



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL CASE NO. 8 OF 2018

JUANCO SPS LIMITED.....PLAINTIFF

VERSUS

DOMINION FARMS LIMITED.....DEFENDANT

RULING

Juanco SPS Limited hereinafter referred to as the plaintiff company filed suit on 6th April, 2018 against Dominion Farms Ltd hereinafter referred to as the defendant company seeking judgment for Kshs 16,009,280 plus accrued interest at commercial rates.

At the same time the plaintiff company moved this court under certificate of urgency in a notice of motion dated the same day praying for pre-judgment attachment against the defendant company property to satisfy the intended debt due and owing.

Factual background

The plaintiff company alleges in its plaint that on adverse dates between the 16th March, 2016 and 4th November, 2017 the defendant company placed local purchase orders for the supply of agricultural products which were duly delivered and received by the defendant totaling a value of Kshs.20,619,400.

That pursuant to the supply various invoices were raised by the plaintiff company to be settled by the defendant company as agreed within the time limit of 120 days which days have since expired on all the invoices. The plaintiff issued a demand notice and as at the time of filing this suit the defendant company owed the plaintiff company 16,009,280 against local purchaser orders of Ksh. 20,619,400. That the amount of Kshs. 16,009,280 is in respect of various agro-chemical products supplied, delivered and invoiced by the plaintiff company.

Affidavit in support of the notice of motion

In the affidavit of Junghae Wainaina, the Director of the plaintiff company deposes that he delivered to the defendant company all the goods and products within the specifications provided for under the local purchase orders. That the defendant company was expected under the contract and obligations set out in the agreement to settle the amount for all the deliveries within the time frame of 120 days.

However the deponent deposes that on October 2016 the plaintiff director deposes that the defendant company approached them for an amendment of the period of 120 days with a restructured credit extension period to 150 days. In essence the deponent director avers inter-alia that it was an extension of the credit date and modifying the period of the repayment. The plaintiff company further deposes that he has learnt from the advertisement in the Daily newspapers that an auction of the defendant company Assets was undertaken on December, 13th 2013.

He further asserts that there is a clear danger of the defendant company will make their property unavailable to satisfy the judgment that the plaintiff anticipates in obtaining from this court. He therefore prayed attachment before judgment be granted. From the affidavit of service filed in court on 11th April, 2018 the plaintiff has demonstrated that attempts were made to serve the defendant company at their operations in Siaya.

However as it turned out the process server had to contend in leaving the summons to enter appearance at the gate of the premises with a watchman on guard.

This application was therefore heard ex-parte in default of attendance by the defendant company.

legal standard:

Normally all disputes filed before a civil court should be dispensed with through due process and on the merits. The order or judgment obtained from such a process is enforced under the provisions of order 22 of the Civil Procedure Rules.

However, in peculiar circumstances as per the mandate of order 39 of the Civil Procedure Rules the court has the discretion to attach Property/Assets of the defendant before final judgment. The scope and object of order 39 and the rules followed therein are merely meant to protect the plaintiff against loss arising from defendant making along with his property pending determination of the suit.

At the very outset it is necessary to refer to order 39 of the civil Procedure Orders which reads as follows:

1. Where in any suit it is proved by affidavit or otherwise

(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree

(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

2. In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

From the bare reading of order 39 for the court to exercise discretion at this interlocutory stage the plaintiff must be specific and clear on its purpose and intention. It is sort of a guarantee against the intended decree becoming unenforceable for want of property available from which the plaintiff can satisfy the decretal amount.

The sole object behind the order leaving attachment before final judgment is to give an assurance to the plaintiff that his decree if made would be settled and satisfied. It does not invalidate any proceedings taken by the court in giving an opportunity for the parties to be heard in parties.

What is required of the plaintiff is to bring himself within any of the grounds specified under order 39 of the Civil Procedure Rules.

In buttressing the provisions of section 38 of the Indian Civil Procedure Code with similar provision of our Article 39 of the Civil Procedure Rules the supreme court in the case of Sardar Govindrao Mahadika and Another v. Devi Sahal and Others 1982 SCPC 186 states as follows:

“ what is the effect of attachment before judgment? Attachment before judgment is levied where the court on an application of the plaintiff is satisfied that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his from the local limits of the jurisdiction of the Court”

The passage in the case of Kanduyi Holdings Ltd v Balm Kenya Foundation & Another eKLR Judge drawing inference under Order 39 of the Civil Procedure Rules stated as follows:

“ Our order 39 Rules 5 and 6 could be said and is a statutory codification of an interlocutory relief known as Mareva Injunction or freezing order in the UK... Accordingly, Order 39 Rules 5 and 6 of the CPR should operate within known dimensions of law drawing from the above case (Mareva Company Navierra SA vs International Bulkcarriers SA [1975] 2 Lloyd dis Rep 509 and other judicial precedents on the subject. Order 39 Rule 5 and 6 of the CPR is not to be used to:1) to pressure a defendant, or 2) as a type of assets stripping (forfeiture); or 3) as a conferment of some proprietary rights on the plaintiff upon the assets of the defendant. The purpose of any order that should be issued under Order 39 Rules 5 and 6 of the CPR is to prevent the Defendants or would be judgment-debtor from dissipating his assets at to have the effect of obstructing or delaying the execution of any decree that may be passed against him”

It is clear from the legal principles in the above cited cases the court has the discretion to be exercised on pre-judgment attachment in regard to the facts of each particular case.

Based on the plaintiff's pleadings, affidavits setting forth specific facts made upon the deponent own knowledge, information and belief requiring orders under order 39 of the civil procedure rules I am of the following conceded view.

The plaintiffs' account and evidenced by the attached annexures indicates that there is prima facie evidence that mandatory claim is due and owing equal to Kshs. 16,009,280 against the defendant company. The amount sought is the sum invoices and statement of account dated between 6th March, 2016 – 21st March 2017.

The defendant company was served with the notice of motion but failed to attend to dispute the balance on its customer account.

It is reasonable to conclude from the annexed invoices and delivery notes that the defendant's settlement terms under the agreement has gone overboard the stipulated timeline of 120 days. It is further reasonable to conclude that the plaintiff has established a prima facie case that the defendant company is experiencing financial difficulties as supported with the public Auction advertised by Nyaluoyo Auctioneers to sell the assets on 13th December 2017. There are high chances given their past instance of failing to settle an order from Siaya Magistrates court, they will engage in precisely the same sort of exercise in dealing with any remaining property to make it unavailable to satisfy the judgment the plaintiff expects to obtain against them.

From the affidavit evidence the defendant is about to close shop and any operations in Kenya or move out of jurisdiction of this court that conduct obviously is likely to delay or obstruct the execution of any decree resultant in the pending suit to be heard on the merits. Under the circumstances that is a clear danger that the defendant company will remove or conceal other unidentified assets if this request for a prejudgment does not issue.

In the present case I am satisfied that the plaintiff company has satisfied the legal threshold under order 39 of the Civil Procedure Rules for this court to exercise discretion to allow the notice of motion filed in court on 6th April, 2018.

1. In the premises the plaintiff company is hereby granted leave to serve upon the defendant company a demand and enforcement order to deposit/furnish security equivalent to the declared sum in the plaint to secure the resultant judgment in the matter.

2. That the security or deposit be held in the joint earning interest account of both parties or their advocates pending the hearing and determination of the suit.

3. That the condition be complied within 30 days from today's date.

4. That in default of the above condition, the plaintiff company is hereby granted leave before judgment to attach any movable properties or place a restriction on any immovable property/properties in the land registry identified to be registered in the name of the defendant company.

5. As a consequence the plaintiff company be at liberty to proceed with the hearing of the suit on priority basis in compliance with order 11 of the civil procedure orders.

6. Costs of this application be borne by the defendant company.

Dated, delivered in open court on 20th April, 2018.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Nzaku for the plaintiff