



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 641 OF 2012

DATA GUARD DISTRIBUTORS LIMITEDPLAINTIFF

VERSUS

VIRGINIA NJERI KIGO1ST DEFENDANT

VALZ DISTRIBUTORS2ND DEFENDANT

VIDI FABRICATORS LIMITED3RD DEFENDANT

NAIROBI TYRE MART CO. LTD4TH DEFENDANT

RULING

1. The ruling herein relates to a notice of motion application dated 7th December 2017, brought under the provisions of Section 1A, 1B and 3A of the Civil Procedure Act, Order 22 Rule 55 Civil Procedure Rules, 2010 and all enabling provisions of the law. It is supported by grounds on the face of it and an affidavit dated 7th December 2017 sworn by Stephen Mwanza Gachie, an Advocate of the High Court of Kenya having the conduct of this matter on behalf of the Plaintiff and/or Decree holder.

2. The Applicant is seeking for orders;-

(a) That the Honourable court be pleased to lift the Prohibitory order issued on the 7th November 2012 and registered against the property known as; Nairobi Block 76/516 Buruburu;

(b) That the Honourable court be pleased to set a date for the sale by Public Auction of the properties known as Nyandarua/Tulaga/1893, L.R. No. 12715/8854 Syokimau and Nairobi Block 76/516 Buruburu;

(c) That the Honourable court be pleased to direct that the auctioneers expenses and costs of advertising the sale by public auction of the properties be recovered from the proceeds;

(d) That the costs of the application be provided for.

3. The Applicant avers that, a prohibitory order was issued herein, against the property known as Nairobi Block 76/516 Buruburu vide an order of the court given on 6th November 2012, issued by Hon. Mr. Justice Ogola and a further consent order recorded before Hon. Justice Havelock on 25th July 2013, pending the hearing and determination of the suit.

4. Subsequently, Judgment was entered on 27th June 2017 in default of filing of a defence, whereby the Judgment debtor was ordered to pay the decree holder the sum of Kshs. 43,000,000, together with interest and costs of the suit. The amount remains unpaid to date.

5. That the Decree holder desires to execute the decree for settlement of the decretal sum outstanding and therefore it is in order that, the prohibitory order in respect of three (3) properties said property be lifted.

6. The application was served upon the Respondents but they did not file any response in opposition or support thereof. The same was disposed of vide written submissions filed by the Applicant, which I have considered.

7. The Applicant submitted that, the Decree holder has no power to sell the immovable property save through a court order obtained in the

suit herein and that, without a court order, the Decree holder would be incapacitated to deal with the property of the Judgment debtor, unless the Judgment debtor himself or herself offers the property willingly for sale in settlement of the decretal amount.

8. The Applicant relied on the case of; *Fubeco China Fushun vs Naiposha Company Limited & 11 Others (2014) eKLR*, where the court held as follows:-

“I will start by restating the law. Once a property is attached pursuant to a court order, it becomes the property of the court and is bound by the law. Execution by way of sale will be regulated by the court in tandem with the application procedures in execution of a decree unless there is a specific agreement of the parties on the sale. Whether the sale is by private treaty or public auction, any questions which are raised on the property of the sale particularly of immovable property, should be investigated by the court. And where any serious irregularity or impropriety is found, it will result into the setting aside of the sale.”

9. The Applicant further invited the court to consider the following provisions of the law Section 44 of the Civil Procedure Act which provides as follows;

“in 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 the decree.”

10. Similarly, the Applicant invited the court to consider the procedural provisions of Order 22 Rule 55, 56(1) 57(1) and 58 which provides as follows;

Order 22 Rule 55 states:-

“Any court executing a decree may order that any property attached by it and liable to sale or such portion thereof as may seem necessary to satisfy the decree, shall be sold and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.”

Order 22 Rule 56(1) states:-

“save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the court or by such other person as the court may appoint in this behalf and shall be made by public auction in the manner prescribed.”

Order 22 Rule 57(1) states:-

“where any property is ordered to be sold by public auction in execution by a decree, the court shall cause public notice and advertisements of the intended sale to be in such manner as the court may direct.”

Order 22 Rule 68 states:-

“sale of immovable property in execution of decree may be ordered by the court.”

11. I have considered these provisions of law and I find that indeed under Rule 68 referred to above, an immovable property may be sold by an order of the court in execution of a decree. However, this sale must be under the supervision of the court. The general conduct of a sale would require that, the property be first valued to ascertain whether it is viable to order for a sale taking into account the amount of the decree.

12. The Applicants have sought that the Honourable court do issue the prohibitory order issued over property known as Nairobi Block 76/516 Buruburu. They have then sought that the court sets a date for sale of that property alongside two others known as Nyandarua/Tulaga/1893, LR No. 12715/8854 Syokimau. However, they depose that any property that a prohibitory order was issued against was Nairobi Block 76/516 Buruburu. In that case, the only property that can become a subject of attachment is the one against which the prohibitory order was issued.

13. In that regard, I allow the application herein in terms of prayer (1) and order that the property Nairobi Block 76/516 Buruburu be subjected to evaluation by each party independently and/or jointly to enable the court give further orders as to, the manner of the sale and the dates thereof.

14. Those are the orders of the court.

Dated, delivered and signed in an open court this 30th day of April 2019.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Githendu holding brief for Mr. Gachie for the Plaintiff/Applicant

No appearance for the Defendant/Respondent

Dennis-----Court Assistant