order commends itself in this case. I am persuaded that the order sought should be, and is hereby granted, in favour of the applicant in terms of prayer 2 of the Originating Summons. Each party shall bear their own costs.

Dated, signed and delivered at Nairobi this 21st Day of February, 2019.

A. MBOGHOLI MSAGHA

JUDGE