



Chatthe v Somaia (Civil Suit 10 of 2020) [2022] KEHC 14172 (KLR) (24 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14172 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL SUIT 10 OF 2020
JN KAMAU, J
OCTOBER 24, 2022**

BETWEEN

RAGHBIR SINGH CHATTHE PLAINTIFF

AND

RAJNIKANT KARSANDAS SOMAIA DEFENDANT

RULING

1. In his Notice of Motion dated November 3, 2020 and filed on November 26, 2020, the Plaintiff herein sought for orders that judgment be entered in his favour as against the Defendant for Kshs 90,398,787.53 being the amount due and owing on the principal sum and accrued interest as at November 2020, costs of the suit and interest on (1), (2) and (3) (sic) above at court rates from the date hereof until payment in full.
2. In the alternative, he sought that the Defendant be ordered to deposit the aforesaid sum of Kshs 90,398,787.53 in an interest earning bank account in the joint names of counsel for the parties within seven (7) days and/or deliver a bank guarantee for the payment of the same amount or deposit sufficient security for the performance of the decree hereof.
3. He swore an affidavit on November 23, 2020 in support of his said application. He averred that the Defendant was indebted to him in the sum of Kshs 35,250,000/= as per the Debt Acknowledgements dated October 2, 2018 which he duly signed and was confirmed by a Forensic Document Examiner.
4. He contended that the only known assets of the Defendant were parcels of land known as Kisumu Municipality/Block 12/228 Kisumu Municipality/Block 2/136 (sic) (hereinafter referred to as “the subject properties”) as per copies of the Certificates of Lease and Certificates of Official Search dated October 6, 2020.
5. He averred that the Defendant had commenced a process to sell the said properties to a third party as per the letter dated September 14, 2020 by M/s Apollo Chagina & Co Advocates which was addressed



to Mr Ramesh C. Mehta. He also annexed a Report and Valuation by M/s Chrisca Real Estate to his said application.

6. He was apprehensive that the intended sale and/or conveyance could be concluded before this suit was listed down for hearing as a result of which he would not be able to realise the fruits of his judgment. He averred that he had received a computation of the amount due and owing comprising the components of the principal sum and the accrued interest was Kshs 90, 398, 787.53.
7. It was his contention therefore that the Defendant's actions were aimed at defeating the course of justice by frustrating the execution of the decree that would ensue herein. He was emphatic that the Defendant did not stand to suffer any serious loss, damage and or prejudice if the orders he had sought were granted but that if the Defendant was allowed to dispose of his only known asset, he (the Plaintiff) would suffer substantial loss, damage and prejudice.
8. He pointed out that orders he had sought were interlocutory in nature and meant to be in furtherance of the objectives of the court as set out in Section 1A and 1B of the *Civil Procedure Act*.
9. In opposition to the said application, the Defendant swore a Replying Affidavit on December 9, 2020. He averred that the provisions of Order 36 of the *Civil Procedure Rules* had been cited in error and did not apply herein in view of the fact that he filed his defence on September 29, 2020. He urged the court to dismiss the same in terms of Order 36 Rule 8(1) of the *Civil Procedure Rules 2010*.
10. He denied having been indebted to the Plaintiff as claimed in the Plaint and in this application and stated that the sums of money claimed by the Plaintiff were astronomical, unsubstantiated, not recoverable and had no legal or moral basis.
11. He invited the court to note that the documents relied upon by the Plaintiff were devoid of any material particulars as there was no document evidencing on what date the monies were disbursed to him, no bank transaction and/or remittance details or documents, no signed vouchers confirming receipt by him of the monies and no copies of cheques or check numbers inter alia.
12. He asserted that the signatures appended on the Debt Acknowledgements were not his as he did not sign them on October 2, 2018 or any other date. He denied having signed the same in the presence of Mr Olel (Advocate) or knowing his chambers. He contended that the signatures thereon were plain and blatant forgeries and that the documents had been fabricated. He annexed his specimen signatures which he claimed did not correlate or correspond with the signatures appended to the Debt Acknowledgements.
13. He challenged the Forensic Report and argued that its contents were superficial and that it was not disclosed whether or not the documents examined were in original form or photocopies. He blamed the examiner for having not qualified his Report and failing to explain how he arrived at the conclusion that the signatures were by the same hand. He added that even though he had been stranded in the United Kingdom due to the Covid-19 lockdown coupled with the fact that he was eighty (80) years of age and had suffered four (4) strokes, a heart attack, surgery and several hospitals admissions, he ordinarily travelled to Kisumu on average every four (4) to six (6) months and was willing to attend court and defend his matter to conclusion.
14. He contended that as an advocate of fifty three (53) years standing, he would not have signed a debt acknowledgment confirming debt of monies he had allegedly received over twenty (20) years old yet he was aware of the Law of Limitation.
15. It was his averment that even if he was to accept that the Defendant paid a sum of Kshs 2,250,000/= as deposit for the purchase of a property, the same would have been paid to the law firm and not in



- his name. He stated that he met the Plaintiff several times prior to his retiring from practice in the year 2017 and that the Plaintiff was well aware that he was winding up his law firm yet not once, did he ever raise the issue of monies owed to him arising from the property transactions. He wondered why the Plaintiff would wait for twenty three (23) years to lodge his claim against him.
16. He asserted that whereas the Plaintiff contended that he was in the process of disposing of his property, his assertions could not hold water in view of the undisputed evidence that the Plaintiff had irregularly lodged a caution against the subject property as he was never issued with a Notice as envisaged in Section 72 of the *Land Registration Act*.
 17. He added that the Plaintiff took the keys to the property when he went to view the house but he never returned the same and he could not therefore access the property. He pointed out that the Plaintiff had also removed all the furniture and fittings from the subject property and having engaged his own security providers, no one could enter the subject property to view the same for purposes of selling the same. He asserted that he was unable to access the subject property during his last trip in 2020.
 18. He stated that his agent had never received any offer to purchase the subject property and the letter by Apollo Chagina Advocates was not addressed to him and did not mention any of his properties. He also asserted that the mere fact that a valuation over the subject property was commissioned did not mean that the said subject property was being disposed of.
 19. He further stated that he was unable to dispose of the subject property which was currently valued at a sum of Kshs 200,000,000/= which was far in excess of the claim the Defendant had sought due to the caution. He pointed out that if the Plaintiff obtained judgment, he would be able to realise his decree and hence there was no basis for bringing the present application which had sought draconian, oppressive and unconscionable orders against him. He was emphatic that his subject properties were secure and adequate to satisfy any judgment in respect of the Plaintiff's claim should he be successful at the conclusion of the suit
 20. It was his further contention that there were triable issues and hence the Plaintiff's claim was not merited and/ or justified. He thus urged this court to dismiss the present application with costs and for the suit to proceed to full hearing for purposes of verification of the documents relied on by the Plaintiff.
 21. The Plaintiff's Written Submissions were dated and filed on March 21, 2022 while those of the Defendant were dated and filed on March 22, 2022. This Ruling is based on the said Written Submissions which parties relied upon in their entirety.

LEGAL ANALYSIS

22. In his submissions, the Plaintiff indicated that he had abandoned his prayer for summary judgment. He only submitted on the alternative prayer for the deposit of the amount of the liquidated claim as security for the due performance of the decree in the event he succeeded in the prosecution of his suit.
23. He placed reliance on *Goode on Commercial Law* 4th Edition at Page 1287 where it was stated that before granting a freezing injunction, a court had to be satisfied that the applicant had an arguable case based on a pre-existing cause of action, that the court had jurisdiction over the claim, that the assets were within the jurisdiction of the court, that there was a real risk that those assets being removed from the jurisdiction of the court or otherwise would be dissipated if the injunction was not granted, that there was a balance of convenience in favour of granting the injunction and that the court could also order disclosure of documents or the administration of the requests for further information to assist the claimant in ascertaining the location of the defendant.



24. He further relied on the case of *Kanduyi Holdings Ltd vs Balm Kenya Foundation & Another* [2013] eKLR where the court held that the purpose of any order that is issued under Order 39 Rules 5 and 6 of the *Civil Procedure Rules 2010* was to prevent the defendants or would be judgment-debtors from dissipating their assets as to have the effect of obstructing or delaying the execution of any decree that may be passed against him.
25. He also cited the case of *International Air Transport Association & Another vs Akarim Agencies Company Limited & 2 others* [2014] eKLR where the court therein granted an order for tracing of the assets of the defendants, an order of disclosure of their assets and a freezing order restraining the defendants from selling, disposing of, exchanging, mortgaging, transferring or in any other way dealing with their property.
26. He contended that he had demonstrated that he had a strong case against the Defendant. He explained that it was common ground that the Defendant was currently a resident of the United Kingdom and that it was not known when he would return to Kenya. He pointed out that in order for the court to secure his interests and to avoid making orders in vain, it ought to grant the order sought.
27. On his part, the Defendant reiterated the averments of his Replying Affidavit. He termed the present application as a fabrication, fraudulent and tainted with irregularities. He submitted that the Plaintiff had failed to demonstrate that he intended to abscond the jurisdiction of the court and thus defeat his claim as he even returned to Kenya in 2020 and had only failed to returned to Kenya due to the restrictions that were imposed during the COVID -19 pandemic.
28. In this respect, he placed reliance on the cases of *Bayusuf Grain Millers vs Bread Kenya Limited* [2005] eKLR, *Philip Ndolo vs Kenya Crocodile Farm* Mombasa HCCC No 237 of 1996 and *Kanyoko t/a Amogos Bar vs Nderu* (1988) A KAR 126 where the common thread was that the order of attachment before judgment was draconian and was only to be issued in the clearest of cases.
29. The Defendant submitted that the Plaintiff's reliance on Order 39 (1), (2), (5) and (6) of the *Civil Procedure Rules* had caused confusion as it was not clear which orders he was really seeking. He stated that Order 39 Rule (1) of the Civil Procedure Rules provided for issuance of a warrant of arrest to bring a defendant before the court to show cause why he should not furnish security for his appearance.
30. It was his submission that the Plaintiff was required to satisfy the court that he had intent to delay or obstruct his or avoid any court process or delay the execution of a decree that may be passed against him, that he had absconded or was about to abscond the jurisdiction of the court or had disposed of his property or that he was about to leave Kenya thereby obstructing or delaying the execution of any decree that may be passed against him.
31. He argued that Order 39 Rules (1) and (5) were mutually exclusive and a plaintiff could not place reliance on both rules as the common denominator was the right of the defendant to show cause why he should not furnish security. He argued that there was no factual or legal basis for invocation of Order 39 Rule 1 & 5 and as such the application should be dismissed with costs.
32. Attachment before judgement is provided for under Section 63 of the *Civil Procedure Act* Cap 21 (Laws of Kenya) and Order 39 of the *Civil Procedure Rules*.
33. Section 63 of the *Civil Procedure Act* provide as follows:-

In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed:



- a. issue a warrant to arrest the defendant and bring him before the court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to prison;
- b. direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order the attachment of any property;
- c. grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;
- d. appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;
- e. make such other interlocutory orders as may appear to the court to be just and convenient.

34. Order 39 Rule 1 of the [Civil Procedure Rules](#) further states that:-

“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.”

35. Order 39 Rule 5 of the [Civil Procedure Rules](#) further 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.”
36. As was held by the Court of Appeal in the case of *Kuria Kanyoko t/a Amigos Bar and Restaurant vs Francis Kinuthia Nderu & 2 others* (*Supra*), the power to attach before judgement must only be exercised upon clear proof 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.
37. Indeed, Section 63 of the *Civil Procedure Act* and Order 39 Rules (1) and (5) are very specific on the circumstances under which the orders of attachment before judgement or an order to provide security may be granted. It is only where a defendant has deliberately taken action to avoid any process, obstruct or delay execution of a decree and/or frustrating an applicant from enjoying the fruits of his judgment either by removing himself from the jurisdiction of the court and/or disposing or intending to dispose of the subject property that such orders may be made.
38. In the present case, the Defendant left Kenya in the year 2017, three (3) years prior to filing of this suit hence it could not be argued that he had absconded or intended to abscond the jurisdiction of the court. In any event, the Plaintiff did not prove any conduct on the part of the Defendant that would insinuate that the Defendant had the intent of absconding or had absconded the jurisdiction of the court.
39. Going further, the letter by Apollo Chagina Advocates dated September 14, 2020 was vague as it did not expressly state that the subject properties herein were being sold. The same was also not directly addressed to the Defendant as the owner and as such this court could not make a presumption that the letter referred to the subject properties herein.
40. This court agreed with the Defendant’s submissions that the commissioning of a valuation report was not indicative of an intention to sell property and/or an intention to remove property out of the jurisdiction of this court.
41. After carefully analysing the affidavit evidence and written submissions that was presented, this court was also not persuaded that the Plaintiff had demonstrated that the Defendant did not intend to appear before this court for the hearing and/or determination of the suit herein so as to defeat the ends of justice.
42. Additionally, the Plaintiff did not provide proof that the Defendant had disposed and/or intended to dispose of the subject property and/or that the Defendant would be incapable of complying with any decree that may be issued by this court if his claim were to succeed.
43. Indeed, the orders that the Plaintiff had sought were draconian and being interlocutory in nature they had to be granted sparingly and only in the clearest circumstances. This clarity was missing herein. To the contrary, the affidavit evidence that was presented by both parties demonstrated that there were arguable and triable issues that needed to be canvassed during the hearing of the case herein.



DISPOSITION

44. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's Notice of Motion dated November 3, 2020 and filed on November 26, 2020 was not merited and the same be and is hereby dismissed with costs to the Defendant herein.
45. To ensure that the hearing herein proceeds expeditiously, it is hereby directed:-
- a. That the Plaintiff files and serves a witness statement(s) cross-referenced to his indexed and paginated bundle of documents by November 7, 2022.
 - b. That the defendant files and serves a witness statement (s) cross-referenced to his indexed and paginated and bundle of documents by 7th December 2022.
 - c. That the matter be mentioned on December 13, 2022 to confirm compliance and/or for further orders and/or directions.
46. It is so ordered.

DATED AND DELIIVERED AT KISUMU THIS 24TH DAY OF OCTOBER 2022.

J. KAMAU
JUDGE

