



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 24 OF 2019

REMY GmbH CO. KG.....PLAINTIFF

-VERSUS-

HENKEL POLYMER CO. LTD T/A HENKEL CHEMICAL (E.A).....DEFENDANT

AND

I & M BANK LIMITED.....GARNISHEE

RULING

1) This ruling is the outcome of two applications. The first application is the motion dated 1st December 2020 taken out by the plaintiff whereof it sought for the following orders:

i. THAT owing to the urgency expressed in the certificate of urgency, service of the application be dispensed within the first instance and the same be heard exparte.

ii. THAT this honorable court be pleased to issue a Garnishee Order Nisi against I & M Bank Limited, the Garnishee herein, attaching account number 0030xxxxxxxxxx or any other account run by the Garnishee for the defendant, ordering that all monies deposited, lying and being held in deposit by the Garnishee respectively to the credit of the defendant herein be attached to answer the judgment of the court for the sum of USD.401,623.19/=, or its equivalent in Kenya shillings, pending hearing and determination of this application.

iii. THAT this honourable court be pleased to issue a garnishee Order against I & M Bank Limited, the garnishee herein, attaching account number 0030xxxxxxxxxx or any other account run by the garnishee for the defendant, ordering that all monies deposited, lying and being held in deposit by the garnishee respectively to the credit of the defendant herein be attached to answer the judgment of the court for the sum of USD.401,623.19/=, or its equivalent in Kenya Shillings.

iv. THAT the garnishee does appear before this court on the appointed date and time to show cause why they should not pay to the plaintiff's advocates the sum of USD.401,623.19/= being the judgment sum in favour of the plaintiff herein and further costs of these garnishee proceedings.

v. That the plaintiff be at liberty to apply for any such further order/direction as the honorable court may be deem fit and just to grant.

vi. That the cost of this application be borne by the defendant.

2) The plaintiff filed the affidavit of David Njoroge, learned advocate for the plaintiff in support of the motion. The defendants filed the replying affidavit sworn by Arti Issar to oppose the motion.

3) I have considered the grounds stated on the face of the motion dated 22.10.2020 and the facts deponed in the rival affidavits. I have further considered the rival oral submissions of learned counsels.

4) It is the submission of Miss Ndirangu, learned counsel for the plaintiff that judgment in the sum of USD.411,623.19 plus interest and costs was entered by consent in favour of the plaintiff and against the defendants on 3rd April 2019. It is said that parties agreed that the amount would be settled by instalments with a clause authorizing the plaintiff to execute the decree in case of a default.

5) The plaintiff stated that the defendants only paid a paltry sum of USD.10,000/= and defaulted on the remaining amount. The plaintiff beseeched this court to issue the order making the garnishee nisi absolute so that the bank is ordered to release the balance of USD. 401,623.19/= or its equivalent in Kenya shillings to settle the decree.

6) The defendants opposed the application arguing that an account should be provided to them on the sum which were raised from the property attached by the auctioneer on 28th August 2019. The defendants admitted that the decretal amount still remains as outstanding.

7) I & M bank Ltd, the garnishee did not file a response to the motion despite having been served. The relevant party who should respond to the motion is actually the garnishee. The defendants admitted the debt but they appear to plead to be given accounts.

8) In the absence of any response from the garnishee, I am convinced that the plaintiff has successfully established the prayers it is seeking in the motion. The record shows that this court granted a garnishee nisi order nisi on 8th January 2021. I am convinced that the plaintiff is entitled to the orders. Consequently, the garnishee order is made absolute as prayed in the motion dated 1st December 2020.

9) The second application is the motion dated 22nd October 2020 also taken out by the plaintiff whereof it sought for the following orders:

i. THAT this application be certified urgent and in view of the urgency thereof, the same be fixed for hearing on a priority basis.

ii. THAT pending the hearing and determination of this application, this honourable court be pleased to grant a Prohibitory Order barring the charging, transfer or any dealings in respect of the properties know as

a) L.R No. Mombasa/Block/1/201 located in Shimanzi Area within Mombasa County.

b) L.R. No. Mombasa/Block/1/356 located in Mbaraki Area within Mombasa County

c) L.R. No. 1870/III/245 situate in Westlands, Nairobi.

d) Title No. Mombasa/Block/XLVIII/107 situate in Mombasa County

and registered in the name of the defendant, as security for payment of the outstanding decretal amount in the decree herein dated 6th August 2019 in terms of a consent order recorded on 3rd April 2019.

iii. THAT this court be pleased to order that the defendant's properties namely L.R. No. Mombasa/Block/1/201 Mombasa/Block/1/356., LR no. 1870/III/245 situate in Westlands, Nairobi and title no. Mombasa/Block/SLVIII/107 situate in Mombasa county be attached, advertised and sold by public auction to recover the outstanding decretal sum of together with further accrued interest thereon until payment in full.

iv. THAT the defendant/respondent be ordered to grant free and un-limited access to the subject properties for the purpose of inspection and valuation.

v. THAT the court to allocate a convenient date for the deputy registrar for the settlement of the terms and conditions of sale of the property.

vi. THAT the costs of valuation, Auctioneers fees and any other related expenses to be paid from the proceeds of sale herein.

vii. THAT the costs of this application be borne by the defendant.

10) The plaintiff filed the affidavit sworn by Eberhard Stute in support of the motion.

11) The defendant filed and relied on the replying affidavit sworn By Arti Issar to resist the motion.

12) I have considered the grounds stated on the face of the motion and the facts deponed in the rival affidavits plus the rival oral submissions of the learned counsels. It is the submission of the plaintiff that the defendant has failed to settle the decree therefore it is only fair for this court to authorize the attachment and sale the properties listed to settle the decree. It is argued that unless the prohibitory order is issued the defendant is likely to transfer or alienate the listed properties to frustrate the execution of the decree and therefore render the application nugatory.

13) In the replying affidavit sworn by Arti Issar the defendant opposed the motion arguing that the plaintiff has failed to disclose the efforts the defendant has made in repaying the debt due to it.

14) The defendant pointed out that it does not own all the properties listed in the application. The defendant stated that L.R. No. 1870/III/245 Westlands, Nairobi do not belong to the defendant.

15) It is further argued by the defendant that the plaintiff's advocate has engaged the defendant to dispose of the listed properties and use the proceeds to settle the decree. The defendant stated that the application is filed by the plaintiff with malice and in bad faith.

16) Having considered the material placed before this court and the rival submissions, I am satisfied that the plaintiff's application has merit save that the plaintiff has failed to tender a search certificate showing that L.R. no. 1870/III/245, Westlands, Nairobi belongs to the defendant. Consequently, I allow the motion dated 22nd October 2020 in terms of prayers 2, 3, 4, 5, 6 and 7 save that LR No. 1870/III/245 should be excluded from attachment.

17) In the end the two applications dated 22.10.2020 and 1st December 2020 are allowed to the extent proposed hereinabove.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF OCTOBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff/Respondent

.....for the Defendant/Applicant