



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 115 OF 2019

EQUATOR BOTTTLERS LIMITED.....APPELLANT

VERSUS

EUNICE RAHEL ACHIENG.....RESPONDENT

(An appeal from the Judgment of the Chief Magistrate's Court at Kisumu

(Hon. Julius Ng'arng'ar CM) delivered on the 18th September 2019

in CMCC NO. 425 of 2017)

JUDGMENT

The appeal arises from an interlocutory order which was made by the learned trial magistrate on 18th September 2019. The order that is the subject matter of the appeal was that the Appellant should deposit the sum of Kshs 17,260,810/= as security for the Decree that may finally be issued against the Defendant, in respect to the sums which the Plaintiff had claimed against the said Defendant.

1. The said Ruling was made in relation to the application dated 7th March 2019.
2. The application was premised on the provisions of **Order 39 Rules 5 and 6** of the **Civil Procedure Rules**. The said Rules provide as follows;

“5 (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, or 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 to be attached and the estimated value thereof.

(3) The court may also order or direct the conditional attachment of the whole or any portion of the property so specified.

6. (1) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the court, the court may order that the property specified, or such portion thereof as appears sufficient to satisfy the decree which may be passed in the suit, be attached.

*(2) Where the defendant shows such cause
or furnishes the required security, and
the property specified or any portion of
it has been attached, the court shall
order the attachment to be withdrawn,
or make such order as it thinks fit.”*

3. Essentially, that rule provides for circumstances when the court may order for attachment before judgment.

4. In the case of BETA HEALTHCARE INTERNATIONAL LIMITED Vs GRACE MUMBI GITHAIGA & 2 OTHERS HCCC NO. 256 OF 2015 Kariuki J. held as follows;

*“Thus from the above, it is clear that
Order 39 Rule 5 deals with situations
where the Respondent is about to
dispose of or remove property from the
jurisdiction of the court.”*

5. In my considered view, the Plaintiff would need to prove not only that the Defendant was about to either dispose of or to remove the property from the jurisdiction of the court; but also that the reason for such disposal or removal of the property was intended to obstruct or delay the execution of any decree which may be passed against him.

6. In the case of KURIA KANYOKO T/A AMIGUS BAR & RESTRAURANT Vs FRANCIS KINUTHIA NDERU & OTHERS [1985] 2 KAR 126 emphasized that;

*“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 (which is
equivalent to the current Order 35 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.”*

7. I note that even when the Plaintiff was canvassing the application before the trial court, it expressly acknowledged that;

*“..... the onus of proof lies squarely on
the shoulders of the Plaintiff to prove
that the defendant;
(a) Is about to dispose of the whole*

or any part of his property; or

(b) Is about to remove the whole or

any part of his property from

the local limits of the jurisdiction

of the court.”

8. When determining the application, the learned trial magistrate held that the Defendant was financially sound.

9. Upon a re-evaluation of all the evidence which were placed before the trial court, I find that the Plaintiff did not discharge the onus of proving either that the Defendant was about to dispose of the whole or any part of its property; or that the Defendant was about to remove the whole of or any part of its property from the court's jurisdiction.

10. In the circumstances, I find that the court ought to have dismissed the application.

11. When responding to the appeal, the Respondent said the following;

“The court exercised its jurisdiction

and gave him a remedy, even though

that is not what it had asked the

court for ………”

12. That is reason enough to warrant the setting aside of the orders in issue.

13. Although the Respondent has urged me not to focus on **Order 39** of the **Civil Procedure Rules**, and to use my discretion to develop jurisprudence for future commercial disputes that will entrench trust and good faith in transactions, I find that my primary role, as an appellate court, is in determining whether or not the Ruling in issue should be upheld or be set aside. I therefore refrain from engaging in an academic discourse, for purposes of developing jurisprudence.

14. In the result, the appeal is allowed, and I set aside the orders made by the learned trial magistrate on 18th September 2019. I substitute the said decision with an order dismissing the application dated 7th March 2019.

15. The Appellant is awarded the costs of the appeal, as well as the costs of the application dated 7th March 2019.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 19TH DAY OF MAY 2021

FRED A. OCHIENG

JUDGE