



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
MISCELLANEOUS CAUSE NO. 3 OF 2016

YASMIN MOHAMMED ALIDECREE HOLDER

VERSUS

RBS LIMITED JUDGMENT DEBTOR

AND

BHUPESH LAKIHANI 1ST OBJECTOR

SIGHT & SOUND LIMITED 2ND OBJECTOR

R U L I N G

1. There are two Notices of Motion applications before me. The one filed first in time is dated 25th February 2019. This is filed by **RBS Limited**, the Defendant Judgment Debtor (RBS). By that application RBS seeks the following orders:

- a. That this Honourable do find and declare that the execution of decree and in particular the Warrants of Attachment and sale and proclamation of goods by Moran Auctioneers on 18th February 2019 is illegal and wantonly irregular;*
- b. That an order be and is hereby issued for lifting and discharge of the Warrants of Attachment and sale dated 5th February 2019 and issued to Moran Auctioneers pending hearing and determination of this application;*
- c. That an order be and is hereby issued that proper accounts be rendered and a decree be extracted accordingly;*
- d. That if any amounts are found due and owing, the Applicant be given an opportunity to pay by giving a scheme of payment.*

2. The second application is filed by Objectors namely **Bhupesh Lakhani** and **Sight & Sound Limited**. They seek an order for this Court to lift the proclamation and attachment levied by Moran auctioneers.

3. Parties in respect to those two applications relied on the affidavit evidence.

NOTICE OF MOTION DATED 25TH FEBRUARY 2019

4. The Director Shabir Ahmed Bhati of RBS swore the affidavit in support of the application. By it the said affidavit the Director deponed that Judgment, in this matter, was entered by consent dated 14th February 2017 against RBS for Kshs. 12,500,000. That RBS paid **Yasmin Mohamedali Abdulla** the Decree Holder Kshs. 10 million by RTGS (Real Time Gross Settlement) while other payments were made to the Decree Holder by cheques. He deponed that on 18th February 2019 Moran Auctioneers proclaimed personal and household goods of RBS Directors and those of another entity Sight & Sound.

5. The said Director deponed that it was improper and illegal for the Decree Holder to have proclaimed goods belonging to Sight & Sound which is a separate entity to RBS.

6. The Director further deponed that the amounts reflected in the Warrants of Attachment Form Civil 26D and Civil 7D reflected different amounts as due from the Judgment Debtor. As a consequence the Director stated in his said affidavit that the conduct of the Decree Holder was illegal, improper, irregular, unfair and unjust.

7. In response to that application Learned counsel for the Decree Holder swore a Replying Affidavit on 6th March 2019.

8. He deponed that the application is misconceived and bad in law and is intended to delay and deny the claimant's rights to enjoy the fruits of her judgment.

9. The Learned Advocate proceeded to give the background of this. He stated that the Decree Holder was successful in the Arbitration between her and RBS. That Arbitral Award was recognized as binding and enforceable against RBS. That indeed the application for the recognition of the Arbitral Award was granted by consent of the parties on 2nd June 2016. By that consent the Directors of RBS jointly and severally guaranteed the payment due by RBS. Following that consent a decree was issued on 19th July 2016. By further consent parties agreed the decretal sum would be liquidated by monthly installments. RBS only paid Kshs. 10 million but defaulted in making further payments when they were due. As a consequence interest accrued. Further by this Court's Ruling of 30th October 2018 the Court allowed substitution of the amount due from RBS from Kshs. 12,315,000 to Kshs. 13,590,000. The consent of the parties otherwise remained unchanged.

ANALYSIS AND DETERMINATION OF NOTICE OF MOTION DATED 25/02/2019

10. I have considered the parties affidavit evidence and exhibits thereof. Having done so I find the application by RBS to be mischievous to say the least. It is inconceivable that the Directors of RBS can allege that the attachment of their properties is illegal when in fact they, by consent, jointly and severally guaranteed RBS debt to the Decree Holder. The pertinent paragraph which captured that fact is as follows:

“That the Directors of the Respondent company (RBS), namely BHUPESH LAKHANI, RAJASH LAKHANI and SHABIR BHATTI, jointly and severally do hereby guarantee the payment of the decretal sum in the event of default by the Respondent(RBS).”

11. In the light of such clear undertaking it is inconceivable that the same Directors would argue that attachment against them is illegal. That argument is wholly rejected.

12. The Directors argued that there were variations in the amount set out in the Decree Holder's application for execution and the amount set out in the Warrant of Attachment. The Directors were indeed correct in that observation but the error is one that was made by the Court in processing the warrants. The application by the Decree Holder correctly set out the amount execution was sought as Kshs. 1,190,358. The Court instead of issuing warrants for that amount issued warrants for 9,123,301.01 and Kshs. 7,420,586. The Decree Holder, through her Learned Advocate stated that on realizing that error informed Moran Auctioneer the correct figure to obtain in execution. I can indeed confirm that in the Notice of Motion dated 4th March 2019 (to be considered later in this Ruling) has the proclamation of attachment of Moran Auctioneers which reflects the figure the auctioneer was to recover as Kshs. 1,910,358. That is the figure reflected in the Decree Holder's application for execution. The Decree Holder cannot be blamed for that error. It is an error of the Court.

13. I therefore find that the Notice of Motion application dated 25th February 2019 is without merit and is dismissed with costs to the Decree Holder. The Court shall withdraw the Warrants of Attachment issued in error and shall issue Warrants of Attachment reflecting the figure in the Decree Holder's application. Such re-issue shall be at no cost to the Decree Holder.

NOTICE OF MOTION DATED 4TH MARCH 2019

14. This application is filed by Ghupesh Lakhani (1st Objector) and Sight & Sound Ltd (2nd Objectors). They seek an order to lift the proclamation of Moran Auctioneers.

15. In respect to the 1st Objector the ground upon which he seeks the lifting of the proclamation is that the same was carried out on his property when he was merely a Director of RBS.

16. I have fully expressed myself on the consent of the Directors of RBS whereby they guaranteed the debt of RBS. The 1st Objector was one of those that guaranteed that debt. The prayer for lifting of proclamation in respect to the 1st Objector consequently fails.

17. The affidavit in support of the Notice of Motion application is by Bhupesh Lakhani. The said deponent stated that the goods proclaimed by Moran Auctioneers belong both to him and to the 2nd Objector. Other than stating so the deponent did not specify which item of property belong to him and which belong to the 2nd Objector. The deponent simply proceeded to set out the constitutional, as well as other, rights that were violated by the said attachment.

ANALYSIS AND DETERMINATION OF THE NOTICE OF MOTION DATED 4TH MARCH 2019

18. The application simply contains long arguments of alleged violation visited upon the Objectors by the proclamation but makes no attempt to prove what is required by Order 22 Rule 51 of the Civil Procedure Rules. That Rule provides:

“Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the Court and to all the parties and to the decree-holder of his objection to the attachment of such property.”

19. There was no attempt by the 2nd Objector to prove that it had a legal or equitable interest in the proclaimed goods. There were no

receipts or any other proof of ownership of those items by the Objectors. In my view and in my finding this was an application that was made to simply derail the execution process. It is without merit and is dismissed. The costs will be borne by Bhupesh Lakhani.

CONCLUSION

20. In the end the following are the orders of this Court:

- a. **The Notice of Motion applications dated 25th February and 4th March 2019 are dismissed.**
- b. **The costs of the Notice of Motion dated 25th February 2019 shall be borne by the Respondent, RBS Limited.**
- c. **The costs of the Notice of Motion dated 4th March 2019 shall be borne by Bhupesh Lakhani.**
- d. **The Deputy Registrar of this Court shall withdraw the Warrants of Attachment issued herein and shall issue other Warrants of Attachment, free of charge, which warrants shall reflect the correct amount due and payable to the Applicant herein.**

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 24TH day of JULY, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... FOR THE DECREE HOLDER

..... FOR THE JUDGMENT DEBTOR

..... FOR THE 1ST OBJECTOR

..... FOR THE 2ND OBJECTOR