



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAJIADO
ELC CASE NO. 78 OF 2017
(formerly Machakos HCCC No. 306 of 2011)

KIHARA WAWERU CONSTRUCTION CO. LTD.....PLAINTIFF

VERSUS

BENJAMIN LEMASEI TUMPES.....DEFENDANT

RULING

The application before Court is a Notice of Motion dated 17th April, 2015 brought pursuant to Section 1A, 1B, 3A and 44 of the Civil Procedure Act and Order 51 rule 1 of the Civil Procedure Rules and all the other enabling provisions of the law.

The application is based on the following grounds that a decree was issued against the Respondent on 11th June, 2012 for a refund of Kshs. 2, 250, 000 together with costs of the suit. The Respondent has failed and/or neglected to pay the decretal sum and the total amount outstanding is Kshs. 2, 717, 260.

The application is supported by the affidavit of KIHARA WAWERU where he deposes that he obtained judgement against the Defendant and a decree was issued on 11th June, 2012 for Kshs. 2,550,000 to be refunded by the Judgement Debtor. The Judgement Debtor has declined to settle the decretal sum and on 9th September, 2013 he agreed to sign an agreement with the Plaintiff's advocates on record on the mode of settling the said decretal sum but has not honoured it to date. He claims he is prejudiced by the Judgement Debtor's lack of settling the decretal sum and that he has shifted his movable property elsewhere making it impractical to attach them. He contends that they established through a search that the Judgment Debtor owns land reference number KEKONYOKIE/ILKISUMENT/535 and he wishes to proceed with attachment and sale of the said land. He confirms the said attachment can be effected by Mambu Auctioneers or any other auctioneer within this jurisdiction. The Defendant did not file any response to oppose the application.

On 19th October, 2017, application was unopposed as the Defendant's Counsel who were duly served on 10th October, 2017 as evidenced by the affidavit of service filed on 19th October, 2017, failed to attend court.

The Plaintiff's advocate reiterated their claim and produced copies of Certificate of Official Search confirming the Judgement Debtor as owner of the land parcel number KEKONYOKIE /ILKISUMENT /535; copies of warrant of attachment and letter from the proposed auctioneer.

Analysis and Determination

Upon perusal of the Notice of Motion dated including the supporting affidavit and annexures thereon, I note that the only issue for determination is whether the Plaintiff/decree holder should be allowed to attach the Judgement debtor's land parcel number KEKONYOKIE /ILKISUMENT /535.

Order 22 rule 48 of the Civil Procedure Rules provides that: *'(1) Where the property to be attached is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such purported transfer or charge, and the attachment shall be complete and effective upon registration of a copy of the prohibitory order or inhibition against the title to the property.'*

(2) A copy of the order shall be affixed on a conspicuous part of the property.'

In so far as the instant application is not opposed, I note that the Decree holder has not adhered to the above provisions of Order 22 rule 48 of the Civil Procedure Rules before filing the application herein for attachment of the Judgement debtor's land parcel number KEKONYOKIE /ILKISUMENT /535.

In the circumstances, I find that the instant application is hence premature as the Decree holder has not complied with the above legal provisions which are couched in mandatory terms and outlines the process to be adhered to where the property to be attached is an immovable one.

The upshot of the matter is that the Notice of Motion dated 17th April, 2015 is not merited and is dismissed with no order as to costs.

Dated, signed and delivered in open court at Kajiado this 6th day of December, 2017.

CHRISTINE OCHIENG

JUDGE