



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 26 OF 2015**

**CAPRICORN FREIGHT FORWARDERS LIMITED ..... PLAINTIFF**

**V E R S U S**

**VICTOR OMONDI (T/A FIRST IMPEX & FIRST WESTLINK).....DEFENDANT**

**RULING**

1. By a Plaint filed in this case on 20<sup>th</sup> February 2015 Plaintiff pleaded that the Defendant by a written agreement dated 15<sup>th</sup> July 2013 appointed Plaintiff as its sole Clearing and forwarding agent for all of its consignments passing through the Port of Mombasa. The Plaintiff's claim against Defendant is for Kshs. 15,973,831/- , being charges Plaintiff paid on behalf of the Defendant; and a claim for general damages because amongst other reasons, the Plaintiff alleged the Defendant appointed another clearing agent other than the Plaintiff.

2. The Defendant filed a Defence and Counter Claim on 6<sup>th</sup> March 2015 whereby Defendant denied the Plaintiff's claim. Specifically Defendant pleaded that on the registration of the business First Westlink under the Registration of Business Names Act, the Defendant engaged the Plaintiff on ad hoc manner in clearing its consignments through the Mombasa Port. Defendant therefore denied there was a written agreement appointing Plaintiff as sole agent of Defendant as pleaded in the Plaintiff. Defendant termed the said agreement as forgery. By its Counter claim Defendant alleged that the Plaintiff failed to account for money paid to it by Defendant; failed to issue receipts to Defendant for such payments; diverted payments made by Defendant; presented forged documents relating to Defendant's consignments; charged Defendant's account for various consignments of third parties; fraudulently and irregularly made importation entries with Kenya Revenue Authority (KRA); and that Plaintiff unlawfully demanded payment from the Defendant for services not rendered. Further in the Counter claim Defendant claims for refund of demurrage and other expenses the Defendant will be required to pay in respect to Defendant's four containers over which Plaintiff irregularly without Defendant's consent made importation declaration.

3. For consideration in this Ruling is the Plaintiff's Notice of Motion dated 13<sup>th</sup> February 2015. That Notice of Motion is brought under Orders 39 and 40 of the Civil Procedure Rules. Plaintiff seeks the following prayers-

**Ø The Honourable Court be pleased to make an Order for the conditional attachment of the four containers namely MAEU 8386788, PONU 7522661, MRKU 4595019 and MRKU 2541395 lying at the Port of Mombasa pending the provision of security for the sum of Kshs. 15,973,831/- by the Defendant.**

**Ø The Honourable Court be pleased to make an Order for the Defendant to furnish security for the sum of Kshs. 15,973,831/- as claimed by the Plaintiff in this suit.**

4. In support of that Notice of Motion is the affidavit of LAMECK OLUOCH OGONDA.

5. The deponent stated that Plaintiff's main business activity is clearing and forwarding. That on 15<sup>th</sup> July 2013 Plaintiff entered into written agreement with Defendant where by the Defendant appointed

Plaintiff its sole clearing and forwarding agent of all Defendant's consignment passing through the Port of Mombasa. To that end deponent annexed a copy of that alleged agreement. In further deposition the deponent deponed that Defendant for the period of January 2013 to August, 2014 was indebted to Plaintiff for the sum of Kshs. 15,973,831. To prove the debt deponent referred to very bulky bundle of documents which he referred to as duty/taxes, payment receipts, Port charges, payment receipts, Bills of Lading, import entries, CFS/KPA and other invoices and receipts for the period. Deponent also referred to an Accountant's report of Muga J. N. & Associates. The conclusion of that report is as follows-

**“CONCLUSIONS:**

**From all the material information we received, we are able to know total invoices billed to client between 2013/2014 was: Kshs. 42,154,026/-**

**Total payments to date by client Kshs. (26,180,195/-)**

**Balance unpaid Kshs. 15,973,831/-**

**Based on this conclusion, we are certified (sic) that the actual outstanding amount not settled by First Impex Limited/First Westlink as at 31.12.2014 is Kshs. 15,973,831 (Fifteen millions, nine hundred seventy three thousands, eight hundred and thirty one only).**

**CPA John N. Muga P/No. 1617**

**Certified Public Accountant (K)**

**04/02/2015.”**

6. It is further deponed that the Plaintiff while it was in the process of clearing the Defendant's four containers, the subject of the application, it was instructed by the Defendant to surrender clearing documents to another clearing agent appointed by the Defendant. That such appointment was made without regard to the Defendant's alleged debt to the Plaintiff of Kshs. 15,973,831.

7. Plaintiff has based the prayers in its application on the ground that Defendant owes it Kshs. 15,973,831/-; and that the proprietor of the Defendant is a holder of a British Passport; and there is risk of him relocating to Britain which will make it difficult for Plaintiff to recover the amount owed to it.

8. Defendant in opposition to the application relied on two affidavits.

9. The first to be considered is the affidavit sworn by the Defendant VICTOR OKELLO OMONDI on 6<sup>th</sup> March 2015. He deponed after registration of First Westlink his brother Michael Ouma Omondi assisted him to source second hand clothes abroad. It is the said Michael who set up the management of Defendant's business and also managed all the logistics of that business. In that regard it was Michael who exclusively dealt with Plaintiff on all matters relating to shipping and clearance of Defendant's consignments. The deponent even went as far as to say that he had never been in Mombasa and only did so in attendance of this case on 2<sup>nd</sup> March 2015. He denied ever having met the Plaintiff's Directors, or employees of Plaintiff. He proceeded to state that the agreement dated 15<sup>th</sup> July 2013 was a forgery and that the signature appearing thereof was not his signature. The deponent annexed a copy of his Kenyan National Identity Card and Kenyan Passport.

10. The other Replying Affidavit was sworn by MICHAEL OUMA OMONDI on 6<sup>th</sup> March 2015. Michael confirmed that it was he who engaged Plaintiff on ad hoc basis to clear Defendant's consignments. That there was no written agreement in regard to those services. Michael however became suspicious of fraud against Defendant whereby he suspected Plaintiff to have fraudulently made entries in respect of its services to Defendant. Michael requested a meeting with Plaintiff's Director after suspending Plaintiff's services. Michael then deponed thus-

Ø THAT however, notwithstanding the suspension of the Plaintiff's services as discussed with the Plaintiff's Lameck Oluoch Ogonda in early August 2014, on September 23, 2014, unknown to the Defendant and myself, the Plaintiff had, without any instructions, authority, permission and or knowledge of the Defendant as was the usual practice and necessary in law and shipment practice, made custom entries/declarations 2014MSA5028757, 2014MSA/ 5028529, 2014MSA5028886 and 2014MSA5028710 respectively for following consignments belonging to the Defendant:

BILL OF LADING	VESSEL VOYAGE	LAST SLING	C'NER NO.	CTN SIZE	C'NER TRANSFER TO CFS
951785172	LILLY SCHULTE	1407	22 Aug 2014	40	23 Aug 2014
951715262	MARTHA SCHULTE	1405	11 Aug 2014	40	11 Aug 2014
951867350	MARTHA SCHULTE	1407	09 Sep 2014	40	08 Sep 2014
951843721	MARTHA SCHULTE	1407	09 Sep 2014	40	08 Sep 2014

I now produce and mark as "B3" copies of the above entries which are in respect of the consignments affected and or attached by the orders given by this Honourable Court on February 24, 2015.

Ø THAT at the time the Defendant unlawfully, irregularly and or fraudulently made the above entries, the Plaintiff's services had not only been suspended by mutual agreement but the Defendant had also not instructed the Plaintiff and or even furnished the Plaintiff with copies of Bills of Lading and the other documents and advise regarding the necessary documents required for making customs declaration and his affidavit as well as all the annexures relied upon by the Plaintiff do not contain any of those documents.

Ø THAT it is during the meeting of September 29, 2014 at the Plaintiff's office, that the Plaintiff's aforesaid representative informed me, that he had made custom declarations for the above four (4) containers without any instructions and documents from me and or the Defendant in order to prevent the Defendant from gaining access to the consignment until the accounts were reconciled and settled and it was the first time I became aware of this unlawful, irregular and fraudulent act of the Plaintiff.

11. Michael alleged that the Plaintiff had inflated its charges and when this was pointed out by Michael, the Plaintiff's employee undertook to rectify the amount in the accounts but did not do so. That the Plaintiff allegedly demanded refund of taxes paid for Defendant without producing receipts. That although the Plaintiff's claim in this case against Defendant is for Kshs. 15,973,813/- that the Plaintiff had previously demanded from Defendant Kshs. 7,227,483/-. Michael deponed that documents relating to fumigation of Defendant's consignment, relied upon by the Plaintiff in this action were forgeries.

#### ANALYSIS

12. It is important to state before proceeding with analysis of the application that the Plaintiff obtained interim injunction on 24<sup>th</sup> February 2015 which order restrained the Defendant from clearing or removing the four containers from the Port of Mombasa. The application was fixed for inter partes hearing on 2<sup>nd</sup>

March 2015 when the Defendant had not filed its response in opposition and sought time to do so. Defence Counsel however robustly opposed extension of the injunction order on the ground that the cost in demurrage for the four containers was outstripping the value of the consignment. Defence Counsel stated that it made more economic sense to have the containers released from the Port then have them attached if so ordered. The Court granted Defendant an adjournment to enable Defendant file its documents in opposition. The application was fixed for inter partes hearing on 9<sup>th</sup> March 2015 and the interim injunction was extended to that date. Defendant was ordered to file and serve its documents by 6<sup>th</sup> March 2015.

13. It does seem that the Defendant filed and served the Plaintiff as ordered with Replying Affidavits, Defence and Counter claim but on 9<sup>th</sup> March 2015 when the application was fixed for inter partes hearing Plaintiff's Learned Counsel sought time to file further affidavit. In so doing Learned Counsel for Plaintiff stated-

**“My client (Plaintiff) is in Nairobi and is expected here (Mombasa) later today.”**

14. The Plaintiff is a Limited Liability Company with more than one Director. That as it may be no explanation was given why one of the Plaintiff's Director, who would have sworn the further affidavit, was out of Mombasa more particularly when Plaintiff had filed the application under Certificate of Urgency. The Court therefore declined the application for adjournment and ordered the hearing of the application to proceed.

15. Plaintiff has moved the Court under two orders in the Civil Procedure Rules, that is Order 39 and 40.

16. Order 39 is entitled ‘**Arrest and Attachment before judgment.**’ The condition over which the Court would grant an order under Order 39 is stated in Rule 1(a) and (b) which is in the following terms-

**“Where at any stage of a suit, .... 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 or 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.”**

It is only where the Defendant fails to show cause that an order for his arrest is made and if he fails to furnish security the Court can order for attachment before judgment.

17. The Plaintiff by its prayers reproduced above seeks orders that the Defendant's containers be attached and Defendant be ordered to furnish security for the amount of Kshs. 15,973,831/-. The Plaintiff did not as provided under Order 39 pray for an order for Notice to Show Cause to be shown by Defendant why he should not be ordered to provide security for the amount claimed.

18. The two issues that present themselves for consideration are-

(i) **Has Plaintiff satisfied the Court that the conditions exist for ordering the Defendant to show cause or provide security?**

(ii) **If the answer to the first issue is in the positive should the Court order Defendant to show cause why he should not provide security for the amount claimed?**

19. There is a wealth of authorities which will assist me in determining the first issue.

20. In the case SHIVA ENTERPRISES LIMITED -Vs- JIVAYKUMAR TULSIDAS PATEL T/A HYTECH INVESTMENT (2006)eKLR the following was stated-

**“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 aforestated 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-**

**“The power to attach before judgment must not be exercised lightly and only upon clear proof of the mischief aimed at by Order 38, rule 5 (now Order 39) 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. In an application under Order 38 rule 5, the onus of showing a plausible case for resisting the application can only shift to the Defendant once the Plaintiff fully satisfied the requirements under the order ....”**

21. In the case AWO SHARIEFF MOHAMED T/A ASMI SERVICES STATION -Vs- CALTEX OIL KENYA LTD [2008]eKLR the Court discussing Order 39 (which then was Order 38) stated-

**“It is my view that the interpretation of the provisions of Order 38 is clearly set out in the above authorities. The purpose of the procedure is to secure the Plaintiff against any attempt on the part of the Defendant to defeat the execution of any decree that may be passed or to delay the proceedings in the Plaintiff's case. But because the Court has not had opportunity to try the case yet the Court has to act carefully and not to grant orders lightly. Always remembering that justice demands that both parties be heard before the dispute is determined. Therefore the requirements of the provisions of the Order (38) must be complied strictly.”**

22. The Court of Appeal in the case KANYOKO T/A AMIGOS BAR & RESTAURANT -Vs- NDERU & 2 OTHERS [1988]eKLR quoted from Mullar on Code of Civil Procedure 18<sup>th</sup> Edn. Pg 1502 as follows-

**“According to Mulla, when the Rules required the Judge to be satisfied:-**

**‘Vague allegations are insufficient. The power to attach is not to be exercised lightly and without clear proof of the mischief aimed.’”**

23. The Plaintiff through its affidavit in support of the application sought that orders be issued for attachment before judgment because the Defendant was a National of the United Kingdom and might abscond without paying Plaintiff’s debt. That argument was demolished by Defendant attaching his Kenyan National Identity Card and Kenyan Passport. Defendant is not a foreigner as deponed by Plaintiff. The same goes in respect of MICHAEL OUMA OMONDI. Michael holds a Kenyan Passport but has a right of residence in the United Kingdom. But it’s important to remember MICHAEL is not the Defendant.

24. The other issue to be considered is the Plaintiff’s allegation, by this suit, that Defendant owes it Kshs. 15,973,831/-. That claim is contradictory to the demand in the Email of 26<sup>th</sup> August 2014 sent by Lameck Oluoch through email address [cappricornltd@yahoo.com](mailto:cappricornltd@yahoo.com). In that Email Plaintiff’s debt was stated to be Kshs. 7,227,483/-. I will reproduce that email as follows, because in my view it probably reveals the true basis of bringing the action and the interlocutory application-

**“Hallo Milly/Michael,**

**As confirmed to you on phone. The said Certificates are with us and I told Michael the same when we spoke.**

**Michael seemingly is diverting the business to another clearing agent and yet he owes us Kshs. 7,227,483 being for the past cleared containers.**

**We have no objection returning the Certificates, but let Michael clear with us and pick his Certificates from us. He actually knows our office very well.**

**We have been picking COC on behalf of Michael from SGS for his previous containers for a very long time, without any issues and let him not bring our issues to SGS.**

**Please ask Michael to come to our office and we solve our issues soberly.**

**Regards.**

**Lameck.”** (emphasis is mine)

25. Reading that Email one cannot fail to note that the Plaintiff’s Director Lameck Oluoch is displeased by Defendant’s act of diverting business from Plaintiff’s Company.

26. The Plaintiff failing to respond to Defendant’s depositions leaves the Court to accept as correct that the Plaintiff made entries over the four containers without Defendant’s authority and contrary to the KRA procedures at the Mombasa Port. That entry has denied Defendant possession of those containers and is resulting in escalation of demurrage costs. In this regard it is important to refer to an authority **MERU FARMERS CO-OPERATIVE UNION –Vs- SULEIMAN (No.2) [1966]EA 442** where Sir Charles Newbold P. said-

**“The Courts should always be extremely anxious to ensure that the due administration of justice does not cause unnecessary expenses. If any course of action which either litigant chooses to adopt would result in unnecessary expense, the Courts should be zealous to ensure that such a course of action is not open. A Court should, not itself be used as a tool to incur unnecessary expenses where it is satisfied that such expense is unnecessary.”**

27. In my consideration of the first issue I find the Plaintiff has failed to satisfy the conditions set out in Order 39. The Plaintiff has not shown that Defendant has intent to delay, avoid the Court process or obstruct the execution of the Decree, has absconded out of the jurisdiction of this Court or has disposed its property. Having found the first issue in the negative there is no basis of consideration the second issue. There is no basis of ordering the Defendant to show cause or to order him to provide security.

28. There is also the doubt whether the containers can be the subject of attachment. This is because they may be Customs Warehouse goods which means the goods are under the custody of Customs and not liable to be released to any one until all duties, expenses, rent, freight and other charges have been paid. See Section 43(8) of the East African Community Customs Management Act.

### **CONCLUSION**

29. The Plaintiff's Notice of Motion dated 13<sup>th</sup> February 2015 is dismissed with costs to Defendant.

**DATED and DELIVERED at MOMBASA this 19<sup>TH</sup> day of MARCH, 2015.**

**MARY KASANGO**

**JUDGE**