



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**MILIMANI COMMERCIAL AND ADMIRALTY DIVISION**

**MISC. APPLICATION NO. 104 OF 2017**

**GICHUKI KING'ARA & CO.**

**ADVOCATES.....APPLICANT/ DECREE HOLDER**

**AND**

**EMPERIUM ESTATE LTD.....RESPONDENT/ JUDGMENT DEBTOR**

**RULING**

1. This ruling relates to a Notice of Motion Application dated 8<sup>th</sup> March 2018, brought under the provisions of Section 3A of the Civil Procedure Act, Order 22 rule 48 (1) and (2), Order 49 Rule 7 (1)(b)(x) of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.
2. The Applicant is seeking for orders that:
  - a) *Spent*
  - b) *That this Honourable court do issue a warrant of attachment by way of a Prohibitory Order prohibiting the Respondent/Judgment Debtor either by itself or its agents from transferring or charging property namely, L.R NO.3734/417 and any of the apartments therein, and this order be registered by the Chief Land Registrar on the relevant Land Register pending further orders.*
  - c) *That the Deputy Registrar do execute the prohibitory orders annexed hereto.*
  - d) *That the costs of this application be provided for.*
3. The Application is based on the grounds on the face of it and is supported by an Affidavit dated 8<sup>th</sup> March 2018, sworn by Peter Gichuki King'ara an Advocate of the High Court of Kenya. He avers that on the 15<sup>th</sup> of November 2017, an Advocates-Client Bill of Costs herein was taxed and Certificate of Costs issued on the 16<sup>th</sup> of November 2017.
4. Subsequently, judgment was entered on the taxed costs on 2<sup>nd</sup> February 2018, for the sum of Kshs.10,894.062 with interest at the rate of 14% per annum with effect from 16<sup>th</sup> November 2017 until payment in full.
5. On 7<sup>th</sup> February 2018, the Decree of Court was issued which remains unsatisfied to date and neither has the certificate of costs, judgment and decree been challenged nor an Appeal or Review been preferred against them.
6. That on 21<sup>st</sup> March 2017, the Respondent was ordered to deposit the sum of Kshs. 17,746,919.6 into Court or in a joint interest earning account in the names of the Advocates for the parties as security for satisfaction of the amount taxed. The Respondents have not complied with that.
7. The Applicant avers that other than Apartments built on the property, L.R No. 3734/417, which are currently on offer for sale through the firm of Kiragu & Mwangi Estate Agents, there is no other known asset of the Respondent. That upon the sale thereof the Respondent will transfer the land to a holding Company made up by the purchasers.
8. Therefore it is in the interest of fairness and justice and in the greater public interest that an order be made prohibiting the transfer of the

mother title prior to payment of its fees.

9. I have considered the Application, the grounds and the Affidavit in support and I found the issue for consideration is whether the Applicant has met the requirements of the law for grant of the orders.

10. The Application is premised on the procedural provisions of Order 22 Rule 48(1) of the Civil Procedure Rules, which stipulates that:-

*“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 persons 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.”*

11. It may suffice to appreciate what a Prohibitory order entails and the circumstances under which it may be issued. A Prohibitory order is an order obtained from the Court prohibiting a judgment debtor from effecting any dealings in relation to his or her landed properties or interest in land held by him or her.

12. In monetary claims, where the judgment is obtained for the payment of money, in the event that a judgment debtor refuses or neglects to comply with the judgment made by the Court, the judgment creditor can proceed to obtain a Prohibitory order, where the properties of the judgment debtor involves land. After obtaining the order, the judgment creditor can proceed to obtain the order for Sale to auction the piece of land to recover the same. However, it may not be justified to obtain a Prohibitory order where the land is charged to a bank or financial institution for a credit facility.

13. It is therefore important that the Applicant conducts a search on the subject property of the debtor with the District Land Registry where the property is, if the result of the search is positive, then an abstract of the land title should be requested for and provided to the Court.

14. The Court will only consider issuing a Prohibitory order ex parte upon production of an abstract of title or other sufficient evidence of the title or interest of the judgment debtor.

15. The next question to consider is whether the Court should grant the orders sought. The statutory provisions of Section 38 of the Civil Procedure Act, states that:-

*(1) 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) by delivery of any property specifically decreed;*

*(b) by attachment and sale, or by sale without attachment, of any property;*

*(2) An application made under this section shall—*

*(a) specify the land to which it relates;*

*(b) specify the disposition alleged to be prejudicial;*

*(c) be served on—*

*i. the person who has made the disposition;*

*ii. the person in whose favour the disposition has been made;*

*iii. any other person involved in the disposition from whom compensation is sought.*

16. In furtherance of the above provisions, Section 44 (1) of the Act provides that:-

*“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.*

17. In considering the facts herein I find that indeed the Advocate-Client Bill of Costs was taxed on 15<sup>th</sup> November, 2017 and a Certificate of Costs issued the following day. Judgment was then entered thereon for the sum stated herein on 2<sup>nd</sup> February 2018, and it is allegedly unsatisfied.

18. The Court record reveals that the Court heard a Notice of Motion Application dated 8<sup>th</sup> March, 2017 and granted the Applicant orders to the effect that the Respondents deposit the sum of Kshs 26,923,183, in an interest earning account in the joint names of the parties to secure costs due to be taxed. The Court is informed that there has not been compliance with this order.

19. Subsequently upon filing the Application under consideration the Court as a matter of precaution ordered the same be served. I have seen an Affidavit of service sworn by Daniel Gatutha a licenced Court Process server, that he served the Respondent with the hearing notice of this Application but apparently they did not appear in Court. The history of the matter reveals on all occasions the Respondent does not appear despite service.

20. Be that as it were, I note that the Applicant has annexed on the Affidavit in support of the Application, copies of the Title and last transfer documents relating to the subject land. The last entry indicates transfer to "Emporium Real Estate limited". It is not clear by who and why. However, the Charge to Barclays Bank of Kenya was discharged on 8<sup>th</sup> February, 2012.

21. The Court is satisfied that the Applicant has made out a case for grant of the Prohibitory order sought and in that regard I grant I allow the Application in terms of prayers 2,3 and 4 thereof.

22. It is so ordered.

Dated, delivered and signed in an open Court on this 19<sup>th</sup> day of March, 2018 at Nairobi.

**G. L. NZIOKA**

**JUDGE**

**In the presence of:**

Mr. King'ara for the Applicant

No Appearance for the Respondent

Mr Lang'at -----Court Assistant