



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.570 OF 2011

BRITISH AMERICAN INVESTMENT COMPANY (K) LIMITED.....PLAINTIFF

VERSUS

NJOMAITHA INVESTMENT LIMITED.....1ST DEFENDANT

GICHUKI KING'ARA & CO. ADVOCATES.....2ND DEFENDANT

RULING

1. Before this Court is the Notice of Motion dated 3rd February 2017 by which **BRITISH AMERICAN INVESTMENTS COMPANY (K) LIMITED** (the Plaintiff/Applicant) seeks to for following orders **THAT:-**

“1. SPENT

2. This Honourable Court do issue an order that the Applicant be at liberty to attach and sell either by public auction or private treaty all those properties in Thika known as LR NO.13136/11, LR NO.13136/12, LR NO.13136/13. LR NO.13136/14, LR NO.13136/15 and any other property owned by the Respondent, in satisfaction of the preliminary decretal sum and all costs incurred by the Applicant.

3. The costs of this application be awarded to the Applicant.”

2. The Application which was premised upon **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Order 22 Rule 48 and 68, Order 51 Rule 1** of the **Civil Procedure Rules, 2010**, and all other enabling provisions of the law, was supported by the Affidavit of even date sworn by **NANCY KIRUKI**, the Company Secretary of the Plaintiff/Applicant.

3. The Defendant/Respondent **NJOMAITHA INVEST-MENTS LIMITED**, opposed the application through the Replying Affidavit dated **15th September 2017**, sworn by **MICHAEL NJOROGE MUIGAI** a Director of the Defendant Company. The Application was canvassed by way of written submissions. The Plaintiff/Applicant filed its written submissions on **17th January 2019**, whilst the Defendant/Respondent filed their submissions on **4th May 2019**.

BACKGROUND

4. On **12th August 2011** the parties herein entered into a Sale Agreement in respect of the sale to the Plaintiff of the Defendants properties in Thika being:-

- LR NO.13136/11
- LR NO.13136/12
- LR NO.13136/14
- LR NO.13136/15

The purchase price was agreed at **Kshs.700 Million** out of which a deposit of 10% (**Kshs.70 Million**) was paid by the Applicant upon execution of the Sale Agreement. It was agreed that the completion date would be sixty (60) days from **12th August 2011** that is **12th**

October 2011.

5. On 15th December 2011 the Applicant filed a Notice of Motion seeking a refund of the **Kshs.70 Million** paid as a deposit, on the grounds that they had not been notified of the existence of an injunction order in respect of the suit property obtained by **Suraya Property Group Limited** in Nairobi **HCCC No.385 of 2010**. That application was dismissed on **21st June 2012**. Meanwhile the completion date of **12th October 2011** expired and accordingly the Agreement for Sale was lawfully rescinded.

6. On **10th February 2016**, the parties entered into a consent, which on **15th February 2016** was duly adopted as an order of the Court. That consent included inter alia the following terms:-

“(a)That a Preliminary Decree do issue in favour of the Plaintiff for the payment of a sum of Kshs.63,000,000/= by the First Defendant within the next 6 months from the date hereof.

(b) The issue of what and whether interest or any other sum is payable (if at all) be agreed between the Plaintiff and First Defendant within the next 90 days failing which the same be remitted for the decision of the Judge upon the Plaintiff and the First Defendant making submissions on the same.”

Accordingly the court issued a preliminary decree in favour of the Plaintiff/Applicant for a sum of **Kshs.63,000,000/=** to be paid within six (6) months from **17th March 2016**.

7. By way of an application dated **7th October 2017** the Defendant/Respondents sought a determination from the Court on the interest payable in terms of clause (b) of the consent. The Court ordered that the Applicant was entitled to interest at Court rates from **September 2016** until payment in full.

ANALYSIS AND DETERMINATION

8. I have carefully considered the rival submissions filed by the parties in this matter. The only issue for determination is whether an order ought to issue that the Applicant be at liberty to sell by public auction or by private treaty the 4 named properties as well as any other properties owned by the Defendant/Respondent in order to recover the preliminary decretal amount, and interest accrued thereon.

9. Basically what is before the Court is an application for attachment and sale of unmovable property? The legal position on execution by way of sale and attachment is that, unless expressly exempted by law, any property belonging to the judgment-debtor is liable to attachment and sale in execution of a decree.

10. Section 38(b) of the Civil Procedure Act, Cap 21, Laws of Kenya provides:-

“Subject to such conditions and limitations as may be prescribed, the court may on the application of the decree holder, order execution of the decree:-

a.

b.

c.

d. By attachment and sale or by sale without attachment, of any property”

11. Section 44(1) of the same Act states as follows:-

“All property belonging to a judgment debtor, including property over which or over the profits of which he has a disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf shall be liable to attachment and sale in execution of a decree.” [own emphasis]

12. The Plaintiff/Applicant herein holds a legal and valid decree against the Defendant/Respondent. Therefore any unmovable property belonging to the Respondent as Judgment-Debtor is liable to attachment and sale in execution of that decree. Accordingly **LR NO.13136/11, LR NO.13136/12, LR NO.13136/ 13. LR NO.13136/14, LR NO.13136/15** Thika all being properties owned by the Defendant/Respondent are available for sale in execution of the decree against the Respondent as judgment-debtor.

13. The Respondent submits that there exists no proof that the properties in question belong to them. One need go no further than a look at the Agreement for sale dated **12th August 2011** which is annexure **“PK3”** to the Notice of Motion dated **3rd February 2017**. By that Agreement **Njomaitha Investments Ltd** who are the Defendant/ Respondents offered to sell to the Plaintiff/Applicant the properties known as **LR NO.13136/11, LR NO.13136/12, LR NO.13136/ 13. LR NO.13136/14 and LR NO.13136/15** all located off **Thika Road – opposite Kalimoni Senior School, Juja Area, North East of Ruiru Township**.

14. The Respondent can only offer to sell property that he owns. At no time did the Defendant deny owning the properties in question. Is the Defendant now suggesting that it offered to the Plaintiff for sale property which it did not own? Clearly this submission is a red herring

and is merely an attempt by the Defendant to cloud issues. I find and hold that the properties in question do in fact belong to the Defendant/Respondent.

15. Under the laws specific ways of attachment and sale of different types of properties belonging to a judgment debtor are provided. Attachment of immovable property is achieved through a prohibitory order to prohibit the judgment -debtor from selling, transferring or charging said property in any way. Under **Order 22 Rule 48** of the **Civil Procedure Rules 2010** this is done by the registration of the copy of the prohibitory order against the Title to the property in question.

16. Accordingly I do hereby issue a prohibitory order prohibiting the Defendant/Respondent from selling, transferring and/or charging the subject property in any way. Finally this court allows the Notice of Motion dated **3rd February 2017** and makes the following Orders:-

i. A Prohibitory Order be and is hereby issued stopping the sale, transfer charging or any further dealings in respect of all that property known as **LR NO.13136/11, LR NO.13136/12, LR NO.13136/13. LR NO.13136/ 14** and **LR NO.13136/15** situated in Thika.

ii. The Respondent shall pay to the Applicant the decretal sum within ninety (90) days of today. In default thereof, the attached property namely **LR NO.13136/11, LR NO.13136/12, LR NO.13136/ 13. LR NO.13136/ 14** and **LR NO.13136/15** situated in Thika to be advertised and sold either by public auction or private treaty to recover the total outstanding decretal sum of **Kshs.63,000,000/=** together with further accrued interest thereon until payment in full.

iii. The Respondent shall grant free and unlimited access to the subject property for the purpose of inspection and valuation.

iv. Costs of this application shall be borne by the Defendant/Respondent.

Dated in Nairobi this 20th day of December 2019.

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Justice Maureen A. Odera