



**Uzuri Foods Limited v Shreeji Computers Limited & 2 others (Civil Case E926 of 2021)
[2022] KEHC 16048 (KLR) (Commercial and Tax) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 16048 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E926 OF 2021
WA OKWANY, J
NOVEMBER 24, 2022**

BETWEEN

UZURI FOODS LIMITED APPLICANT

AND

SHREEJI COMPUTERS LIMITED 1ST RESPONDENT

DELTA INTERNATIONAL FZE 2ND RESPONDENT

DHAVAL VINODBHAI SONI 3RD RESPONDENT

RULING

1. The plaintiff herein filed the Application dated 24 November 2021 seeking orders to prevent the Defendants from dissipating, diminishing, disposing or wasting away their assets, or the 3rd Defendant leaving jurisdiction in a manner that would obstruct or delay the execution of a decree that may be passed against them. The plaintiff also seeks the alternative prayer for the deposit of the sum of USD 195,300 in Court by the defendant and further, that judgment on admission in the sum of USD 195,300 be entered in its favour. The plaintiff further seeks orders for the issuance of a warrant of arrest against the 3rd defendant and to bring him before court to show cause why he should not furnish security for his appearance.
2. The Application is supported by the Supporting and Supplementary Affidavits of Mr Aneez Lalji and is premised on the grounds that: -
 - a. On or about the year 2018; the 3rd Defendant and Manoj Babulal Panchal as Directors of the 1st and 2nd Defendants represented to the Plaintiff that the 2nd Defendant was a Microsoft Business Solution, Independent Software vendor of Microsoft capable of providing Product license,



customization, implementation and support service on ERESOURCE Enterprise Resource Planning Program Software (ERESOURCE ERP).

- b. The Plaintiff placed reliance on the 3rd Respondent's representation and executed the ERESOURCE ERP implementation proposal with the 2nd Defendant on 18 September 2018 (the Contract) where it was agreed that the 2nd Defendant would supply the Plaintiff with the ERESOURCE ERP by October 2019 through the 1st Defendant domiciled in Kenya.
 - c. At the 2nd Defendant's request, the Plaintiff paid the 1st and 2nd Defendants a cumulative sum of USD 184,800 as consideration under the contract and spent a further USD 500 receipt of which the Defendants acknowledged. The total sum owing is USD 195,300.
 - d. However, the Defendants failed to supply the agreed services and despite numerous reminders, the Defendants have failed, refused and/ or neglected to deliver the services or refund the sum of USD 195,300.
 - e. The Defendants acknowledge and admit to owing the Plaintiff the sum of USD 195,300 but have deliberately declined, failed and/ or refused to pay it.
 - f. The 1st Defendant/ Respondent is in the process of disposing off its property and withdrawing and/ or transferring all the funds in its Bank Account from the reach of the Plaintiff while the 3rd Defendant is about to leave the local limits of the jurisdiction of the court in order to make it impossible for the Plaintiff to recover the debt even by way of execution if the Plaintiff' Claim is successful.
 - g. There is a reasonable likelihood that the Defendants are planning to abdicate their responsibility of settling its debt by leaving jurisdiction and removing their assets from the jurisdiction of the Court and consequently leading to the Plaintiff being disenfranchised.
 - h. It is therefore necessary that the Defendant/ Respondents' assets including Bank accounts be preserved pending the hearing and determination of this instant application and the suit in general to ensure that ends of justice are met and the consequential decree executable.
3. The Plaintiff's case is that it has an arguable case based on a contract signed by the parties for the supply of a software program. It states that the Defendants appear to have assets within the court's jurisdiction (Money in the Bank account) and that there is demonstrably and admittedly the real risk of their removal in a manner that would disenfranchise the Plaintiff. It further states that the claim of USD 195,300 is admitted by the 3rd Defendant who is the sole Director of the 1st and 2nd Defendants and adds that in view of the acknowledgment of debt coupled with the defendant's proposal the settle the same, judgment ought to be entered in order to obviate unnecessary costs and delay.
 4. The plaintiff avers that the 2nd Defendant is an entity incorporated and based in the Free Trade Zone of the United Arab Emirates against whom execution of the decree may be difficult if the orders sought herein are not granted.
 5. The Defendants opposed the application through the replying affidavit of the 1st defendant's Director and Technical Manager Mr. Manoj Panchal who concedes that the defendants agreed to supply software the plaintiff but attributes the frustration of the contract to the plaintiff's change of mind and refusal to cooperate in its implementation. The defendants contend that they incurred losses due to the plaintiff's actions but are still keen to deliver on the project.
 6. It is the defendants' case that they are well established companies carrying out business in Kenya and have no intention of disposing of their property. They maintain that it is the plaintiff who breached



the terms of their agreement and that the application does not meet the threshold for the granting of the orders sought.

7. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the plaintiff has made out a case for the granting of the Mareva injunction.
8. Order 39 of the Civil Procedure Rules provides for the conditions to be satisfied in an application for a Mareva injunction as follows: -

“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.

9. In *Beta Healthcare International Limited vs Grace Mumbi Githaiga & 2 others* [2016] eKLR the court set out the conditions to be met in an application for Mareva injunction to be, firstly; that the Court has jurisdiction, secondly; that there is a good arguable case based on an existing cause of action, thirdly; that the Defendants appear to have assets within the jurisdiction, fourthly; that there is a real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted, and lastly; that there is a balance of convenience in favour of granting the injunction.
10. The issue that arises is whether the instant case meets the criteria set out in the above cited case. It is not disputed that the parties herein entered into a contract for the supply of software and that the plaintiff paid a tidy sum of money to the defendants for the said purpose. It is further not in dispute that this court has the jurisdiction to hear and determine the case.
11. On whether the case is arguable, I note that while the plaintiff claims that the defendants did not perform their part of the contract despite the payments being made. The defendants contend that their efforts to perform the contract were frustrated by the plaintiff. In other words, the scenario presented herein is that of each party blaming the other for the frustrating the deal. My take is that in



the circumstances of this case, it is not possible to determine which party is telling the truth without having the advantage of hearing the evidence of both parties.

12. I further find that the claim that there is a real risk that the defendants' assets will be removed from the court's jurisdiction or otherwise dissipated was not supported by any tangible evidence. In my humble view, the balance of convenience tilts in favour of hearing the suit on its merits.
13. Turning to the prayer for the issuance of a warrant of arrest against the 3rd defendant in order to bring him to court to show cause why he should not furnish security for his appearance, I note that it was not disputed that the 3rd defendant is a director in the 1st and 2nd defendant companies. Considering that a company is separate legal entity from its directors, I find that it will be premature to take precipitate action against the companies' director at this interlocutory stage of the case before hearing the merits of the case or lifting the corporate veil of the said companies.
14. On the alternative prayer for the deposit of security in the sum of USD 195,300 in court, I note that it was not disputed that the plaintiff paid for the supply of the software. Paragraphs 14 - 18 of the replying affidavit, contain the defendants' acknowledgement of receipt of payments and the claim that they procured the necessary licences and approvals required for the project. They further state that they are still willing to deliver on the project but decried the plaintiff's apparent change of mind and frustration. The defendants tendered copies of receipts as exhibits in support of the said payments.
15. I find that the defendants' averments lend credence to the plaintiff's claim that it paid for the supply which has clearly not been fully actualized. I am therefore persuaded that this is a case where the interests of justice would be served if a deposit is made for security is made.
16. Having found in favour of the plaintiff for the deposit of security and further, having found that the issue of whether the plaintiff has an arguable case would require a full hearing of the case, I do not find it necessary to belabor the prayer for entry of judgment on admission.
17. For the above reasons, I allow the application dated 24th November 2021, albeit in part, in the following terms: -
 - a. That the defendants shall, within 30 days from the date of this ruling deposit security in the sum of USD 100,000 pending the hearing and determination of the suit.
 - b. That in the event of failure to comply with order in (a) above, the plaintiff shall be at liberty to execute for the said amount.
 - c. The costs of this application shall abide the outcome of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF NOVEMBER 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Kinyanjui for plaintiff/applicant

Mr. Muriungi for Oonge for defendants/respondents

Court Assistant- Sylvia

