



**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 for consideration is at the execution stage of these Arbitral Proceedings. It is a Motion dated 29<sup>th</sup> August 2018 for the following prayers:-

1. The rental income realized by the Judgment Debtor from ELYSEE PLAZA ON L.R NO. 2/186 NAIROBI, Kilimani Road, off Elgeyo Marakwet Road, Nairobi, is hereby attached to settle the Decretal sums due under the Decree issued by this Court herein on the 16<sup>th</sup> February 2016, and all the tenants thereon shall with immediate effect pay directly to the Applicant/Decree-Holder of its Advocates, all and any rent due to the Respondent/Judgement-Debtor, until the satisfaction of this Court's afore stated Decree.

2. In the alternative, the Decree-Holder herein be appointed as a receiver of the Judgement-Debtor's property known as ELYSEE PLAZA ON L.R NO. 2/186 NAIROBI, Kilimani Road off Elgeyo Marakwet Road, Nairobi.

3. The Honourable Court does commit the Judgement-Debtor's property known as ELYSEE PLAZA ON L.R NO. 2/186 NAIROBI, Kilimani Road, off Elgeyo Marakwet Road, Nairobi, to the possession, custody and management of the Decree-Holder as the Receiver of the same, until satisfaction of the Decretal sums due under the Decree issued by this Court on the 16<sup>th</sup> February 2016 together with the accrued Auctioneer's Charges.

4. The Honourable Court does confer upon the Decree-Holder as receiver of the Judgement Debtor's property, all such powers as to bringing and defending suits and for the realization, management, protection, preservation, and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of such documents as the owner himself has, or such of those powers as the Court thinks fit.

5. Any other orders which the Court may deem apt and just.

6. The cost of this application be provided for.

2. On 16<sup>th</sup> February 2016, this Court granted Leave to China Young Tai Engineering Company Limited (China Young Tai) to enforce, as a

Decree, the Final Award published on 9<sup>th</sup> November 2015 by the sole Arbitrator John Mwai Mathenge for the sum of Kshs.278,656,582.05 against Ravasam Development Company Limited (Ravasam) with simple interest thereon at 21% pa chargeable from 21 days of the Award until payment in full. It is common ground that the Decree remains unsatisfied todate.

3. Ravasam is the owner of immovable property known as Elysee Plaza which is a building that stands on LR. NO.2/186 Nairobi. That property is currently encumbered by way of a mortgage to Spire Bank Limited (The interested party). It is also common ground that the said property is the only asset of Ravasam.

4. This is not the first occasion in which China Young Tai has attempted to execute the Decree. By way of an Application dated 12<sup>th</sup> February 2016, the Decree Holder had, inter alia, sought to have the property sold in Execution of that Decree. That plea was answered by a Ruling of Court dated 8<sup>th</sup> December 2016 but was declined. Indeed one of the grounds upon which the current application is resisted by Ravasam is that it is res judicata the application of 24<sup>th</sup> February 2016. This is a prefatory issue that calls for an early determination.

5. The mainstay of the Decision of 8<sup>th</sup> December 2016 is to be found in paragraphs 9, 10 and 11 thereof and are reproduced below:-

“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.”

6. Having determined that the time was not right for grant of the Orders sought by Ravasam, the Court observed as follows:-

“16. For now this Court strikes out the Application dated 24<sup>th</sup> February 2016 with costs to the Respondent. The Applicant is at liberty to bring a similar application in the event of change of circumstances.”(my emphasis)

Is there change of circumstances?

7. Pending before Court are two causes being HCC. No. 450 Of 2015 (Farouke Ravate & 7 others vs. Eric Agbeko & others) and 476 of 2015 (Ravasam Development Company Ltd vs. Spire Bank), which have been consolidated (the consolidated suit) and in which the Interested Party has a Claim for a substantial sum being Kshs.937 million on account of monies said to be owed to it by Ravasam and for which the mortgage was created. An argument taken up by both the Interested Party and Ravasam is that the grant of Orders in this matter will whittle down the effect of any Decree that will be passed in the consolidated suit which remains undetermined.

8. Of course there is force in that argument as the Interested Party enjoys secured interests which are prior to those of unsecured Creditors. A position expressly acknowledged in the Ruling of 8<sup>th</sup> December 2016. Yet there are at least two developments from the time of that Ruling that create changed circumstances.

9. At the time of the Ruling, a Receiver Manager of the Bank was collecting Rent from the property in exercise of the Rights of the Bank under the Mortgage Instrument. While there is an Order entered on 3<sup>rd</sup> October 2018 by Consent of the Bank and Ravasam in Nairobi Civil Appeal No. 34 of 2017 to the effect that the Bank will not take any precipitate action against Ravasam, I do not understand that Order to have restrained the Bank from continuing to collect rent from the charged property. I say so because in an Affidavit of Erick Agbeko sworn on 3<sup>rd</sup> October 2018 on behalf of Ravasam and in response to the current Application he states as follows:-

“(14) THAT the Chargee/Mortgagee has already initiated its Statutory Power of Sale and there is an existing Order from the Court of Appeal in CA No.344 of 2017 which requires the rental income collected from the suit property to be paid to the Chargee/Mortgagee”.

10. On the part of the Bank (which is entitled to collect the Rental income), it makes the following concession to the current application by China Young Tai,

“13. THAT despite the foregoing the Interested Party would not be opposed to any of the Orders sought by the Applicant/Decree Holder on condition that the net rents collected (after deduction of maintenance costs and utilities ie. Service charge) by the Applicant/Decree Holder are shared as amongst the Applicant/Decree Holder and the Interested party in the ratio; 50:50. This is so as to enable the Interested Party partially recover monies due to it in respect of monies it advanced to facilitate the completion of the construction of Elysee Plaza on LR. No. 2/186 and which said monies remain unpaid as the Respondent continues to be in default

notwithstanding a Court of Appeal Order requiring it to effect monthly payments”.

As the Bank, whose interests the Court protected in its Ruling of 8<sup>th</sup> December 2016, is willing to accommodate the Decree Holder, the launch of this Application cannot and should not be considered to be res judicata the Application of 24<sup>th</sup> February 2016.

11. There is then a second development. Shown to this Court is a Consent Order of 21<sup>st</sup> December 2017 in HCC No. 408 of 2017, Peter Gichuki Kingara t/a Gichuki Kingara & Co. Advocates vs. 1) Eric Agbeko 2) Ravasam Development Company Ltd in the following terms:-

“It is hereby ordered by Consent:-

1. THAT the Decree dated 15<sup>th</sup> November 2017 be and is hereby amended from Kenya Shillings 52,780,000 stated therein to a Decree for the sum of Kenya shillings 35,000,000 having taken into account past payment and rebate on inherent an amended Decree do issue in favour of the Plaintiff for the said amount of Kenya Shillings 35,000,000 in the lieu of the previous decree of Kenya shillings 52,780,000.

2. THAT the Judgement Debtors do pay the Decree Holder a lump sum of not less than Kenya Shillings Five Million on or before 30<sup>th</sup> March 2018. In default execution to issue for the balance.

3. THAT the Decree Holder do collect rent from the 1<sup>st</sup> Floor space measuring Three thousand two hundred and forty one (3241) square feet) currently let as the rate of Kenya Shillings 111.9 per square foot and currently occupied by Three Folks Grill Limited trading as Uptown Grill on the property known as Elysee Plaza erected on L.R 2/186 NAIROBI registered on volume N. 38 Folio 225/10 File Number 11936 until payment of the Decretal amount in full.

4. THAT the Decree Holder do collect the sum of Kenya Shillings One Million from Levs Trading Company Limited trading as the House of Leather on the property known as Elysee Plaza erected on L.R 2/186 NAIROBI registered on volume N. 38 Folio 225/10 File Number 11836 the 1<sup>st</sup> Garnishee herein every quarter until full payment of the Decretal amount.

5. THAT the Judgment debtors do pay costs of this suit amounting to Kenya Shillings One Million to the Plaintiff’s advocates, which will be payable in two equal installments. The first installment should be paid to the Plaintiff’s advocates by the 5<sup>th</sup> day of February 2018 and the second installment should be paid by the 5<sup>th</sup> day of March 2018.

6. THAT each party to be at liberty to apply.

7. THAT suit be mentioned after ninety days to confirm compliance”.

In implementation of that Order the Decree Holder therein is receiving a portion of the Rental Income from the property. This Court is not aware that the Bank has challenged this Order.

12. Does the current Application have merit? The Application is brought under various provisions of the Law which include Order 23 Rules 1,2 to 9, Order 22 Rule 40 and Order 41 Rule 1(d) of the Civil Procedure Rules. Order 23 Rule 1 are provisions in Garnishee Proceedings but as correctly pointed out by Mr. Kingara appearing for the Judgement Debtor the Application has not been presented and prosecuted as typically required under the said provisions.

13. However under the provisions of Order 41 of Civil Procedure Rules the Court may appoint a Receiver for collection of rent in realization of a Decree. Rule 1 of Order 41 reads:-

“1. (1) Where it appears to the court to be just and convenient, the court may by order —

(a) appoint a receiver of any property, whether before or after decree;

(b) remove any person from the possession or custody of the property;

(c) commit the same to the possession, custody or management of the receiver; and

(d) confer upon the receiver all such powers as to bringing and defending suits and for the realisation, management, protection, preservation, and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of such documents as the owner himself has, or such of those powers as the court thinks fit.

2) Nothing in this rule shall authorise the court to remove from the possession or custody of any person property whom any party to the suit has not a present right so to remove.”

14. There is a Decree that is not satisfied. The Judgement Debtor owns property from which rental income is generated. This Court sees no reason why it should not allow the appointment of a Receiver for a portion of that income in satisfaction of the Decree.

15. One other issue needs to be addressed. The Lawyer for the Judgement Debtor argues that only an Estate Agent registered under the Estate Agents Acts (chapter 533 Laws of Kenya) can be permitted in law to collect Rent. However my reading of Section 1(1) of The Estate

Agent Act does not seem to include Rental collection as a practice in Estate Agency. Practice as an Estate Agent is defined as follows:-

*“the doing, in connection with the selling, mortgaging, charging, letting or management of immovable property or of any house, shop or other building forming part thereof, of any of the following acts—*

*(a) bringing together, or taking steps to bring together, a prospective vendor, lessor or lender and a prospective purchaser, lessee or borrower; or*

*(b) negotiating the terms of sale, mortgage, charge or letting as an intermediary between or on behalf of either of the principals;*

In respect to letting of property, what would amount to estate agency is the bringing together or taking steps to bring together the Lessor and Lessee or negotiating the terms of letting as a middleman or on behalf of either the Lessor or Lessee. It does not extend to routine collection of Rent.

16. Finally and so as to protect the interests of the Bank, the Bank shall be at liberty to seek reversal of the Orders granted herein upon the outcome of the consolidated suit. If the Bank were to emerge victorious therein, then its victory should not be eroded by the Orders made herein as it enjoys a predominant position as a secured Creditor.

17. These are the Orders of Court:-

(1) The firm of Lubullellah & Associates or any other Law firm appointed by the Decree Holder shall be appointed as Receiver of the Rental Income of Elysee Plaza in LR No.2/186 Nairobi in respect to Rental Income not affected by Civil Suit No. 408 of 2017 (Peter Gichuki King'ara t/a Gichuki King'ara & Co. Advocates vs. Eric Agbeko & Another).

(2) The net Rental Income (after deduction of maintenance costs and utilities) shall be shared equally between the Decree Holder herein and the Bank.

(3) Orders 1 and 2 above shall subsist until satisfaction of the Decretal sums herein or upon further Orders of this Court.

(4) The Bank is at liberty to apply.

(5) Costs of the Notice of Motion of 25<sup>th</sup> August 2018 shall be to China Young Tai to be paid by Ravasam.

**Dated, Signed and Delivered in Court at Nairobi this 18<sup>th</sup> day of January, 2019.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Mutubwa for Applicant

Gichuru (mrs) for Kingara for Respondent

Muchiri for Interested party

Nixon - Court clerk