REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 256 OF 2015

BETA HEALTHCARE INTERNATIONAL LIMITED .....PLAINTIFF

VERSUS

GRACE MUMBI GITHAIGA.....1ST DEFENDANT

JOYCE NJERI GITHAIGA.....2ND DEFENDANT

LEVNEL ENTERPRISES LIMITED..... .....3RD DEFENDANT

RULING

1. The application for determination is the Notice of Motion dated 26th May, 2015. The Plaintiff seeks the following orders :

a. ***Spent***
b. ***THAT pending inter parties hearing, the Honourable court do issue warrants of attachment of the defendants movable property, to wit vehicles, parcels of land, jewellery, stocks and equity, and the goods of trade and in stock in the defendants godowns/shops or premises before judgement in this suit.***
c. ***THAT this Honourable Court orders an account and delivery of records of all proceeds from the sale of the goods delivered by the Plaintiff worth Kshs. 52,640,990.48/= or in the alternative, the Defendants be ordered to furnish within 30 days from this date hereof a banker's guarantee to pay the plaintiff Kshs. 52,640,990.48/=, through the Plaintiffs' Advocates.***
d. ***THAT this Honourable Court be pleased to make an Order for the Defendants to furnish security for the sum of Kshs. 52,640,990.48/= within 14 days as claimed by the Plaintiff in this suit.***
e. ***THAT a temporary injunction do issue to restrain the defendants, or by their servants, or agents or otherwise howsoever from selling, transferring, or in any manner dealing with any shares, equity, property and or bank accounts from the jurisdiction of this Court and freeze any or all of such accounts held by the defendants, either wholly or as a percentum of the total.***
f. ***Any other relief that the court deems fit in the interest of justice.***
g. ***Cost of the application.***

2. The application is based on the grounds contained in the face of the application and supported by the affidavit and supplementary affidavit of Margaret John- Mathengesworn on 26th May, 2015

and 29th July, 2015 respectively. The deponent among other things,deponed that the Plaintiff and the Defendants had entered into an agreement for the supply of goods.

3. It was a condition in the agreement that the credit account would be used to demand and supply goods which would be payable on invoicing after a 90 day period. The deponent contended that on diverse dates of the months of July 2014 to October 2014, the Applicant supplied various goods worth Kshs. 53,040,990.48/= to the Defendants who have since disposed off all the goods supplied, but have failed to pay to the Plaintiff the outstanding sums of money.
4. In addition, the Plaintiff accused the Defendants of issuing bad cheques which were dishonored thus negatively impacting it. In line with this, it was the deponent's position that it was only cheques of Kshs. 400,000/= that have been honored despite the Defendants undertaking to pay the outstanding sums of money.
5. It was contended the Respondents have wasted or disposed off most of their property and assets to other entities other than the 3rd Defendant in view of defeating the Plaintiff's claim. The Plaintiff also claimed that the Respondentshave been dealing with other manufacturers using the proceeds of sale from the goods supplied by the Plaintiff.
6. The deponent further alleged that the 1st Respondent also seeks to dispose her well known assets and relocate to another jurisdiction away from the court, to render any decree issued by this court impossible to execute. The Plaintiff therefore urged the court to grant the prayers sought in the application.
7. Through the Replying Affidavit of Grace MumbiGithaiga sworn on 29th June, 2015, the Defendants opposed the Plaintiff's application. The 1st Defendant averred that she was in a business relationship with the Plaintiff for the supply of pharmaceutical products. That upon the supply of its products, the Plaintiff would then be issued with postdated cheques by the Defendants that would then be banked within 90 days as agreed by the parties.
8. Under this arrangement, the Deponent contended that the postdated issues would be issued even before the supply of goods. The deponent also pointed out, that under the business arrangement, she had a credit limit of Kshs. 20,000,000/= and as such, once that limit was attained, the plaintiff would not supply any goods until the amount due was paid.
9. That this arrangement was duly reflected in an agreement between the parties, a copy of which was retained by the plaintiff. In view of the foregoing, it was the Defendants' case that there is no way the Plaintiff would have supplied to them goods worth Kshs. 53,040,990.48/= as alleged as the same was above the credit limit. The Defendants further pointed out that the delivery notes in support of the Plaintiff case are not signed by either of defendants or the delivery of thengoods duly acknowledged.
10. It was further contended that the Plaintiff declined the 1st defendant's request to have a reconciliation of accounts of the goods supplied. The Deponent also went ahead to state that she went ahead to replace the dishonored cheques, a fact that the Plaintiff failed to mention in its application. The 1st and 3rd Defendant's also contended that in a criminal case instituted against the 1st Defendant , the Plaintiff claimed that it was issued with bad cheques totaling to Kshs. 12,000,000/= while in the instant suit, the claim was for the amount of Kshs. 53,040,990.48/=.
11. Given this variance, it was the Defendants' assertion that a reconciliation was necessary to determine the extent of the Defendants indebtedness. It was also the defendants' case that the goods delivered to it by the plaintiff were yet to be sold. The defendants also denied trying to defeat the Plaintiff's claim by removing any assets out of the jurisdiction of the court and that such accusations were unsupported by any evidence.
12. The 1st Defendant further contended that being a mother of three small children she had no intention of living the country as claimed by the Plaintiff. In view of the foregoing, the Defendants averred that this court should decline to issue the orders sought and let the matter be substantively heard to determine how much is owed. That the orders sought herein would essentially frustrate the business endeavors of the Defendants as no accounts had been reconciled. The Defendants therefore urged the court to dismiss the application with costs.
13. In rebuttal to the Defendants Reply, the Plaintiff filed a supplementary affidavit where the Plaintiff denied that the Defendants replaced the bad cheques. Further, the Plaintiff contended that there was no need for reconciliation of accounts since the goods demanded and received were acknowledged. In addition, that on 9th March 2015, there was commitment by the defendants to

reduce the debt.

14. The Plaintiff further averred that in the undertaking to pay dated 9th March, 2015, the 2nd Respondent presented herself as the sole director of Levnel Enterprises with the full knowledge that the said enterprise had ceased to exist when the same was incorporated as a company on 15th October, 2014 with two Directors. That this action was done with the sole aim of defeating any claim and liability born by the 1st defendant when trading as Levnel Enterprises.
15. That further the 1st Defendant in her dealings and correspondences with the Plaintiff never indicated any difficulty in selling the goods supplied but demanded for more goods while knowingly issuing bad cheques for the said goods. Additionally, the Plaintiff insisted that the Defendants were well aware of the amounts due and outstanding and therefore the prayers sought are merited.
16. When parties appeared before the court on 8thOctober, 2015, they agreed to dispose of the application by way of written submissions.The Plaintiff filed its submissions on 7th October, 2015, while the 1st and 3rd Defendants filed their joint submissions on 16th March, 2016. The same were orally highlighted in court on 23rd March, 2015. I have carefully considered the application, the affidavits and the written submissions of the respective parties. In my view, the issue that arises is whether the Plaintiff's prayers are merited.
17. Before delving into the merits or otherwise of each of the prayers, it is worth noting that the application herein is brought under the provisions of Order 39 and order 40 of the Civil Procedure Rules together with Sections 1, 1A, 3 and 3A of the Civil Procedure Act and any other enabling provisions of the law.
18. It seeks various orders including an order for accounts, warrants of attachment to issue on the defendants' movable and immovable property, security of costs, a temporary injunction restraining the defendants from selling, transferring any shares, equity, property or bank accounts from the jurisdiction of the court. The Plaintiff also prays for the freezing of any or such accounts held by the defendants, wholly or as a per centum of the total.
19. It is also noteworthy that the prayers are not made in alternative of each and are governed by different rules which are adjudicated by different judicial principles. It is instructive to note that Courts have frowned upon applications of this kind and nature as elaborated in the case of **PYARALAL MHAND BHERU RAJPUT vs BARCLAYS BANK AND OTHERS Civil Case No. 38 of 2004** stated as follows;

> ***"There is no doubt the application is an all-cure, omnibus application. It is a wide net cast over a large body of water, and out of all the lake or sea, creatures caught in it, there will be one or two edible crabs or fish. It is not quite so. An omnibus application is incapable of proper adjudication by the court for each of the reliefs sought apart from being governed by different rules, is also subject to long established and different judicial principles which counsel need to bring to the attention of, and the court needs to consider before granting the entire relief sought. This alone makes the plaintiff's application incurably defective, and a candidate for striking out."***

20. From the foregoing case it is clear that the application before this court is a prime candidate for striking out. Be that as it may, I am still of the opinion that though the instant application may not be the epitome of elegant drafting, the Court still has the discretion to examine the arguments brought forth by learned Counsel to the Plaintiff and determine whether or not they are merited. I thus propose to examine the various orders sought in turn us hereunder.

21. With regard to the prayer for attachment, order 39 Rule 5 ofthe Civil Procedure Rules provides for conditions of attachment before judgment. The same 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; 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.**

(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."

22. The court had occasion to consider the scope of Order 39 of the Civil Procedure Act in the case of **BGM HCCC NO 5 OF 2013 KANDUYI HOLDINGS LIMITED v BALM KENYA FOUNDATION & ANOTHER [2013] eKLR**where it held 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 [MarevaCompaniaNavierra SA v 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 asset stripping (forfeiture); or 3) 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 Rules 5 and 6 of the CPR is to prevent the Defendants or would be judgment-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''

23. Thus from the above, it is clear that order 39 Rule 5 deals with situations where the Respondent is about to dispose of or remove property from the jurisdiction of the court. I think in my own view, it fits situations where the property is still available but is about to be removed from the jurisdiction. Applying this rule, to the current case, it is of note that this is essentially case was instituted on a claim of non- payment of a monies by the defendant after goods were supplied by the Plaintiff.
24. From the record and affidavits filed by the applicant, there is no concrete evidence that the respondents have absconded or are about to abscond or have disposed of or removed their property from the jurisdiction of the court. For attachment before judgement as contained in Order 39 Rule 5 to apply, cogent evidence must be produced to demonstrate absconding or disposal of property or real possibility of absconding or disposing of property. The property to which has been disposed of or is about to be disposed of or removed from the jurisdiction must also be specified if an order is to issue under the aforesaid legal provisions, something that the Plaintiff has failed to do.
25. What is before the court are mere allegations that are yet to be tested through evidence. I will therefore decline to issue the order for attachment of the Defendants movable or movable assets, as prayed by the Plaintiff in prayer number (b).
26. It is however important to note that the Applicant have sought for other orders including freezingorder, security of costs, Production of Documents and Accounts. I propose to deal with these reliefs in a structured and systematic way by looking at the overarching order of freezing first as contained in prayer (e) and it efficacy in the circumstances of the case.
27. A freezing order is not an interim injunction and the threshold to be attained for it to be issued is also distinct from those attending a temporary injunction set out in in the **Giella –vs- Cassman Brown** case. A freezing order is an order of the court which is usually issued in personam restraining or enjoining a person from dissipating an asset directly or indirectly.

28. It is ordinarily issued ex parte for it is intended to serve a useful purpose of preservation of assets. See the opinion of Lord Denning in the case of **Mareva Campania Naviera SA vs. International Bulkcarriers SA [1980] 1 All E.R. 213.** The basis for freezing order is the inherent jurisdiction of the court. The same may be issued alone or with other injunctive orders or orders calling for security for satisfaction of an existing or a judgment which may be issued by the court in the case.
29. However, a freezing order is not to be used to pressure a defendant or as a type of asset stripping (forfeiture) or 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 Rules 5 of the civil Procedure act is to prevent the Defendants or would be judgment-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 See the case of **International Air Transport Association & another v Akarim Agencies Company Limited & 2 others [2014] eKLR.** What then is the threshold for the grant of freezing order?
30. In **GOODE ON COMMERCIAL LAW, 4th Edition** at **Page 1287** to be as follows;-

"***The grant of a freezing injunction is governed by principles quite distinct from those laid down for ordinary interim injunctions....Before granting a freezing injunction the court will usually require to be satisfied that;***

(a) The claimant has 'a good arguable case' based on a pre-existing cause of action;

(b) The claim is one over which the court has jurisdiction;

(c) The defendant appears to have assets within the jurisdiction;

(d) There is a real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted; and

(e) There is a balance of convenience in favour of granting the injunction;

(f) The Court can also order disclosure of documents or the administration of requests for further information to assist the claimant in ascertaining the location of the defendant's assets"

31. A "good arguable case in the context of a freezing order 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. this was the holding in the case of **AFRICAN BANKING CORPORATION LIMITED –VS- NETSATAR LIMITED & 6 OTHERS NAIROBI MILIMANI HCC NO. 299 OF 2009 (UR).** Bearing these principles in mind, I shall turn to the facts of this case.
32. It is clear that there was an agreement between the parties herein. The Plaintiff supplied goods and expected to be paid a sum of Kshs. 52,640,990.48/= which the 1st and 3rd Defendant concede, have failed to do. The thrust of the Defendants' defence is that the amount claimed is incorrect and it is only through a reconciliation that the true indebtedness of the Defendants can be determined.
33. At this stage, I need only state that the evidence on record establishes an arguable case based on allegations of breach of contract of payment of the goods delivered to the 1st and 3rd Defendant by the Plaintiff. Does this state of affairs however give the Plaintiff impetus to request for an injunctive order prohibiting the defendants from dealing with the shares, equity, property and or bank accounts from the jurisdiction of this court? In the case of **Mareva Campania Naviera SA vs. International Bulkcarriers SA (supra)** Lord Denning stated as follows;

"A mandamus or an injunction may be granted or a receiver appointed by an interlocutory Order of the Court in all cases in which it shall appear to the Court to be just or convenient …"

Lord Denning held at page 215:

" In my opinion <u>that principle applies to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting judgment for it. If it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets</u>." (emphasis added)

34. Subsequently Lord Denning MR in applications by a Plaintiff for a Mareva injunction against a Defendant within the jurisdiction of the court set out some guidelines for the Plaintiff to satisfy before a Mareva injunction can be granted. This was in the case of **Third Chandris Shipping Corporation and others v Unimarine SA The Pythia, The Angelic Wings, The Genie [1979] 2 All ER 972**, per **Lord Denning M.R. at 984 – 985** ;

"The guidelines -

In endeavouring to set out some guidelines, I have had recourse to the practice of many other countries which have been put before us. They have been most helpful. These are the points which those who apply for it should bear in mind. (i) The Plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the judge to know... (ii) The Plaintiff should give particulars of his claim against the Defendant, stating the ground of his claim and the amount thereof, and fairly stating the points made against it by the Defendant. (iii) The Plaintiff should give some grounds for believing that the Defendants have assets here. ... The existence of a bank account in England is enough, whether it is in overdraft or not. (iv) The Plaintiff should give some grounds for believing that there is a risk of the assets being removed before the judgment or award is satisfied."

35. Bearing the above in mind, I have looked at the evidence on record at this particular stage. In this case the Plaintiff has not made a full and frank disclosure of all matters within its knowledge which are material for the judge to know. Secondly there are no material disclosures on the any source of information to reach the conclusion that the first 1st Defendant was planning to wind up the business operations of the 3rd Defendant.
36. The mere fact that the an entity known as Levnel Enterprises was incorporated into a company known as the 3rd Defendant does not lead to this inference of fact. Further there is absolutely no evidence anywhere about whether the 1stRespondent is about to liquidate the assets of the 3rd Defendant and divest them to other entities.
37. Further, the Plaintiff has not given this court the grounds for believing that there is a risk of the assets of the defendants being removed from the court's jurisdiction before judgment or award in this suit. The issuance of a series of bad cheques in itself, does not aid the Plaintiff's case for the grant of a mareva injunction. In the premises the Applicant does not satisfy the basic requirements for the grant of a Mareva injunction and therefore the application for the grant of a Mareva injunction is disallowed. The prayer for a temporary injunction is also rejected on the same grounds.
38. I shall now turn to the prayer by the Applicant for the Defendants' to furnish security for the sum of Kshs. 52,640,990.48/=. The law is settled in this area that an order for security of costs is a discretionary one. Order 26 rule 1 of the Civil Procedure Rules actually confers discretion on the court, which is recognition that there may be many cases where a call for security for costs may be refused.
39. This discretion is, however, to be exercised reasonably and judicially by taking absolute reference to the circumstances of each case. Such matters as; absence of known assets within the jurisdiction of court; absence of an office within the jurisdiction of court; insolvency or inability to pay costs; the general financial standing or wellness of the Plaintiff; the bona fides of the Plaintiff's claim; or any other relevant circumstance or conduct of the Plaintiff or the Defendant. This list is by no means exhaustive. However, in this case I shall restrict myself to Order 26 rule 1 of the Civil Procedure Rules whose wording is clear enough and provides that the court may order the Plaintiff to furnish security for the payment of all costs incurred by the Defendant.
40. Thus, the rule only caters for applications by the Defendant for the furnishing of security for costs

by the Plaintiff. I do not need to consider the rational for having the Plaintiff furnish security for costs. The rule does not cater for the Defendant furnishing security for costs of the Plaintiff. In the premises the Applicant's application for the Defendants/Respondents to furnish security for costs cannot be sustained and is accordingly disallowed.

41. With regard to the prayer for accounts and production of records of all transactions for the proceeds from sale of the goods delivered to the Plaintiff, it is my finding that the same will have to await the full trial. The prayer cannot be granted at this interlocutory stage and is therefore dismissed.

42. The upshot is that the Plaintiff's application is dismissed. Costs of the application shall be in the cause. Parties should however ensure steps are taken in order to progress the case to trial without delay. It is so ordered.

Dated, Signed and Delivered in Court at Nairobi this 27th day of May, 2016.

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C. KARIUKI

JUDGE