



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**HCCC NO.E.046 OF 2019**

**ALLTERRAIN SERVICES KENYA LIMITED....PLAINTIFF/RESPONDENT**

**VS.**

**ZAHARA OIL AND GAS LIMITED.....DEFENDANT/APPLICANT**

**RULING**

1. Although this decision ought to be an answer to two applications, the Order this Court made at the end of the hearing of the applications discharging the subsisting Orders of Injunctions resolved one of them.

2. The Notice of Motion dated 27<sup>th</sup> March, 2019 is for the following orders:-

1. Spent

2. THAT pending the hearing and determination of this application an injunction do issue against the Defendant/Respondent whether by themselves, its agents, servants and/or employees from demobilizing its drilling operations and/or moving, disposing, alienating, transferring and assigning its assets (as listed in the schedule of assets below) to third parties and from the jurisdiction of this Honourable Court.

Schedule of assets

- i. Drilling rig SK 604 and its accessories
- ii. Well logging equipment
- iii. Cementing equipment
- iv. Oil Country Tubular Goods (OCTG)
- v. Drilling fluids and chemicals
- vi. Any other equipment on site located at Pate Island in Lamu County.

3. That pending the hearing and determination of this suit an injunction do issue against the Defendant/Respondent whether by themselves, its agents, servants and/or employees from demobilizing its drilling operations and/or moving, disposing alienating, transferring and assigning its assets (as listed in the schedule of assets above) to third parties and from the jurisdiction of this Honourable Court.

4. THAT in the alternative to prayer 2, pending the hearing and determination of this application the Court directs that the Defendant/Respondent do deposit USD.850,000.00 (to satisfy the decretal sum) in Court or do provide a bank guarantee of an equivalent amount.

5. THAT in the alternative to prayer 3 pending the hearing and determination of this suit the Court directs that the Defendant/Respondent do deposit USD.850.000.00(to satisfy the decretal sum) in Court or do provide a bank guarantee of an equivalent amount

6. THAT cost of the application be provided.

3. While the resolved Motion of 14<sup>th</sup> May 2019 had sought the following substantive orders:-

4. The subsisting interlocutory injunctive orders granted in favour of the Respondent herein on 4.4.2019 and subsequently on 30.4.2019 be discharged, set aside or varied.

5. If the subsisting interlocutory injunctive orders are not discharged or set aside the Respondent be ordered to give an undertaking as to damages in the amount of US \$ 60,000 (Kshs.6,060,000) per day from 4.4.2019 up and until the said injunctive orders are so discharged or set aside.

4. While the latter motion was determined when this Court discharged the subsisting interlocutory injunctive orders on 30<sup>th</sup> May 2019, the affidavit in support of that Motion is to be treated as the response to the Plaintiff's application of 27<sup>th</sup> March, 2019.

5. Another preliminary issue is that in the course of hearing the Motion of 27<sup>th</sup> March 2019, it became apparent that the Applicant would not be pressing the application for injunction as it became evident that the assets sought to be preserved by the order of injunction belonged, not to the Defendant, but certain third parties. For this reason, therefore, the only prayer for consideration is the prayer seeking that the Defendant do deposit USD 850,000.000(to satisfy the decretal sum) in Court or provides a bank guarantee of an equivalent amount.

6. The Application is said to be brought under the auspices of Order 39 Rule 1 of The Civil Procedure Rules.

7. A short background to the matter. The Defendant is a Company engaged in Oil and Gas exploration in Kenya and had sites in Pate Lamu. It contracted the Plaintiff for the provision of catering, cleaning, laundry, house-keeping and camp administration services. The contract is dated 26<sup>th</sup> April, 2018.

8. The Plaintiff's case is that it offered the services contracted for but the Defendant owes it the sum of USD 816,470.58 in that regard. In a Plaint dated 27<sup>th</sup> March 2019 and filed on even date, the Plaintiff sues for this sum as the principal claim with interest thereon at 0.25% per month from the date of default until payment in full. Costs of the suit are also sought.

9. In the affidavit made in support of the application before Court, George Maina, a Director of the Plaintiff, avers that the Defendant has ceased its operations at the Pate Island site. The reason cited is that it has not struck commercially attractive reserves of natural gas and has commenced plugging of the well and demobilization. The Plaintiff is apprehensive that the Defendant will eventually relocate outside the jurisdiction of the Court. It is also averred that the Defendant has no permanent residence in the Country or any other known assets in the Country other than the ones at Pate Island.

10. It is the Plaintiff's assertion that the chances of executing a decree in case of success would be diminished completely if the Defendant is allowed to demobilize and "whisk" away its assets.

11. On the part of the Defendant, it states that whereas it had not struck commercially viable gas at Pate -2 well it was nevertheless keen on further exploring vast areas of Oil blocks being L4 and L13. It has therefore sought an extension of its exploration period for a further 3 years. It is therefore asserted that the Defendant intends to remain within the jurisdiction of the Court up and until December 2022.

12. On another front, the Defendant disputes the debt. In the affidavit of John Patrick Barr sworn on 14<sup>th</sup> May, 2019, he depones that the Plaintiff claim does not give credit for some payments made and credit notes issued. Further that it includes a claim of US\$ 95,422 for waste management services not offered.

13. This Court has given regard to the evidence before it and the argument made by Counsel in support and against the Motion.

14. Order 39 Rule 1 of The Civil Procedure Rules provides 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".

15. The principles governing the grant of orders under order 39 Rule 1 and 5 of the Civil Procedure Rules are well established. The power must not be exercised lightly (see Kuria Kanyoko t/a Amigos Bar and Restaurant vs. Francis Kinuthia Nderu, Helen Njeru Nderu and Andrew Kinuthia Nderu [1988]2 KAR 1287-1334). For that reason the suitor of such an Order must establish a strong arguable case and that the Order is intended to avoid the mischief sought to be addressed by the Rules and not for other ulterior motives.

16. As to a good arguable case it is 'one which is more than barely capable of serious argument, but not necessarily one which the Judge considers would have a better than 50 per cent chance of success' (see Kariuki J. in Beta Healthcare International Ltd vs. Grace Mumbi Githaiga & 2 others[2016] eKLR).

17. Regarding the mischief, the Rules contemplates two scenarios. First, that with intent to delay the Plaintiff or to avoid process of Court or to obstruct or delay the execution of decree, the Defendant does or is about to do what is set out under Subrule 1(a). There the Plaintiff must demonstrate the Defendant's conduct is intended or aimed at delaying, obstructing or avoiding Court process or execution. Intention is therefore critical.

18. But under Subrule 1(b) it is sufficient for the Applicant to show that, because a Defendant is about to leave Kenya, there is reasonable probability that the Plaintiff will or may thereby be obstructed or delayed in the execution of any decree. The existence of intention to obstruct or delay execution is not a prerequisite.

19. In addition to the above considerations, the Court must be careful enough to ensure that the process is not abused. Instances of abuse would include if the order is being used to simply exert pressure on the Defendant to pay a yet proven debt; if it is used to unjustly strip the Defendant of his assets; or for conferring the Claimant some proprietary rights of assets of the Defendant in a manner that is inimical to the Constitution.

20. With these principles in mind I now take the following view of the matter.

21. Although the Defendant asserts that it highly disputes the debt, it only sets out the following sums as not credited for by the Plaintiff:-

- i. US\$ 70,000 on 13.2.2019
- ii. US\$ 60,000 on 6.3.2019
- iii. US\$ 25,000 on 3.4.2019
- iv. Credit for US\$ 95,422
- v. Credit notes US\$ 61,200.

22. The total of these amounts is US\$ 311,622. So, even if we were to believe the Defendant on his own account, a sum of US\$ 504,848.58 (816,470.58-311,622) would still be owing.

23. Of course the Defendant says that this amount would be much less in view of a counterclaim it intends to pursue because of some alleged substandard services. While the Court has been shown some emails in which the Defendant raised complaints about the services of the Plaintiff on diverse dates, this Court sees no evidence, as of now, that the Defendant had any intention to retain any payments due to the Plaintiffs on account of the specific matters complained about.

24. Back to the amount that may be due and owing. There is a statement of account by the Plaintiff showing that the following sums were credited to the Defendant.

Credit note.....	US\$ 18,840
Credit note .....	US\$ 34,172.20
Payment (6.3.2019).....	US\$ 60,000.00
Payment (14.3.2019) .....	US\$34,982.00
Total sum .....	US\$ 147,994

If this sum is added to 504,848 then one gets a total of USD 652,842.

25. While the Defendant did not file a further statement in reply to this, it nevertheless maintains that the amount owed is disputed and points to clause 7.5 and 7.6 of the contract on disputed invoices which reads:-

7.5.1 If the Company disputes an invoice or part thereof of if an invoice is prepared or submitted incorrectly in any respect, the Company shall notify the Contractor of the item disputed, specifying the reason(s) thereof. Those items of the invoice not in dispute will be settled in accordance with Clause 7 by the Company upon receipt from the Contractor or a credit note amending the original invoice by the amount in dispute. Both parties shall use their reasonable endeavors to resolve disputed items promptly.

7.5.2 If any other dispute exists between the Company and the Contractor, the Company may withhold, from any monies which become payable under the Contract, the amount that the Company considers is due in connection with the subject of the dispute. On settlement of any dispute, the Contractor shall submit an invoice for sums due and the Company shall make payment in accordance with the provisions of clause 7.

7.6.1 Payment of any invoice shall not prejudice the right of the Company to later question the propriety of charges therein, and the Company, during the performance of the Contract and within twenty-four (24) months following settlement of the final account, may give to the Contractor written notice of objection to any item or items in an invoice, specifying the reasons for such objection.

7.6.2 Should the Company so notify the Contractor of any objection then relevant equitable adjustment/s shall be determined to address the propriety or impropriety of such item or items objected to by the Company and the Company may make such adjustment/s and recover the same either as a deduction from payments due to the Contractor or as a debt due from the Contractor.

7.6.3 The Contractor shall maintain complete set of records relevant to all activities associated with the Company in respect of the Contract, including the performance thereof by the Contractor. The Company and its nominated auditors, in order to verify that all the terms and conditions of the Contract have been complied with, shall have the right to inspect and audit any and all such records during the performance of the Contract and within a period of twenty-four (24) months following settlement of the Contract final account, provided that Contractor shall have the right to exclude any trade secrets, formulae or processes from such inspection or audit. The Contractor shall arrange for the Company and its nominated auditors to have access to the relevant premises. The Contractor shall make available appropriate employees to assist the Company in the performance of its audit. Should the results of any audit so require, appropriate adjustments or payments shall be made by the parties.

26. While the Defendant may still be within the timeframe provided for questioning invoices, the Court observes that upto the time of filing of this suit, there is no evidence that the invoices had been disputed.

27. This Court therefore returns an interim verdict that on the material before it, the Plaintiff has a good arguable case against the Defendant for USD 652,842.00.

28. On its own evidence, the Defendant's continued presence in Kenya is dependent on it getting an extension of its exploration license for a period of three years. See what Mr. Barr states in paragraph 29 of his affidavit:-

“29. THAT similarly, the Defendant/Applicant as recently as 31/03/2019, asked, from the Ministry of Petroleum and Mining, for an extension of its exploration period for a further period of three (3) years which would mean it has the intention to remain within the jurisdiction, at the minimum, up and until December 2022. The foregoing is a fact well within the knowledge of the Plaintiff/Respondent but which fact was, unfortunately, not brought to the Honorable Court's attention”.

29. Although the Defendant also alludes to operational offices in both Lamu and Nairobi, it does not state the value of assets it holds in their offices or elsewhere in Kenya. It therefore seems that the Defendant's meaningful presence in Kenya is predicated on it obtaining the extension applied for on 31.3.2019. An extension is yet to be granted as at the time of the hearing of this application.

30. In these circumstances, the Plaintiff may not be unjustified in apprehending that the Defendant is about to leave the Country in a manner that the Plaintiff will or may be obstructed or delayed in execution of any decree that may be passed against the Defendant herein. I so hold.

31. In finding in favour of the Plaintiff, I have not sensed that the Plaintiff seeks to abuse the process of Court to achieve any other motive other than those contemplated under order 39 of the Civil Procedure Rules. The circumstances I have set out above do not speak to a design to use the process to exert pressure on the Defendant to pay an unproven debt or such other ulterior motive.

32. In the end I allow the application of 27<sup>th</sup> March, 2019 in terms of prayer 5 but the Bank Guarantee or Deposit shall be in the sum of USD 652,842. The Bank Guarantee or Deposit shall be furnished or made within 45 days hereof. Costs of the application to the Plaintiff.

**Dated, Signed and Delivered in Court at Nairobi this 28<sup>th</sup> Day of June, 2019.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

**Wachira for Plaintiff**

**Achoki h/b for Muchiri for Defendant**

**Nixon – Court Assistant**