



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E309 OF 2020

BETWEEN

TUFFSTEEL LIMITED.....PLAINTIFF

AND

BOLEYN MAGIC WALL PANEL LIMITED.....DEFENDANT

RULING

1. The Plaintiff's claim is for Kshs. 32,348,841.77 against the Defendant for goods sold and delivered. The application for consideration is the nature of attachment before judgment. By the Notice of Motion dated 25th November 2020 made, inter alia, under **Order 39 rules 5 and 6** of the *Civil Procedure Rules* ("the *Rules*"), the Plaintiff seeks the following orders:

[1] THAT this application be heard ex-parte in the first instance.

[2] THAT this Honourable court be pleased to issue summons to the director(s) of the Defendant /Respondent to appear before court to show cause why they should not furnish security for their appearance and the undisputed contractual debt of Kshs. 32,348,841.77/=

[3] THAT upon hearing the said director (s), this Honourable court be pleased to order them to give sufficient property to answer the claim as against the Defendant/Respondent.

[4] THAT pending the hearing and determination of this Application an order be and is hereby issued by this Honourable Court for immediate closure and/or freezing of the following bank account belonging to the Defendant to the extent of the amount owed of Kshs. 32,348,841.77 to protect the suit amounts: BOLEYN MAGIC WALL PANEL LIMITED, KRA PIN NUMBER: P051352190A, COMPANY REGISTRATION NO: CPR/2011/41966. The said Company has both Dollar and Kenya Shillings Accounts in the following Banks: CREDIT BANK LIMITED, EQUITY BANK LIMITED, SBM BANK LIMITED All which are within the jurisdiction of Central Bank of Kenya.

[5] THAT in the alternative to prayer no. 4 the Defendant be ordered to immediately and or within 14 days from the date of this Honourable courts Order issue security for the suit amount in the sum of Kshs. 32,348,841.77

[6] THAT this Application be heard inter-partes as a matter of urgency on such date and at such time as this Honourable Court may direct.

[7] The Court be pleased to grant any other orders that it may deem necessary in the interest of justice.

2. The application is supported by the affidavit of Dev Mukund Patel ("Patel"), a director of the Plaintiff, sworn on 24th November 2020. It is opposed by the Defendant through the affidavit of its director, Jack Liu ("Liu"), sworn on 10th December 2020. In addition to the depositions, I heard the oral submissions of the parties advocates in support of their respective positions.

3. The Plaintiff's case is that it supplied to the Defendant building and construction materials to the Defendants' various sites; Tulip Storage,

GSU Statehouse, SDA Site, Kitengela and Low Cost Housing. It issued various invoices and demanded payment from the Defendant who failed to honour its obligation. It contends that the invoices are way overdue and which the Defendant has ignored.

4. The gravamen of the Plaintiff's application is to be found in Patel's affidavit where he depones, at the material part, that:

[5] THAT in a bid to resolving the issue and the payments, the Plaintiff Company has issued several correspondences to the Defendant, all of which have been ignored.

[6] THAT the Defendant is in total breach of the terms and conditions on the Credit Application form and Invoices and has proved keen on avoiding to make the payments.

[7] THAT the Defendant has previously offered to satisfy the debt by offering overvalued property as a means of camouflaging the full debt owed and if the orders sought herein are not granted, the Plaintiff's business will be extremely prejudiced as it continues to suffer financially.

[8] THAT it is in the interest of justice and in order to avoid any prejudice to be occasioned to the Plaintiff, I therefore seek the grant of the preservation orders sought in the Plaintiff's/Applicants Application and that the same be heard on priority basis.

5. Counsel for the Plaintiff submitted that the apart from the breach of contract and failure to pay its debt, the Plaintiff is apprehensive of the fact that it may never recover the debt if the Court does not compel the Defendant to make good the said payment. The Plaintiff contends that the Defendant is a foreign company whose major operations are done in China, and to date, it has not completed most works it has been contracted to do. Counsel further submitted that some of its directors are already out of this Court's jurisdiction and there is a likelihood that they are closing its operations in Kenya as their office functions are way minimal unlike before hence it is necessary that the court issue the orders sought.

6. The Defendant opposed the application. In his deposition, Liu states that the Defendant is a limited liability incorporated in Kenya on 12th January 2011. He states that he has been running the Defendant since its incorporation. He further explained that the Defendant owns Kenya's first modern precast concrete plant with a value of Kshs. 2.5 Billion.

7. The Defendant admits that the Plaintiff supplied building materials to it for the various projects that it was undertaking with Government. It also admits that it owes the Plaintiff Kshs. 27,524,926.00 according to its records but denies that it owes the Plaintiff the amount claimed in the Plaintiff. The Defendant states that it has been unable to settle the Plaintiff's debt as the Government has failed to pay it. It is ready and willing to pay the Plaintiff once it is paid by the Government. Liu depones that by an email dated 2nd October 2020, the Defendant offered the Plaintiff a parcel of Land in Athi River towards settlement of the outstanding debt though the same did not elicit any response.

8. The Defendant submits that orders sought should not be granted as the Defendant is a local company and not a foreign company as averred by the Plaintiff. That the Defendant owns property in Kenya and the plant it runs in Kitengela is valued Kshs. 2.5 billion hence it is a solid Company with investments in the country. Counsel for the Defendant submitted that the Plaintiff has not tendered any evidence to demonstrate that the Defendant is removing and or disposing off its assets. Liu stated that he has been living in Kenya with my family since the year 1988 that he possesses a valid work permit and has invested heavily in the country.

9. Counsel for the Defendant urges to court to dismiss the application as the Plaintiff has not made out a case to warrant the grant of the orders sought. She also submits that the orders in force should be discharged as they have paralyzed the Defendant's operations as it has been unable to pay over 100 staff working in the factory due to the freezing of its accounts and that no payments can be made into it accounts hence frustrating any payments into the said accounts.

10. The Plaintiff seeks execution before judgment against the Defendant. It has invoked **Order 39 rule 5 and 6** of the **Rules** which provides 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, 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.

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 security not fixed by the court, the court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

11. The principles governing attachment before judgment were laid down by the Court of Appeal in the case of **Kuria Kanyoko t/a Amigos**

Bar and Restaurant vs. Francis Kinuthia Nderu, Helen Njeru Nderu and Andrew Kinuthia Nderu [1982-88] KAR 1287-1334 as follows:

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, 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.

12. The principles were adopted by this court in the case of ***Shiva Enterprises Limited vs. Jivaykumar Tulsidas Patel t/a Hytech Investment HC COMM No. 501 of 2006 [2006] eKLR***, where Kasango J., observed as follows:

That a party would need to meet that high standard of proof before a party is ordered to supply security for the amount claimed. The jurisdiction that the Plaintiff invoked has to be appropriately exercised to ensure that a party meets the aforesaid high standards. It ought to always be remembered that the purpose of that jurisdiction is to secure the Plaintiff against the Defendants act aimed at defeating judgment that may be entered. It is however not the intention of that jurisdiction to harass or to punish the Defendant before judgment is entered against him. It is worthy to quote from the case of ***Kuria Kanyoto T/A Amigos Bar and Restaurant v Francis Kinuthia Nderu, Helen Njeru Nderu and Andrew Kinuthia Nderu [1988]2 KAR ...***

13. This position was reiterated in ***FTG Holland v. Afapack Enterprises Limited & Another NRB CA Civil Appeal No. 171 of 2014 [2016] eKLR*** where the Court of appeal held the view that, “*The power to attach before judgment is not to be exercised lightly and without clear proof of the mischief to be avoided.*”

14. In summary, the general principle espoused by the decisions I have cited, is that the Plaintiff bears the burden of proving, by way of affidavit or otherwise, that the Defendant is about to dispose of the whole or any part of its property or about to remove its property outside the local limits of the jurisdiction of the court 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. It is not enough to merely allege the fact or recite the provisions of the rule.

15. The deposition by Patel sworn on behalf of the Plaintiff together with the annexures therein do not disclose any case that the Defendant is about to dispose of the whole or any part of its property or is about to remove the whole or any part of its property from the local limits of the jurisdiction of the court in circumstances that may lead to the conclusion that the Defendant is intent on obstructing justice. In ***FTG Holland v. Afapack Enterprises Limited & Another (Supra)***, the Court of Appeal expressed the following view which I find relevant to this case:

The respondent sought to persuade the court below that, since the appellant is a foreign company domiciled in Holland with no known assets in Kenya, there was real likelihood that should the respondent succeed in its counter-claim, it will be unable to execute the decree. In that case, by **sub rule 1 (b) of rule 5**, it was incumbent upon the respondent to demonstrate, by affidavit, and the court to be satisfied, from that evidence, that the appellant was about to leave Kenya under circumstances that would lead to reasonable apprehension that it intended to obstruct or delay the execution of any decree that may be passed in the counter-claim. There was no scintilla, not a whit of evidence to prove any of the above. Having found no such evidence, but concerned that the appellant was a foreign registered company with no known assets in Kenya, the learned Judge, quite uncharacteristic, so to speak, fished out **rule 5** to protect the respondent’s interest. That rule provides that [Rule 5 of the Civil Procedure Rules set out in full]

Again for the court to have resorted to this rule it had to be satisfied that the appellant was about to dispose of its assets or repatriate them from the local limits of the court’s jurisdiction. The respondent provided no evidence at all to demonstrate that any of the above was about to happen.

16. In order to rebut the Plaintiff’s claims, the Defendant placed before the court evidence that it is a local company with substantial assets. It admitted part of the debt and was willing to liquidate the debt by offering the Plaintiff another property. It expressed difficulty in paying the debt because of the failure of the Government pay it. The fact that the debt is admitted or that the Defendant has difficulties in settling the debt is not a ground for seeking an order of attachment before judgment. The Plaintiff must provide facts upon which the court may infer or indeed conclude that the Defendant is disposing of its property or taking out of the reach of the court’s jurisdiction in a manner that would obstruct justice for the Plaintiff.

17. I find and hold that the Plaintiff has failed to discharge its burden. For the reasons I have set out above, I dismiss the Notice of Motion dated 25th November 2020 with costs to Defendant. The interim orders in force are now discharged.

DATED and DELIVERED at NAIROBI this 18th day of DECEMBER 2020.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Wachira instructed by Wachira Gachoka and Company Advocates for the Plaintiff

Ms Karanu instructed by Karanu Kanai and Company Advocates for the Defendant.