



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL SUIT NO 351 OF 2013**

**CRESCENT CONSTRUCTION COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**RICHFIELD INTERNATIONAL COMPANY LIMITED.....DEFENDAN**

**RULING**

(1) Before this Court is the Notice of Motion dated **23<sup>rd</sup> April 2019** by which **RICHFIELD INTERNATIONAL COMPANY LIMITED** (the Defendant/Applicant) seeks the following Orders:-

**“1. SPENT**

**2. SPENT**

**3. The subject property namely Land Reference Number *MN/V/529* (Certificate of Title Number *C.R 15493*) to be advertised and sold by public auction to recover the total outstanding decretal sum of *Kshs.38,818,045.45* together with further accrued interest thereon until payment in full.**

**4. The Respondents be ordered to grant free and unlimited access to the subject property for the purpose of inspection and valuation.**

**5. The court to allocate a convenient date before the Deputy Registrar for the settlement of the terms and conditions of sale of the property.**

**6. Costs of valuation, Auctioneers fees and any other related expenses to be paid from the proceeds of sale herein.**

**7. Costs of this application be borne by the Respondents.**

(2) The application which was premised upon **Order 22 Rule 6 and Rule 18(2)(3) of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act Cap 21 of the laws of Kenya** and all enabling provisions of the law, was supported by the Affidavit of even date sworn by **DAULA OMAR**, a Director of the Defendant Company.

(3) **CRESCENT CONSTRUCTION COMPANY** (the Plaintiff/Respondent) opposed the application by way of the Replying Affidavit dated **21<sup>st</sup> June 2019** sworn by **MOHAMED ASHRAF** a Director and shareholder of the Plaintiff Company. The application was canvassed by way of written submissions. The Defendant/Applicant filed its written submissions on **13<sup>th</sup> June 2019** whilst the Plaintiff/Respondent filed its submissions on **24<sup>th</sup> September 2019**.

**BACKGROUND**

(4) On **17<sup>th</sup> February 2017** judgment was entered in this matter in favour of the Defendant against the Plaintiff in the sum of **Kshs.18,600,000** together with interest thereon at commercial rates from **3<sup>rd</sup> October 2012** until payment in full. A Decree to this effect was issued on **16<sup>th</sup> March 2017**. On **30<sup>th</sup> March 2017** the parties entered into a consent, by which the amounts in the decree were amended and a payment plan to offset the decretal sum was agreed upon. The said consent was duly adopted by the Court on **3<sup>rd</sup> April 2014**.

(5) The Plaintiff/Respondent failed to adhere to the terms of the consent with the result that as at **4<sup>th</sup> February 2019** the total outstanding decretal sum due and owing from the Plaintiff/Respondent stood at **Kshs.38,818,045.45**.

(6) The Applicant avers that it has made various attempts to execute against the Plaintiff/Respondent, but that such efforts have proved unsuccessful as the Respondent has no moveable assets available for attachment in order to satisfy the Decree. The Defendant/Applicant further avers that the Plaintiff/Respondent is the Registered Proprietor of the parcel of land known as Land Reference Number **MN/V/529** (Certificate of Title Number **C.R 15493**) (hereinafter referred to as the “**suit property**”). The Applicant submits that it is entitled to attach and sell the suit property under the direction and supervision of the court in order to recover the outstanding decretal sum together with interest accrued thereon. The Applicant further submits that the Respondent has sought to evade payment of the judgment debt, and as such the Applicants are apprehensive that the Respondent may move to alienate and/or transfer the suit property in order to frustrate the execution of the decree herein thus rendering the entire application nugatory.

(7) The Plaintiff/Respondent avers that it is misleading for the Applicant to aver that no part of the decretal sum has been paid. The Respondent avers that subsequent to the consent dated **30<sup>th</sup> March 2017**, the Plaintiff did between **30<sup>th</sup> March** and **3<sup>rd</sup> August 2017** pay to the Applicant a total of **Kshs.4,990,000**. Thereafter between **3<sup>rd</sup> August 2017** and **18<sup>th</sup> August 2018** a further sum of **Kshs.3,450,000/=** was paid towards the satisfaction of the decree. Thus the Respondent’s position is that to date they have paid a total of **Kshs.8,440,000** in satisfaction of the decree dated **16<sup>th</sup> March 2017**, which amount has not been factored by the Defendants into the amount now being claimed as against the Plaintiff/Respondent.

(8) The Respondents deny moving to alienate the suit property in order to frustrate recovery of the decretal sum by the Applicants. The Respondents explain that the title to the suit property was deposited with **Sidian Bank** on **15<sup>th</sup> December 2018** in order to guarantee by way of an informal charge a facility of **Kshs.30 Million** borrowed by **Blay Energy Limited**. The Respondent submits that in light of the above the orders being sought in this application by the Defendant are incapable of being granted as they will interfere with the pre-existing right of **Sidian Bank** over the suit property.

#### **ANALYSIS AND DETERMINATION**

(9) I have carefully considered the submissions of both parties in this matter. Two issues arise for determination:-

(i) Is the Defendant/Applicant entitled to an Order for sale by Public auction of the suit property?

(ii) Does the alleged Informal Charge in favour of Sidian Bank act as a bar to the Grant of the Orders being sought by the Defendant/Applicant?

(10) The fact that the Defendant/Applicant has a valid decree issued in its favour is not in any doubt and is not denied by the Respondents. It is common ground that on **30<sup>th</sup> March 2017** the parties entered into a consent in the following terms:-

**(1) “The amount due in respect of the Decree issued herein is agreed and amended to be the sum of kshs.26,312,222/=**

**(2) Auctioneers and Advocates costs payable by the Defendant have been agreed as the sum of Kshs.2,600,000/= and Kshs.500,000/= respectively, making in total together with the decretal sum, an aggregate amount of Kshs.29,412,222/= which shall be paid by the Plaintiff to the Defendant through the Defendant’s Advocates in the following manner:**

**a. Kshs.1,500,000 on or before 3<sup>rd</sup> April 2017**

**b. Kshs.6,900,000 on or before 3<sup>rd</sup> May 2017**

**c. Kshs.6,900,000 on or before 3<sup>rd</sup> June 2017**

**d. Kshs.6,900,000 on or before 3<sup>rd</sup> July 2017**

**e. Kshs.7,212,222 on or before 3<sup>rd</sup> August 2017**

**(3) That the aforesaid amounts shall be remitted through the Plaintiff’s Advocate’s office.**

**(4) That in default of any installment the Defendant shall proceed with execution in recovery of any outstanding balance.**

**(5) Interest shall accrue per the judgment on any defaulted amount/installment.**

**(6) That the Application by the Plaintiff dated 24<sup>th</sup> March 2017 be and is hereby marked as settled.”[own emphasis]**

(11) On **3<sup>rd</sup> April 2017** the above consent was duly adopted as an order of this court. This consent having been entered into voluntarily is enforceable and binds the parties in the same way as a contract would bind parties to it.

(12) The Respondent did not adhere fully to the terms of this consent. Clause (4) of the consent clearly provided that in the event of default of any installment the Applicant would be at liberty to proceed with execution to recover the entire outstanding balance. I am satisfied that

the Applicant has sufficiently demonstrated that there exists a valid decree in his favour which decree has not been satisfied by the Respondent in terms of the consent between the parties.

(13) **Section 38 of the Civil Procedure Act, Cap 21** authorizes a court upon application to order execution of a decree.

**“(b) By attachment and sale or by sale without attachment of any property.”**

**Section 44(1)** of the same Act provides that:-

**“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]

(14) That the suit property belongs to and is registered in the name of the Plaintiff/Respondent is not denied. The transfer of the suit property to the Plaintiff appears as annexure **“DO 2”** to the Notice of Motion dated **23<sup>rd</sup> April 2019**.

(15) The Applicants aver that efforts to execute the decree by other means have not borne fruits as they were unable to trace any moveable assets of the Plaintiff for attachment. The Plaintiffs themselves whilst conceding to the debt have made no proposal on how they intend to satisfy the decretal sum by alternative means.

(16) The Respondent plead that they have been unable to meet the terms of the consent because the Plaintiff Company has been experiencing financial difficulties. Whilst the court may sympathize with the Plaintiff due to the financial constraints it may be facing, this does not excuse its failure to comply with the terms of the consent. The Defendant secured judgment in their favour way back in **February 2017**. They are entitled to the fruits of that judgment. No appeal has been filed against the decision of the trial court. In **KAGWIMI KANGETHE & CO. ADVOCATES –VS- PENELOPE COMBOS & Another [2015] eKLR** the Court held:-

**“...I wonder why the Respondents have prominently decried that the sale of the property should be stopped in order to prevent an injustice to them. Yet they forget that they hold the key to saving their property by paying over the decretal sum to the decree-holder. They will not suffer any prejudice as the decree-holder has the ability to make a refund. There is therefore no justifiable reason in law to postpone the enjoyment of the fruits of judgment by the decree holder herein. The decree-holder is entitled to assert on his right to realize his judgment and reject a proposal he thinks will down-trod on his rights. Such rejection cannot be equated to malice or mala fides on the part of the decree-holder. I, therefore, reject the request for stay of sale of the attached property.”**

(17) Likewise in **REPUBLIC –VS- TOWN CLERK OF WEBUYE COUNCIL & ANOTHER [2014] eKLR**, Hon Justice Majanja held as follows:-

**“On the other hand, a decree holder’s right to enjoy fruits of his judgment must not be thwarted. When faced with such a scenario, the Court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of the Constitution particularized under Article 10, the obligation of the court to do justice to the parties and to do so without delay under Article 159(2)(a) and (b) and the applicant’s right of access to justice protected under Article 48 of the Constitution.”** [own emphasis]

(18) Based on the foregoing, I am satisfied that given the circumstances of this case the Defendant/Applicant is fully entitled to orders for sale of the suit property by way of public auction in order to satisfy the debt due to them from the Plaintiff.

(19) The Respondents have submitted that the Applicants have failed to take into account the sum of **Kshs.8,440,000** which they claim was paid after the consent between the parties was entered into. They therefore claim that the sum of **Ksh.38,818,045.45** now being claimed by the Applicant is an erroneous figure. This allegation by the Respondent is not factually correct. Vide the letter dated **1<sup>st</sup> February 2019** written by Counsel for the Applicant to the Hon Deputy Registrar of the High Court. [Annexure **“DO 1”** to the Further Affidavit of **Daula Omar** sworn on **11<sup>th</sup> September 2019**] the applicants have clearly admitted and taken into account payments made by the Respondent **after** the consent was entered into. I find no merit in this allegation by the Respondents and dismiss the same.

(ii) **What is the effect of the ..charge of the suit property to Sidian Bank.**

(20) The Plaintiff/Respondents submit that the suit property is not available for sale by public auction in order to satisfy the decretal sum because the said property has been charged to Sidian Bank in order to secure a facility of **Kshs.70,000,000** granted to **Blay Energy Limited** by **Sidian Bank**. This facility was to enable **Blay Energy** recover a debt of **Kshs.30,000,000** owed to it by the Plaintiff and the balance of the facility to be transferred to the Plaintiff to enable them pay off the decretal sum. However **Sidian Bank** were only willing to advance a sum of **Kshs.30,000,000** to **Blay Energy**.

(21) The Respondent concedes that the Charge to **Sidian Bank** was not registered but submits that it amounts to an informal charge under **Section 79** of the **Land Act 2012**. Although the Respondent depones that Sidian Bank has already released the sum of **Kshs.30,000,000** to **Blay Energy**, it is not indicated what these funds were utilized for. The fund were seemingly not utilized to clear the decretal sum as alleged by the Respondent.

(22) In any event it is manifest that this charge was not registered. Having not been registered the said charge to Sidian Bank is not recognizable in law and cannot take priority over the rights of the Applicant. If **Sidian Bank** or **Blay Energy** felt their rights in the suit

property were under threat then I have no doubt that they would have approached the court by way of Objection proceedings to seek relevant orders. There being no such objection proceedings I find that the informal charge to **Sidian Bank** does not in any way affect the rights of the Applicant to sell the suit property in order to recover the decretal sum.

(23) Finally I find merit in the present application and I do allow the same and make the following Orders:-

- (a) The subject property namely land Reference Number **MN/V/529** (Certificate of Title Number **C.R 15493**) to be advertised and sold by way of public auction to recover the total outstanding decretal sum together with further accrued interest until payment in full.
- (b) The Plaintiff/Respondent are directed to grant free an un-limited access to the subject property for the purpose of inspection and valuation.
- (c) The costs of Valuation auctioneers fees ad any other related expenses shall be paid from the proceeds of sale.
- (d) The matter to be mentioned before the Hon Deputy Registrar for the settlement of terms and conditions of Sale of the property.
- (e) Costs of this Application will be met by the Plaintiff/Respondent.

It is so ordered.

**Dated in Nairobi this 15<sup>th</sup> day of April 2020.**

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**Justice Maureen A. Odero**

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15<sup>th</sup> March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

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**Justice Maureen A. Odero**