



REPUBLIC OF KENYA



KENYA LAW
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Alpha Dynamics Limited v Super Mega Construction Ltd (Civil Case E064 of 2022) [2023] KEHC 21375 (KLR) (Civ) (4 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21375 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE E064 OF 2022

AN ONGERI, J

AUGUST 4, 2023

BETWEEN

ALPHA DYNAMICS LIMITED PLAINTIFF

AND

SUPER MEGA CONSTRUCTION LTD DEFENDANT

RULING

1. The application coming for consideration in this ruling is the one dated 28/2/2023 brought under Sections 1A, 1B, 3A and 63(b) & (e) of the *Civil Procedure Act*, Order 39 Rule 5(1) and (2) and Order 51, Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law.
2. The applicant is seeking the following orders;
 - i. This application be certified as urgent and the service thereof be dispensed with in the first instance.
 - ii. Pending the hearing and determination of this application and the suit, an order be made directing the respondent to furnish security for the decree that may be passed against the respondent in the sum of ksh.32,035,420.00 by depositing the said sum in court or in an interest earning account held jointly in the names of the applicant's and respondent's advocates on record, or in any such manner as this honourable court may direct.
 - iii. The costs of this application be borne by the respondent.
3. The applications is based on the grounds on the face of it and supported by the affidavit of the applicant in which it is deposed that the defendant owes the plaintiff Kshs. 32,035,420 on account of construction works and services rendered pursuant to a sub contract between the parties dated 12th February 2019. The defendant refused to pay the amount notwithstanding the fact that they received



payment from Kenya Rural Roads Authority (KeRRA) in the sum of Kshs. 102,819,105.88 on 14th July 2022.

4. He deponed that the directors and shareholders of the defendants are foreign nationals and the plaintiff is apprehensive that upon the completion of the road works they will abscond the jurisdiction of this court rendering the proceedings herein moot. That the defendant has no known assets within the jurisdiction capable of satisfying any resulting decree and there is every likelihood on account of the duration of time it would take to hear and determine the suit and obtain a decree the defendant would have long received all the contractual payments relating to the subject matter.
5. He further deponed that the plaintiff is apprehensive that with the intention of obstructing execution of any decree that may be passed against the defendant, the defendant will dispose of and transfer proceeds paid by KeRRA to third parties without paying the applicant as was in the case on July 2022 when the respondent disposed of Kshs. 102,819,105.88 to third parties.
6. The application is opposed by the defendants on grounds of opposition dated 17th April 2023 on the following summarized grounds;
 - a. That the Application lacks merit and should not be entertained by this Honourable Court.
 - b. That the Application is made without any basic strata of truth underlying the allegations that the Respondent intends to abscond the jurisdiction of this Honourable Court and dispose of its property with the intention to defeat the cause of justice.
 - c. That the Application is also unlawful seeing that the Applicant is attempting to limit the Respondent's right to property as enshrined under Article 40 of *the Constitution* of Kenya, 2010. The Respondent is not debarred from using and enjoying its properties merely because a suit has been instituted against it and therefore, the Applicant's contentions that in July, 2022 the Respondent transferred its proceeds from KeRRA to 3rd parties is nothing but interference of company affairs in a free economy, which action is tantamount to infringement.
 - d. That the Application is premature and is intended to use this Honourable Court as a tool to impede access to justice by undermining the Respondent's right to be heard particularly on the strength of the ruling delivered by this Court on 16th December, 2022 granting the Respondent leave to ventilate its triable issues.
7. The defendant also filed a replying affidavit by Li Shichao a shared holder at the defendant company dated 17th April 2022 where he confirmed that indeed on 12th February 2019 the defendant entered into a subcontracting agreement with the applicant for upgrading to bitumen standard and maintenance of Chiakariga-Marimanti-Gatunga road.
8. He deponed that on 16th December 2022 the court set aside the default judgement entered in 24th June 2022 granting the defendant leave to file its defence. That the plaintiff ought to be estopped from playing the role of judge and executioner by attempting to pre-empt the decision of this honorable court.
9. He averred that the allegations by the plaintiff are false, baseless and have been made in bad faith. That there is no imminent danger or possibility of the respondent or its directors and shareholders absconding the jurisdiction of this court.
10. The parties filed written submissions as follows; the plaintiff submitted that its apprehensive that the defendant intends to obstruct the execution of any decree that may be passed against it by disposing



or transferring its property to third parties thereby rendering the proceedings an academic exercise without any prospects of realizing.

11. The plaintiff submitted that the only asset duly registered under the defendant's name is Motor Vehicle Toyota Hilux KBS 439K. That further the plaintiff has satisfied the legal threshold for granting the orders sought according to order 39 Rule 5 (1) of the Civil Procedure Rule.
12. The defendants submitted that it is not in doubt that directors and shareholders are foreign nationals however that is not a reason to warrant the plaintiffs to invoke the discretion of the court under Order 39 Rule 5 of the Civil Procedure Rules. That at all material times the plaintiff knew that the directors and shareholders of the defendant were foreign nationals and proceeded to enter into the subject contract.
13. The defendant submitted that the application herein is for security under Order 39 (5) and cannot be predicated on the happening of future events. That it is absurd for the plaintiff to require security to be furnished because it fears that once an ongoing contract terminates the defendant will flee from the country.
14. The defendant submitted that the respondent is a juristic person incorporated in Kenya under the [Companies Act](#) 2015 therefore the applicant has the onus to prove that the respondent has initiated winding up proceedings or is insolvent for it to justify its allegations that the respondent is about to leave the jurisdiction of the court which it has not yet proved.
15. The defendant argued that the plaintiff's issue that the assets of the defendant are unknown to it is not sufficient reason to order the defendant to provide security. The defendant argued that it demonstrated good faith when it voluntarily tendered proof of some of its assets and it expected receivables and by doing so it has established its capacity to settle any liability that may arise from this suit. That further the defendant stands to suffer substantial loss if its condemned to deposit Kshs. 32,035,420 without having been accorded an opportunity to be heard.
16. The sole issue for determination is whether the applicant is entitled to security for costs.
17. Order 39, rule 1 of the Civil Procedure Rules provides that
 1. Where at any stage of a suit, other than a suit of the nature referred to in paragraphs (a) to (d) of section 12 of the Act, the court is satisfied by affidavit or otherwise—
 - (a) that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him—
 - (i) has absconded or left the local limits of the jurisdiction of the court; or
 - (ii) is about to abscond or leave the local limits of the jurisdiction of the court; or
 - (iii) has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof;or
 - (b) that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court



may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance:

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the court until the suit is disposed of or until the further order of the court."

18. Order 39, rule 5 also provides that;
- (1) Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him—
 - (a) is about to dispose of the whole or any part of his property;
 - (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.
 - (2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.
 - (3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified."
19. The principles governing attachment before judgement were laid down by the Court of Appeal in the case of *Kuria Kanyoko t/a Amigos Bar and Restaurant vs. Francis Kinuthia Nderu, Helen Njeru Nderu and Andrew Kinuthia Nderu* (1988)2 KAR 1287-1334 as follows;
- "The power to attach before judgement must not be exercised lightly and only upon clear proof of the mischief aimed at by order 38, Rule 5, namely that the Defendant was about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him."
20. In the case of *John Kipkemoi Sum vs Lavington Security Guards Limited* (1998) eKLR it was held as follows;
- "... the power to attach before judgment must not be exercised lightly and only upon clear proof of either mischief aimed at by Order 38 Rule 5 of the Civil Procedure Rules, namely, that the defendant is about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him. ... in an application under Order 38 Rule 5 of the Civil Procedure Rules, the onus of sowing a plausible cause for resisting the application can only shift to the defendant once the Plaintiff has fully satisfied the requirements under that Order."
21. In the current case, I find that the applicant has not shown that Defendant is about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him.
22. The Application dated 28/2/2023 lacks in merit and the same is accordingly dismissed.



23. The costs of the Application to abide the cause.

24. The parties are directed to comply with Order 11 within 30 days of this date.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
4TH DAY OF AUGUST, 2023.**

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Applicant/Decree Holder

..... for the defendant/Judgment Debtor

..... for the 1st Garnishee

..... for the 2nd Garnishee

