



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

INSOLVENCY CAUSE NO. 2 OF 2017

DAVID BIKETI WATI..... PLAINTIFF

VERSUS

CHRIS MUNGA NYAMARITANDI BICHANGE.....DEBTOR

AND

SIDIAN BANK LIMITED.....1ST GARNISHEE

LUMALLA, ACHIENG & KAVERE

ADVOCATES.....2ND GARNISHEE

R U L I N G

1. The notice of motion by the applicant dated 13th November 2018 prays for the following reliefs;

1) That Sidian Bank Limited and Lumallas, Achieng & Kavere Advocates be enjoined as garnishee.

2) A garnishee order Nisi be issued attaching the proceeds of sale of L.R. No. Kajiando/Kaputiei North/1342 deposited in Account No. 01036020008845 Kilimani Branch, Sidian Bank Ltd Nairobi in the name of Lumallas, Achieng & Kavere Advocates in the Sum not exceeding 13,930,925 and the same be transferred to the Creditors account number David Biketi Wati – I/D No. [xxxx], Account No. [XXXX] Family Bank, Nkuruma Road Branch, Mombasa in satisfaction of the decree herein.

3. The application is supported by the applicant's sworn affidavit dated even date together with the relevant annexures. The facts and circumstances surrounding this case are clear and straight forward. The Creditor/applicant is owed by the debtor herein and there is a decree to that effect dated 25th May 2017. They then proceeded to record a consent dated 19th September 2018 on how the decretal sum of Kshs 13,789,000 was to be paid.

4. Apparently, and according to the applicant, the said consent was not fulfilled by the creditor. He then applied that the substantive insolvency cause be determined. While the court was drafting the decision, the applicant came up with this cause stating inter alia that the debtor had sold the property and there was every possibility that he wanted to avoid settling the debt. He argued that since he had breached the terms of the consent, he was now dealing with him on a cash to cash basis.

5. The applicant has attached unexecuted sale agreement between the debtor and other purchasers. He has equally attached correspondences between him and the lawyers on record.

6. On his part the debtor has argued in his replying affidavit sworn on 20th November 2018 that the agreement for the Sale of the land was truly executed. He also exhibited undertakings from one John Kiumi Wambugu in respect to the deal .

7. Berveline Chweya on behalf of Sidian Bank had contended that the amount aforesaid has a sum of Kshs 140,084.4 as at 14/11/2018 and consequently it was not in a position to comply with the garnishee order.

8. Panlette Achieng on behalf of the firm of Lumallas Achieng & Kavere Advocates acting on behalf of the debtor admitted that indeed there were negotiations going on in respect to the Sale of suit property. She admitted that the sum of Kshs 140,000.00 was paid without executing the Sale agreement and that if the applicant is allowed to carry on with the application then the entire Sale transaction stands threatened. She deponed that the consent dated 27/9/2018 still subsisted till 9th January 2019 and thus the application was premature.

8. The court has perused the rival affidavit herein as well as attached annexures. The issues as earlier indicated surrounding the creditor and the debtor are clear and cannot be overstated again. The only question is whether in the light of the issues deponed to by the parties the application can still be sustained.

9. What is evidently clear is that despite the uncontested Sale agreement attached to the applicant affidavit not executed, the debtor has received a sum of Kshs 140,000.00/- of which Kshs 12 million was remitted to Bank of Africa.

10. In effect therefore it cannot be said that the Sale Agreement has not been performed and that the debtor was still negotiating with the parties. By implication, the agreement of Sale crystallised. This is exhibited by the admission that the sum of Kshs 12 million was paid out to Bank of Africa. The aforesaid payments in whatever format was done after the consent had been entered and the undertaking given.

11. Is the application herein premature? In my view that is arguable depending on where one sits. It appears that the applicant repudiated the consent as it was not performed within 15 days. The respondent still insist that the same is subsisting. This court would not delve into the merits and demerits of the consent as it has not been asked to do so. Nonetheless if the consent is still subsisting, then as the debtor rightfully stated the 104 days shall expire on 9th January 2019.

12. Again it would be digressing if one was to venture into the question of the undertaking by Wambugu advocates.

13. For now I do not see any prejudice to be suffered by the respondents should the garnishee order issued. The Sidian Bank Ltd have argued that they are holding only Kshs 140,000/- or thereabouts in the stated account. From the attached statement contained in the affidavit of Chweya it appeared that the sum of Kshs 14 million was wired into that account on 30th October 2018 and a sum of Kshs 12 million debited on 31st October 2018. The amount came from one Tobiko Njoroge.

14. As such I do not see any prejudice to be suffered even by the said law firm if the sum received in the said account has no connection with the applicant as well as the debtor. It is in my view incorrect to state that the other clients would be inconvenienced.

15. For the above reasons I shall allow the application as prayed. The only rider shall be that the sum deposited in the account of Lumalla, Achieng and Kevere Advocates must flow from the transaction in respect to the Sale of LR. No Kajiado/Kaputiei – North/1342.

Each party shall bear their respective costs.

Delivered, signed and dated at Kitale this 11th day of February 2019.

H.K. CHEMITEI

JUDGE

11/2/19

In the presence of:

Samba for the Petitioner

Ingosi holding brief for Lumallas Achieng - 2nd Garnishee

Court Assistant - Kirong

Ruling delivered in open court.