



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J)

CIVIL CAUSE NO E002 OF 2021

GREEN LIFE CROP PROTECTION AFRICA LTD.....PLAINTIFF/APPLICANT

VERSUS

OSERIAN DEVELOPMENT COMPANY LTD.....DEFENDANT/RESPONDENT

RULING

Background

1. Through a plaint filed on 2nd February 2021, the plaintiff claims USD.694,121.86/- against the Defendant as a debt for the supply of farm implements and products. The plaintiff further alleges that the defendant on 30/10/2020 acknowledged the claim and promised to settle the debt or give a payment proposal but has to date failed to pay the debt.
2. Simultaneously, the Plaintiff filed an application under **Order 39, Rule 1; 5 & 6; Order 40 Rule 10** of the **Civil Procedure Rules** seeking that the defendant be ordered to furnish the claim amount of USD.694,121.86/- as security to satisfy the decree that may be passed by court.
3. The application for security is premised on the grounds, inter alia, that: the debt is an admitted liquidated amount; that the defendant has defaulted in paying the said amount on the promise that they are obtaining financing to settle the debt in lump sum; that the defendants are dissipating and disposing the assets of the defendant; that the defendant is removing the proceeds of such disposal outside the jurisdiction with intent to obstruct, defeat and delay execution of any decree; and that the defendant has no other attachable assets.
4. The defendant filed grounds of opposition to the effect that it has no intention of leaving nor absconding the jurisdiction of the court and that the defendant has not disposed or removed from the local limits of the jurisdiction of this court its property or any part thereof. The defendant alleged that it was not about to make arrangements that would suggest that the plaintiff would be obstructed or delayed in the execution of any decree that may be issued against in favour of the Plaintiff.
5. The defendant further alleges that the threshold required under **Order 39** of the **Civil Procedure Rules** has not been evidenced by anything that demonstrates that the plaintiff is entitled to move court for orders seeking security for the claim or for the grant of any orders sought in the Application.
6. The only issues for determination are: whether the respondent is indebted to the applicant and, if so, whether the respondent is within the liability threshold of **Order 39** of the Civil Procedure Rules.

The issue of debt

7. The plaintiff applicant made a direct assertion in its pleadings and application that the amount of US Dollars 694,121.86 is due and owing to it from the respondent. They attached sufficient evidence of demands, statements and correspondence between the parties evidencing the same.
8. The respondent did not directly deny the debt, and their grounds of opposition merely deny their intention to abscond or dispose any property from the jurisdiction of the court, nor do they intend to obstruct the court from execution of any decree that may be issued against it by the court in favour of the plaintiff.
9. During the proceedings, the parties were represented by counsel (Mr Kuyo for the respondent and Mr Litoro for applicant) who made representations on the record to the following effect:

“12/2/21:

Kuyo: We are in the process of selling the defendant Oserian Development Co as a going concern. There is an investor coming in.....

Litoro: We have had discussions. We agree to mention the matter in two weeks so the defendant can make proposals on how to secure the debt”

“16/3/21

Kuyo: ...we have not concluded sale and have not secured Litoro’s client. This should be possible within the next one month. The whole class of creditors should be involved.

Litoro: I’m between a rock and a hard place. Defendant has not filed insolvency proceedings. There needs to be some tangible security...”

10. Another mention was agreed and fixed for 18/5/2021 when the following transpired:

“Litoro:I have not been served with a response nor been furnished with any guarantee.

I am constrained to proceed with the application.... Mr kuyo contacted me yesterday seeking another 60 days to make a proposal.

Ndungu (for Defendant)Mr Kuyo says there are statutory processes that are required to be undertaken. He requests another 60 days...”

11. At this point, little progress having been made on the provision of security as had been discussed in open court, it was agreed to proceed with the formal hearing of the application.

12. Clearly, and in addition and beyond what was contained in the formal pleadings, the representations of the parties disclose the fuller picture – namely that that the defendant did not deny the existence of a debt to the applicant; that they were in discussions to resolve the payment of the sums owed; that the status of the discussions was updated during appearances for mention, though not much progress was being made to secure the debt; that the defendants sought sixty days including the parties agreeing that the defendant do avail a guarantee to the plaintiff; and that the defendant was in the process of being sold and or inviting third parties into the capital stake of the defendant.

13. The foregoing notwithstanding, during the hearing, the respondent /defendant argued that the assertions by the applicant that there was a threatened disposal of the assets of the defendant were hearsay and not confirmed by anything in writing.

The **Defendant/Respondent contended that the supporting affidavit by one Festus Mwaniki suffers many defects namely that the main ground of the application is based on hearsay. That the affidavit states that Festus Mwaniki had received information informally from a senior employee from the Defendant Company that a colossal amount of money had come and was to be used to dispose of the sale of the company to persons outside the jurisdiction of the court.** The defendant’s counsel argued that the allegations are vague and that the persons alleged to buy are not indicated and that the intention to obstruct or delay a decree from court is not clearly indicated and cited the case of **Kanyoko t/a Amigos Bar and restaurant vs Nderu & 2 Others (1988) eKLR ...**,

“Vague allegations are insufficient. The power to attach is not to be exercised lightly and without clear proof of the mischief aimed”

14. The Defendant’s counsel contends that the mischief is not stated. Counsel for the defendant submitted that the Applicant cannot supply real prima facie evidence or vague allegations that to obtain judgment before determination of the case. The respondent seeks to have the application dismissed with costs

15. I am unable to agree with the respondent. There is ample evidence attached to the affidavit of the Festus Mwaniki to show the indebtedness of the respondent. For example in the letter by the respondents relied on dated 30/10/2020, and relied on by the applicant, the defendant specifically stated:

‘RE: FINAL DEMAND FOR OVERDUE AMOUNT OF USD 694,121.86

Dear Festus

...the various efforts to being made to refinance the business as well as dispose of significant land assets...I am aware of the huge pressure you are under, but please hold off for another week _ I am so close to securing a re-financing of Oserian.

Neil Hellings.

Managing Director”

16. The foregoing letter was in answer to a demand by the Applicant/plaintiff on the various invoices raised by the plaintiff. In my view that was a clear admission that the amount due was that which was calculated and specified. The letter was not written on a without prejudice basis.

17. *There can be no doubt that the applicant is owed the monies asserted by them.*

Whether the respondent fits into the threshold of Order 39 Rule 5(1)

18. The Applicant submitted in their response that there were no facts of any kind by the Respondent by way of affidavit. It was submitted that the threshold that was challenged by the Respondent in ground 4 of its Grounds of Opposition is established at **Order 39 rule 5(1)** by virtue of the use of the term ‘otherwise’ in the rule. That order entitled: “Where defendant may be called upon to furnish security for production of property” provides as follows:

“(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.”

19. The Applicant contended that the application can be made at any stage of the suit and satisfy court by *affidavit or otherwise*. The applicant urged that the employee who gave evidence gave it in confidence, and it contends that there was an intention to obstruct as per the letter dated 30th October 2020 (page 22). The Applicant contends that the wording of order 39 rule 5(1) by the use of the word ‘otherwise’ validates the Defendant’s instruction as to the disposal of its interests and assets. The applicant further contends that there is no affidavit denying the information deponed in the Application.

20. In *Shiva Enterprises Limited v Jivaykumar Tulsidas Patel t/a Hytech Investment [2006] eKLR*, it was held the burden of proof demanded in this sort of application is that it is for an applicant prove that the respondent is about to close shop and that it will suffer great prejudice as a consequence.

21. In *Godfrey Oduor Odhiambo vs. Ukwala Supermarket Kisumu Limited [2016] eKLR*, the court was of the view that where there is an allegation that a company was closing shop, being a juristic person evidence of winding up or insolvency must be produced. The court emphasized that:

“... It is only where the Respondent has deliberately taken action to avoid any process, obstruct or delay execution of a decree that such orders may be made. The applicant must therefore show that the action taken by the Respondent has been taken with the sole aim of frustrating the applicant's enjoyment of a decree or anticipated decree.”

22. *From the above, a week after intimating that the Respondent was in talks for refinancing of the Company the Applicant has continued to suffer non-payment from at least 24th June 2020. The mere fact that non-payment occurred on the Applicant and that the Defendant, as submitted by its Advocate, is seeking to be sold as a going concern which was divulged in open court on 12/02/2021, satisfies the threshold in Godfrey Oduor Odhiambo v Ukwala Supermarket Kisumu Limited [2016] eKLR.*

23. Given all the representations highlighted herein, I agree entirely with the applicant that it is entitled to some form of security. The Court notes that, while an order for Security for Judgment is not routine, it can be ordered in situations like this where a litigant seeks to use the court to their advantage, yet fails to show a willingness to pay amounts demanded and not denied; or where there is no dispute that the defendant has enjoyed the benefits of what the plaintiff was seeking compensation for, yet refuses to pay, or where security for judgment is needed to encourage respect for the judicial process or prevent abuse of process.

Conclusion and Disposition

24. Taking into account the material and representations of the parties, there is no doubt in my mind that the respondent owes a debt to the applicant, that the respondent is in the process of disposing of its assets, and that the applicant is thereby entitled to be secured.

25. Accordingly, having been so satisfied, I find and order as follows in determination of the application herein:

a. That the applicant’s application succeeds.

b. That the respondent is in the process of disposing part of or the whole of its property (assets);

c. That the applicant has a specified interest by way of unpaid debts that are or ought to be secured in the amount of US Dollars 694,121.86;

d. That the respondent should and is hereby ordered to furnish security to the applicant/plaintiff for the said amount of US Dollars

694,121.86.

e. Such security shall be furnished to the respondent within thirty (30) days of the date hereof.

Administrative directions

26. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

27. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

28. Orders accordingly.

DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 24TH DAY OF SEPTEMBER, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Muguyu holding brief for Litero for the Plaintiff/Applicant
2. Kuyuo for the Defendant/Respondent
3. Court Assistant - Quinter Ogutu