



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

COMMERCIAL SUIT NO. 5 OF 2019

BONIFACE OWITI OKIRI..... PLAINTIFF

VERSUS

JIANGXI ZHONGMEI ENGINEERING

CONSTRUCTION CO. LIMITED..... DEFENDANT

RULING

The Plaintiff's application dated 29th November 2019 was for an Order compelling the Defendant to furnish Security in the sum of Kshs 29,147,360/=.

1. It was the Plaintiff's case that the Defendant, **JIANGXI ZHONGMEI ENGINEERING CONSTRUCTION CO. LIMITED**, is an artificial person whose operations, business, financial means, attachable assets or properties are unknown to the Plaintiff, **BONIFACE OWITI OKIRI**.
2. The Plaintiff asserted that the directors of the Defendant are foreigners who did not reside within the jurisdiction of Kenya; and that they had no representative or any known assets within Kenya or abroad.
3. Therefore, the Plaintiff considered the Defendant as a flight-risk.
4. In his considered opinion, the Plaintiff has a good case against the Defendant, as the Defence lodged by the Defendant did not raise any triable issues.
5. It was the Plaintiff's fear that he will be delayed or obstructed in the execution of any Decree that the court may pass against the Defendant in this suit.
6. Furthermore, as the Defendant was a company that was domiciled outside Kenya, the Plaintiff expressed the view that the execution of any decree against the Defendant would be uneconomical.
7. It is common ground that the Plaintiff was the registered proprietor of the parcel of land **L.R. NO. KISUMU/MUHORONI/0932/877A**.
8. It is further common ground that the Plaintiff entered into a written Agreement dated 10th March 2014, pursuant to which the Defendant leased the parcel of land.
9. The agreed cost of leasing the parcel of land was Kshs 280,000/=.
10. Pursuant to the terms of the Agreement, the Defendant was to back-fill the land in question after the process of excavation for road construction was completed.
11. The Plaintiff's case was that the Defendant failed to carry out the task of back-filling the area which had been excavated.
12. On the other hand, the Defendant asserted that it had restored the land to its status.
13. As a result of the Defendant's actions, the Plaintiff asserted that he has incurred losses for four (4) farming seasons, between 2015 and 2019.

14. The said losses are attributed to the fact that the actions of the Defendant had rendered the land unfit for agricultural farming.
15. In respect to the four (4) farming seasons, the Plaintiff has calculated the losses he has suffered to be in the sum of Kshs 787,360/=.
16. Secondly, the Plaintiff has obtained a professional evaluation, which shows that it would cost him a total of Kshs 28,360,000/= to do back-filling, so as to restore the land to its original topography.
17. The Plaintiff invoked the provisions of **Order 39 Rules 5** and **5** of the **Civil Procedure Rules**, as the foundation for his application.
18. It is the understanding of the Plaintiff that the scope and object of **Order 39** was to protect the Plaintiff against loss arising from a Defendant getting rid of his property whilst a suit was still pending determination.
19. **Order 39 Rule 5** provides as follows;

“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; or

(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.”

20. **Sub-rule (2)** expressly states that it was the obligation of the Plaintiff to specify the property required to be attached and the estimated value thereof: However, it is open to the court to direct otherwise.
21. In my considered opinion, the pictorial evidence produced by the Plaintiff appears to prove that the suit property was not restored to its normalcy. In effect, the Plaintiff has demonstrated a prima facie case against the Defendant, on the issue of liability.
22. I note that the Defendant has, so far, indicated that it does not have either a witness or other evidence which it intends to put forward in answer to the suit.
23. The Plaintiff has stated, on oath, that the Defendant completed the construction of the road which they were working on, between Londiani and Muhoroni.
24. After completing the said task, the Defendant is said to have relocated.
25. On the one hand, the relocation of the Defendant was attributable to the fact that the work they had been undertaking, had been completed.
26. Whilst, on the other hand it cannot be denied that when the assets of a defendant were not easily identifiable and accessible, that fact would make it more difficult for a successful plaintiff to execute such decree as he may obtain against the defendant.
27. But it is not sufficient for the Plaintiff to say that unless security was provided by the Defendant, execution would be more difficult.
28. **Order 39 Rule 5** of the **Civil Procedure Rules** imposes an obligation upon the Plaintiff to demonstrate to the court that the Defendant was dissipating his assets, so as to have the effect of obstructing or delaying execution of such a decree as may ultimately be passed in favour of the Plaintiff.
29. The Defendant may be a foreign company, but that is not a sufficient reason to order them to provide security.
30. Secondly, the fact that the Plaintiff is unaware of the nature and location of the Defendant’s assets is not, of itself, sufficient reason to order the Defendant to provide security.
31. In the event that it was the Defendant who was seeking security from a non-resident Plaintiff, when such a Plaintiff had no known assets within Kenya, that would have constituted a prima facie case for requiring the Plaintiff to provide security for costs.
32. A person who was a non-resident in Kenya, and who did not have known assets within the jurisdiction of the Kenyan courts could end up losing a case; and the successful defendant would then have to go to great lengths to pursue execution in foreign lands.

It is for that reason that in the event that the Plaintiff was a non-resident, the standard of proof was lower than when the Defendant was a non-resident.

33. I so hold because when the Plaintiff chooses to institute proceedings against a non-resident, and then insists that the Defendant must first provide security, that would be equivalent to dragging the Defendant to court, but then placing a hurdle in his path.

34. I believe that that is why **Order 39 Rule 5** is applicable to a Defendant who was dissipating his assets, with the intention of obstructing or delaying the execution of any decree that may be passed against him.

35. In my considered view, the court must consider the possible implications of an order for the Defendant to provide security. Would the failure to provide security result in a judgment in favour of the Plaintiff?

36. I would think not; because the Plaintiff would still have to prove his case against the Defendant.

37. I appreciate that the Defendant could simply have demonstrated to the court that it has assets which are to be found within the jurisdiction of the court.

38. By providing such information, the Defendant would have displayed bona-fides.

39. But then again, the Defendant has no obligation to reveal to either the Plaintiff or the court, the particulars of its assets, or where the said assets are located.

40. I am alive to the fact that lack of knowledge about the particulars of the Defendant's assets or their location, could render execution of a decree against the Defendant more difficult than if the Plaintiff either had security from the Defendant or if the Plaintiff knew where to find the Defendant's attachable assets.

41. True justice is not about hide and seek.

42. Whereas the Plaintiff has not shown that the Defendant was actively dissipating its assets, so that the execution of any decree that may be passed against it would be obstructed or delayed, I find that the Overriding Objective of justice can only be achieved through an Order requiring the Defendant to Show Cause Why it should not be ordered to provide security.

43. Accordingly, whilst I decline to immediately order the Defendant to provide security, I order that the Defendant shall be required to Show Cause Why it should not be ordered to provide security.

44. A date will be set down by the Court, when the Defendant shall Show Cause.

45. On that date, the parties will also be accorded an opportunity to address the court on the quantum of the security, if any.

46. For now, before I have heard either of the parties, I hold the view that the quantum of the security being sought appears to be completely out of line with the value of the subject matter of the suit.

47. Costs of the application dated 29th November 2019 shall abide the final orders, after the Defendant will have been accorded the opportunity to Show Cause.

DATED, SIGNED and DELIVERED at KISUMU

This 27th day of July 2020

FRED A. OCHIENG

JUDGE