



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
MISC APPLICATION . NO.546 OF 2015
IN THE MATTER OF ARBITRATION ACT, 1995

AND

**IN THE MATTER OF THE ARBITRATION DISPUTE BETWEEN THE CONSTRUCTION OF
A PROJECT KNOWN AS ELYSEE PLAZA ON L.R. NO .2/186 NAIROBI**

BETWEEN

**CHINA YOUNG TAI ENGINEERING
COMPANY LIMITED.....APPLICANT**

AND

**RAVASAM DEVELOPMENT COMPANY
LIMITED.....RESPONDENT**

AND

EQUITORIAL COMMERCIAL BANK LIMITED.....INTERESTED PARTY

RULING

1. The Application before Court is hinged, substantially, on the proposition that “**there is nothing in law to stop the Court to order the sale of the attached property subject to the charge**” (as per Githinji J. (as he then was) **in Continental Developers ltd Vs. Sauti Housing Cooperative Society** [1998] eKLR.
2. That Application is dated 24th February 2016 for the following substantive orders:-
 - b) The Honourable Court be pleased to issue Warrants of Attachment and an order prohibiting the Respondent/Judgement Debtor whether acting by itself, its agents, employees, servants, assigns, successors and/or anyone claiming through or under it, from transferring or charging the property known as ELYSEE PLAZA ON L.R NO.2/186 NAIROBI, Kilimani Road, off Elgeyo Marakwet Road, Nairobi, in any way, and all persons from taking any benefit from such purported transfer or charge against the Respondent/judgment debtor’s said immovable property, pending the satisfaction of the Decree issued herein on the 16th February 2016.

c) The Honourable Court be pleased to issue Warrants of Sale of the Respondent/Judgment Debtor's property known as ELYSEE PLAZA ON L.R. NO. 2/186 NAIROBI, Kilimani Road, off Elgeyo Marakwet Road, Nairobi, in satisfaction of the Decree issued herein on the 16th February 2016.

d) The Honourable Court proceeds to make directions on the terms of sale and distribution of the proceeds of the sale among the parties herein and taking into consideration and cognizance the rights appurtenant to the interested party.

3. The Applicant has a Decree against the Respondent for a sum of Kshs.278,656,582.05 with simple interest thereon at 21% p.a chargeable from 21 days of 30th November 2015 until payment in full.

4. In an affidavit sworn by Qiah Guo Jun on 24th February 2016, the Applicant states that Elysee Plaza standing on LR.No.2/186 (the subject property), Nairobi, Kilimani road is the only known asset of the Respondent and it is apprehensive that the Respondent will sell the property without paying the Decree to the detriment of the Applicant. The Applicant cites an advertisement for sale of the property published in the Daily Nation Newspaper of 10th July 2014.

5. It is common ground that the subject property is charged in favour of Equitorial Commercial Bank Limited (the "Bank" or "Interested Party") for certain facilities granted by the Bank to the Respondent. In the Replying Affidavit of Brian Kilonzo sworn on 21st April, 2016, in response to the Application before Court, the Bank annexes charge documents which show that the subject property is charged to secure some Khs.556,628,010.25.

6. The assistance requested of this Court by the Applicant is for an Order that the property be sold jointly by the applicant and the Bank at a reserve price and the proceeds thereof be put in a joint interest earning account in the name of the Applicant and the Bank's Advocates and the same be equitably distributed to meet the various obligations owed by the Respondent and any surplus be paid to the Respondent.

7. In resisting the Application the Bank draws the Court's attention to ongoing litigation in which the Respondent and Bank are involved. Of particular interest, it was suggested, would be **HCC No.476 of 2015 Ravasam Development Company vs. Equitorial Bank** (herein after "HCC 476 of 2015") and **HCC No. 637 of 2015 Faroute Ravale & Another Vs. Eric Agbeko, Philip Nyambol and Equitorial Commercial Bank** (herein after "HCC 637 of 2015").

8. It is legally feasible for the Court to order for the sale of an attached property which is subject to a charge for purposes of satisfying a Decree of Court. However, the Chargee has first priority on the proceeds of the sale after payment of the expenses of the sale. And the sale must proceed in a manner that does not jeopardize the Chargee's secured position and for that reason any monies towards the Decree can only be paid out after the expenses associated with the sale and the Chargee's debt have been paid in full. And as correctly pointed out by Mr. Mutubwa for the Applicant there is precedent in this respect (**Njoroge Regeru vs. Nanda Baird as the Administrator of the Estate of the lated George Neil Baird & 4 Others** [2015]eKLR and **Continental Developers Ltd Vs. Sauti Housing Cooperative Society** [1998]eKLR.)

9. It is however clear to me that in this instance the moment may not be right for this Court to order sale as proposed by the Applicant herein.

10. At the invitation of parties the Court has familiarized itself with the issues involved in suit No.476 of 2015. One of the issues set up by the Respondent is that the Bank has levied unlawful charges, interests and penalties. In effect disputing the amount demanded from it by the Bank. In that suit the Respondent enjoys a status quo order which has the consequence of barring the Bank from exercising its Statutory Power of Sale. However by the same order the Receiver Manager of the Bank is to continue collecting rent from the subject property.

11. It seems to me that even if I were to allow the sale to proceed as proposed by the Applicant, and the sale were to succeed, the Bank will not be able to access proceeds therefrom until the status quo orders in No. 476 of 2015 are lifted or varied. At the same time, the Bank will have lost the Rental income as the property would have changed ownership to the buyer. That would be to disadvantage the Bank from the time of sale upto the time issues in HCC No.476 of 2015 are resolved. It would amount to relegating the position of the Bank. The Bank's predominate position as Chargee will have been disturbed at the instance of a Decree Holder. That is not the way to treat a secured Creditor. And in so far as it is not suggested that the Bank is not diligently resisting the action in 476 of 2015 or otherwise complacent with the orders against it in that suit it should not be prejudiced.

12. And it must be said that even the Decree Holder will not be able to access the proceeds of Sale because it can do so only after the expenses of Sale and the Banks debts are satisfied. And payment of the Banks debt will not happen if the issues in HCC No.476 of 2015 remain unresolved.

13. But there yet another submission by the Applicant that deserves my consideration. It is submitted by the Applicant that as the Bank has elected to recover its debt through attachment of the borrowers rental income, it is not open to it to exercise its statutory power of sale. For this argument Mr. Mutubwa cites Section 104(2) of the Land Act which provides:-

“A court may refuse to authorise an order or may grant any relief against the operation of a remedy that the circumstances of the case require and without limiting the generality of those powers, may —

(a) cancel, vary, suspend or postpone the order for any period which the court thinks reasonable;

(b) extend the period of time for compliance by the chargor with a notice served under section 90;

(c) substitute a different remedy or the one applied for or proposed by the chargee or a different time for taking or desisting from taking any action specified by the lessor in a notice served under section 90;

(d) authorise or approve the remedy applied for or proposed by the chargee, notwithstanding that some procedural errors took place during the making of any notices served in connection with that remedy if the court is satisfied that—

(i) the chargor or other person applying for relief was made fully aware of the action required to be taken under or in connection with the remedy; and

(ii) no injustice will be done by authorising or approving the remedy, and may authorise or approve that remedy on any conditions as to expenses, damages, compensation or any other relevant matter as the court thinks fit.”

14. The Statutory remedies available to a chargee are found in Section 90(3) of the Land Act which reads:-

“If the chargor does not comply within two months after the date of service of the notice under, subsection (1), the chargee may—

(a) sue the chargor for any money due and owing under the charge;

(b) appoint a receiver of the income of the charged land;

(c) lease the charged land, or if the charge is of a lease, sublease the land;

(d) enter into possession of the charged land; or

(e) sell the charged land;”

15. As correctly pointed out by Mr. Mutubwa a Chargee cannot enforce more than one remedy at the same time ie contemporaneously. However nothing in the Statute bars the Chargee from changing from one mode of recovery to another unless, of course, it is done in a manner that is oppressive to the Chargor or is motivated by malafides. Nothing stops the Bank from changing the mode from receiving of the Rental Income to exercising its Power of Sale if the latter proves to be an unsatisfactory way of recovery. The argument by the Applicant is therefore not entirely correct and does not further its Application.

16. For now this Court strikes out the Application dated 24th February 2016 with costs to the Respondent. The Applicant is at liberty to bring a similar application in the event of change of circumstances.

Dated, Signed and Delivered in Court at Nairobi this 8th day of December, 2016.

F. TUIYOTT

JUDGE

PRESENT;

Muchiri for Respondent

Simiyu holding brief for Mutubwa for Applicant

Alex - Court clerk