



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 273 OF 2010

BELGRAVIA SERVICES LTD.....PLAINTIFF/DECREE - HOLDER

- VERSUS -

SIMON NDEGE.....1ST DEFENDANT JUDGMENT DEBTOR
KIGEN KANDIE.....2ND DEFENDANT
KIPTUI KANDIE.....3RD DEFENDANT
KIPRUTO KANDIE.....4TH DEFENDANT/JUDGMENT DEBTOR

AND

MIOTONI WEST VILLAS LIMITED.....GARNISHEE

RULING

1. By a notice of motion dated 9th March 2011 the plaintiff/decree holder seeks to attach monies in the hands of the garnishee that are due to the 4th defendant/judgment debtor. The application is expressed to be brought under order 23 rules 1,3 and 9 of the Civil Procedure Rules as well as section 3A of the Civil Procedure Act. It is supported by the annexed affidavit of Humprey Ndegwa of even date as well as a further affidavit sworn on 4th May 2011.
2. The gist of the matter, as I understood it, is that the decree holder was awarded judgment for Kshs 13,500,000 plus interest and costs which now stands at Kshs 17,072,876.71. Attachment on the defendants' assets has not been successful. It has now come to the knowledge of the decree holder that the 4th defendant is entitled to a sum of Kshs 30,000,000 being a share of proceeds from sale of houses erected on LR No 1055/19 by the garnishee. A bundle of documents marked "HKN 5" are annexed in support of that assertion. The decree holder says all of the 26 houses on that property save for 2 have been sold and hence it is in the interests of justice that the garnishee do satisfy the decree. On 10th March 2011 a garnishee order nisi was issued in the principal sum of Kshs 13,992,380. The matter then before me is whether that order should be made absolute. The judgment debtor himself has not appeared though served.
3. The garnishee opposes the application. The principal objection is that the garnishee does not hold funds from sale of proceeds of the houses on LR No 1055/19 on account of the 4th defendant/judgment debtor. What the garnishee has in its possession are 4 houses on that land to be transferred to the beneficiaries of the estate of the late Aaron Kimosop Kandie (deceased). The 4th defendant is one of the beneficiaries but his interest has not been ascertained and is the subject of pending litigation in Nairobi

HCCC No ELC 344 of 2009 as well as in summons for revocation of grant in Nairobi High Court succession cause No 991 of 2003. As the interests of the beneficiaries have not been determined, it would then be premature to ask the garnishee to satisfy the decree. All these matters are buttressed by two affidavits of David Mambo Muriuki, a director of the garnishee, sworn on 20th May 2011 and 23rd March 2011 respectively.

4. I have heard the rival arguments. I take the following view of the matter. The garnishee has disputed liability in terms of order 23 rule 5. By the earlier directions of the court and consent of the parties, the determination of its indebtedness is being made on the basis of the depositions aforementioned and the submissions of the counsels before court. The key question is whether the decree holder has established the indebtedness of the garnishee to the 4th defendant to ground an order for payment.

Annexure "HKN 5" to the affidavit of Humprey Ndegwa sworn on 9th March 2011 contains a memorandum of agreement between the administrators of the estate of the deceased who include the 4th defendant/judgment debtor. There is also attached there a certificate of confirmation of grant in Nairobi succession cause No 991 of 2003 to the estate of the deceased showing that the 4th defendant is entitled to Kshs 30,000,000 on sale of houses on "LR No 1055/19 Karen to be transferred to Miotoni West Villas Ltd". Miotoni West Villas Ltd is the garnishee named herein. A brochure of sale by selling agents of the houses is also attached. That in a nutshell is the basis of the decree holder's application to attach the garnishee. The supplementary affidavit of David Mambo Muriuki of 20th May 2011 confirms that 4 of those houses are reserved (including one to the 4th defendant) for the beneficiaries of the estate of the deceased under the joint venture agreement dated 18th December 2007 annexed.

5. The garnishee's position is that it does not possess any funds at the moment due to the 4th defendant. It is clear to me that in Nairobi HCCC No ELC 344 of 2008 Kipruto Kandie & another Vs Miotoni West Villas and 5 others a ruling was made by lady justice Nambuye on 14th October 2011 holding that;

"the order of confirmation itself stands faulted because the application of 3rd May 2007 sought to confirm the grant issued on 9th November 2004 but the learned judge Visram J as he then was, now Judge of appeal, inadvertently confirmed a grant issued on 3rd May 2007 which was non-existent.

As matters stand now the grant issued on 9th November 2004 has not been confirmed".

As stated earlier, the above suit relates to the property LR No 1055/19. The 4th defendant here is the plaintiff in that suit and at some point, the Hon Justice Nambuye issued an order prohibiting sale of the houses erected on LR No 1055/19. There is then the High Court succession cause No 991 of 2003 wherein summons for revocation or annulment of the grant subsist. The decree holder admits this save that it insists the houses except 2 have been sold and there are occupants or purchasers for value without notice to defect in the title. The decree holder admits the sales happened before the injunctive order and that transfers are pending at the lands office.

6. I have gone into those lengthy facts to demonstrate that the decree holder has not placed sufficient evidence before me demonstrating that the garnishee is holding a sum of Kshs 30,000,000 due to the 4th defendant and which would be available for attachment to satisfy the decree. On the contrary, the garnishee seems to be right that due to the two litigation matters, and particularly the succession cause, the substratum of the confirmed grant under which benefits of the deceased's estate would flow to the 4th defendant has either collapsed or is under serious contest.

7. Granted those circumstances, I am of the considered opinion that the garnishee proceedings have come before their time. And the court cannot issue orders making the garnishee order absolute in vain, under a cloud or through speculation. The order in the circumstances that commends itself to me to grant is to dismiss the plaintiff's/decreed holder's application dated 9th March 2011 with costs to the garnishee.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 25th day of November, 2011

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of

Mr. Ndolo for Kinoti for the Plaintiff/decreed holder.

Ms Amboko for Onduso for the Garnishee.