



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL SUIT NO. 15 OF 2017**

S N K.....PLAINTIFF/APPLICANT

VERSUS

G T.....DEFENDANT/RESPONDENT

**RULING**

**[Plaintiff's Chamber Summons Application dated 18<sup>th</sup> May, 2017 and Defendant's Notice of Motion dated 23<sup>rd</sup> May, 2017]**

1. This ruling is in respect of two applications. In the Chamber Summons application dated 18<sup>th</sup> May, 2017, S N K, the Plaintiff seeks orders as follows: -

**“1. THAT this application be certified as urgent and service thereof be dispensed with at the first instance.**

**2. THAT an order for the arrest of the Defendant be issued for his arrest and that he be brought to court as quickly as practically possible to show cause why he cannot Deposit his Passport And/Or furnish security for a respective appearance at the hearing hereof.**

**3. THAT this honourable court be pleased to order the respondent to deposit the sum of Kshs. 3,000,000/= OR any sum sufficient by court in court within seven (7) days as security for satisfaction of the Plaintiff's claim and costs;**

**4. THAT the officer commanding Watamu Police Station or any officer deputizing be ordered to effect the warrant of arrest.”**

2. G T, the Defendant in his Notice of Motion dated 23<sup>rd</sup> May, 2017 only seeks one order: -

**“THAT the warrant of arrest issued against the Defendant on 18/05/2017 be set aside and the application be dismissed with costs.”**

3. The Plaintiff appeared before my brother Ogolla, J in Mombasa *ex-parte* on 18<sup>th</sup> May, 2017 and on that day prayers 1, 2 and 4 were dealt with thus leaving Prayer No. 3 of the application for my consideration.

4. The Defendant in his submissions urged this court to consider his application first. However, as the Defendant seeks to set aside the order directing his arrest, I shall in considering the Plaintiff's Chamber

Summons also consider the Defendant's Notice of Motion. It is noted that the issues raised by the two applications are intertwined and it is only logical to deal with the two applications simultaneously.

5. In the supporting affidavit sworn in support of her Chamber Summons, the Plaintiff avers that she met the Defendant in March, 2015 at Comeback Watamu and they became intimate friends. The Defendant rented a house for her at [particulars withheld] in Malindi before inviting her to his house in Watamu where they cohabited together until 8<sup>th</sup> May, 2017 when the Defendant threw her out of his house. It is the Plaintiff's averment that at the time she met the Defendant she was working in a salon earning Kshs.10,000 per month.

6. The Defendant persuaded her to quit her job promising to pay her a stipend of Kshs.40,000 a month pending their marriage. Her averment is that she relied on the Defendant's promise to marry her, quit her job and started cohabiting with him. Things did not, however, work out as agreed as the Defendant only paid her a stipend for one month and stopped payments thereafter. Later the Defendant threw her out of the house and stored her items in a [particulars withheld] at Watamu.

7. The consequences of the Defendant's actions, the Plaintiff says, is loss of opportunity to get married, loss of employment, loss of income and mental anguish. It is the Plaintiff's averment that she learned that the Plaintiff was set to depart the country for Italy on 21<sup>st</sup> May, 2017. With that information she moved the court to grant orders of arrest and deposit of security.

8. The Defendant swore an affidavit on 22<sup>nd</sup> May, 2017 in opposition to the application. Through the affidavit the Defendant reveals that he never made any promise to marry the Plaintiff and that he has indeed been married to one J R M since 1997. Further, that this fact was well known to the Plaintiff who was all along aware that they were involved in an open illicit relationship.

9. It is the Defendant's averment that if the Plaintiff's assertion that he sought to marry her under Kikuyu Customary Law is to be believed, then the Plaintiff's claim is without basis as there is nothing like a breach of promise to marry in Kikuyu culture. Further, that the Italian law under which he registered his marriage does not recognize polygamy.

10. The Defendant therefore asserts that the Plaintiff has not made out a *prima facie* case against him to warrant his being asked to furnish security for his appearance in court.

11. Turning to the issue of his arrest, the Defendant accuses the Plaintiff of misleading the court into issuing oppressive orders against him without giving him an opportunity to provide security before his arrest. It is the Defendant's averment that the court ought to have directed that he deposits his passport with the police so that he can appear in court and face his accuser. The Defendant's view is that this court has treated his liberty with contempt merely because he is a foreigner.

12. The Defendant wonders why the Plaintiff has filed this matter in this court yet the same falls under the jurisdiction of the Chief Magistrate's Court which is empowered to deal with claims up to Kshs.20 million.

13. On another point, the Defendant contends that instead of issuing a warrant of arrest this court ought to have issued an order of sequestration of his apartment. In his opinion, the decision of the Plaintiff to go for an arrest order is evidence of malice and ill will considering that the Plaintiff was aware of his poor health.

14. On his decision to eject the Plaintiff from his residence, the Defendant deposed that the Plaintiff was a drunkard who became violent whenever she took alcohol. Further, that she had used the police to extort money from him.

15. Finally, the Defendant avers that Kenya is his second home and there is no way he can run away from Kenya. He also accuses the Plaintiff of loose morals alleging that she had been seen with another man during his incarceration.

16. I now turn to the Defendant's Notice of Motion. The application is supported by the grounds on its face and the supporting affidavit sworn by the Defendant on 23<sup>rd</sup> May, 2017. The affidavit reiterates the contents of the replying affidavit sworn in opposition to the Plaintiff's Chamber Summons and I need not restate the same. However, I can only do justice by reproducing the grounds in support of the Notice of Motion as follows:-

**"1. The Plaintiff's order of attachment of the Defendant without giving the Defendant an opportunity to explain himself is a nullity.**

**2. The Order issued against the Defendant without giving the Defendant an option to deposit provisional security is a nullity.**

**3. The Honourable Court did not have the jurisdiction to order the arrest of the Defendant without giving him an opportunity to be heard."**

17. One J M also swore an affidavit on 24<sup>th</sup> May, 2017 in support of the Plaintiff's case. The Plaintiff swore a further affidavit on 25<sup>th</sup> May, 2017.

18. The advocates for the parties filed submissions and when the applications came up for hearing they indicated that they would entirely rely on those submissions.

19. A perusal of the pleadings and the submissions leads me to the conclusion that the only issue for determination in this matter is whether the Plaintiff has met the threshold for issuance of orders under Order 39 of the Civil Procedure Rules, 2010 (CPR). Order 39 Rule 1 provides the circumstances under which a defendant may be called to furnish security for appearance. It states that:-

**"1. 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."**

20. As demonstrated by the authorities cited by the advocates for the parties, there are certain principles that govern the issuance of orders under Order 39 Rule 1 of the CPR.

21. In **International Air Transport Association & another v Akarim Agencies Company Limited & 2 others [2014] eKLR**, F. Gikonyo, J cited **Kanduyi Holdings Limited v Balm Kenya Foundation & another [2013] eKLR**, wherein it was held that:-

**“Order 39 rules 5 and 6 of the CPR is not to be used: 1) to pressure a defendant; or 2) as a type of asset stripping (forfeiture); as a conferment of some proprietary rights on the plaintiff upon the assets of the defendant. The purposes of any order that should be issued under Order 39 of the CPR is to prevent the defendants or would be judgement-debtor from dissipating his assets as to have the effect of obstructing or delaying the execution of any decree that may be passed against him.”**

In my view these principles are applicable to Rule 1 of the said Order 39.

22. In addition, for the remedy to be exercised in favour of a plaintiff, he must demonstrate a *prima facie* case. A plaintiff must also show that the defendant is about to leave Kenya in circumstances affording a reasonable probability that the plaintiff may be obstructed or delayed in the execution of any decree that may be passed in his favour—see **Wambugu, Motende & Company Advocates v Kamal Bhusan Joshi & 4 others [2014] eKLR**.

23. In **Linching Liang v Webwave Electric Manufacturing (K) Co. Ltd & 2 others [2016] eKLR**, Mbaru, J held that:-

**“The basic principles of law that must be observed for the court to make orders of security deposit of attachment before judgements lie in the Civil Procedure Act under Order 39. The burden is on the party claiming such an order to show that the Respondent party is in the process of disposing their business/property or moving that property from the jurisdiction of the Court or is about to abscond in either case with the object of defeating any decree that may be passed against him.”**

24. In **Kanyoko t/a Amigos Bar and Restaurant v Nderu & 2 others [1988] KLR 171** the Court of Appeal held that:-

**“It is also well known that an applicant for attachment before judgement must act *bona fide*.”**

25. It is also noted that where a person’s liberty is to be taken away in order to enforce a civil claim such action should be a measure of last resort – see the comments of G.B.M. Kariuki, J (as he then was) in **R.P.M. v P.K.M., Nairobi Divorce Cause No. 154 of 2008 (unreported)**.

26. The Defendant’s counsel has urged me to return a finding that the Plaintiff has no arguable case. He supports this by referring to various averments in the Defendant’s affidavits. With respect, I decline the invitation, for to do so would amount to determining this case without a hearing. The Plaintiff’s claim discloses a cause of action that must be submitted to the trial procedures laid down by the laws of this country and to do as the Defendant’s counsel suggest would amount to subverting those procedures. At this stage it is sufficient to note that the Plaintiff has an arguable case. I need not say more on this issue.

27. The evidence that has been tabled before this court is that the defendant had programmed to leave the country on 21<sup>st</sup> May, 2017. He was aware of the Plaintiff’s claim against him. The Plaintiff concedes that a suit that had been filed a few days before the filing of the instant suit had been withdrawn after it was discovered that the court in which the matter had been filed had no jurisdiction to handle the matter.

28. The Plaintiff’s averment answers two of the Defendant’s complaints. Firstly, that the Plaintiff’s initial pleadings had not disclosed that she had filed and withdrawn a similar suit prior to filing the instant case and secondly that this suit ought to have been filed in a magistrate’s court. In my view, failure to disclose that a suit had been filed and withdrawn was not material as no action had been taken by the court in that matter. The case had thus not been heard by a court of competent jurisdiction. The Plaintiff has also

explained that the matter was withdrawn because she held the view that the magistrates' court had no jurisdiction to handle the matter.

29. Turning to the application itself, I note that the Plaintiff has placed before the court evidence that the Defendant was set to leave the country on 21<sup>st</sup> May, 2017. The Defendant admits that he was indeed set to leave the country on that day. The Plaintiff filed her claim on 18<sup>th</sup> May, 2017. The Defendant was arrested on 19<sup>th</sup> May, 2017 a Friday and brought to court on 22<sup>nd</sup> May, 2017 being the next working day after 19<sup>th</sup> May, 2017. The Defendant cannot therefore fault the court for proceeding *ex-parte*.

30. The Defendant has also lamented that he was never given an opportunity to be heard before the orders were issued. He has indeed been given an opportunity to show cause why he should not furnish security. That is why he is currently before this court. The rules allows for the application to be heard *ex-parte* and the circumstances of this case shows that the Defendant could have left the country had the Plaintiff not moved the Court in the manner she did.

31. The question that remains to be answered is whether the Plaintiff's application has merit. The Defendant is an Italian citizen. He himself concedes he is a tourist. Much time was spent on his alleged apartment at Watamu. At the end of it all it is not clear if he indeed has an apartment at Watamu. He never produced any document to confirm his alleged ownership of an apartment at Watamu. Although the Plaintiff averred that she went and lived at the Defendant's residence at Watamu, she did not state that the Defendant was the legal owner of the house.

32. As matters stand, the Defendant is an Italian tourist with a one way ticket to Italy. If the Plaintiff succeeds in her claim she will not have the means of executing her judgement. I find that hers is a proper case for the application of Order 39 Rule 1. There is the option of asking the Defendant to avail a surety but I do not think that is a viable option when dealing with a foreigner.

33. The Plaintiff has asked that the Defendant be directed to deposit Kshs. 3 million in court. She has not explained the basis of this figure. She has not cited authorities to show the amounts usually awarded to successful plaintiffs in cases similar to hers. Her claim is not a claim for liquidated damages. In my view Kshs. 3 million is on the higher side. Doing the best I can in the circumstances of this case, I find that a deposit of Kshs.2 million is reasonable. Prayer No. 3 of the Plaintiff's Notice of Motion dated 18<sup>th</sup> May 2017 is allowed so that the Defendant shall deposit in court the sum of Kshs. 2 million as security for satisfaction of the Plaintiff's claim and costs should she succeed.

34. This outcome means that the Defendant's Notice of Motion dated 23<sup>rd</sup> May, 2017 has failed. The same is dismissed. As for costs in respect to the two applications, I direct that they shall abide the outcome of the substantive suit.

**Dated, signed and delivered at Malindi this 25<sup>th</sup> day of May, 2017.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**