



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 786 OF 2002

LABELLE INTERNATIONAL LIMITED ::::::::::::::: 1ST PLAINTIFF

TEJINDER KAUR BIRDI ::::::::::::::: 2ND PLAINTIFF

-VERSUS-

FIDELITY COMMERCIAL BANK LIMITED ::::::: 1ST DEFENDANT

ISMAEL M.H MAWJI ::::::::::::::: 2ND DEFENDANT

R U L I N G

1. The application before the court is a **Notice of Motion** by the Plaintiff dated **30th May 2014**. The application seeks the following orders namely:-
 - a. ***This Application be certified urgent and heard ex-parte at the first instance.***
 - b. ***This Honourable court be pleased to determine the amount due to the Defendants by the Plaintiffs for the purpose of providing a bank guarantee pursuant to this Honourable Court's Ruling delivered on 17th March 2014.***
 - c. ***This Honourable court hereby declares that the security being LR No. 209/2490/2 given by the Plaintiffs to the Defendants fully satisfies and indemnifies the Defendants of the outstanding amount in dispute.***
 - d. ***Costs be in the cause.***
- e. The application is premised on the grounds set out therein being that the parties to this suit have failed to agree on the amount outstanding as ordered by the court on 17th March 2014, and that it is in the interest of justice that this court determines the amount outstanding to facilitate compliance with the court order of 17th March 2014.
- f. The application is supported by affidavit of **Tejinder Kaur Birdi** sworn on **30th May 2014**, and a supplementary affidavit of the same person sworn on 12th January 2015. To the supplementary affidavit is annexed a Valuation Report of property situated at Ngara known as LR. No. 209/2490/2 whose value is stated to be Kshs.45,000,000/= This property is currently pledged as security to the 1st Defendant.
- g. By the Ruling of this court on 17th March 2014 the Plaintiff was required to provide security for the outstanding sums owed to the 1st Defendant either by way of a bank guarantee or depositing the same in an escrow account within 30 days. The Plaintiffs have not complied with the said

- order. By the same order the parties were allowed to approach the court to determine the outstanding sums for the purposes of the said guarantee in the event that the parties failed to do that. It appears the parties have failed, and hence this application.
- h. The application is opposed by the Defendants vide the replying affidavit of **Stella Mbuli** sworn on **8th July 2014**. M/s Mbuli states that this application is out of time and is also misconceived. The application is filed more than 70 days after the Ruling of the court of 17th March 2014, and there is no valid explanation for the delay. Therefore the Defendants have submitted that the Plaintiffs are in contempt of the said orders of the court and should not be entertained. The Defendants have also rejected the security offered stating that the said security is not charged to the Defendants, and they the Defendants, do not have title documents to the same, which are in the possession of the 1st Defendant's former advocates.
 - i. I have considered the application and opposition to it. The only issue for consideration is whether the application satisfies the criteria of the Ruling dated 17th March 2014.
 - j. It is to be noted that the Plaintiff/Applicant successfully sought the leave of the court to file the aforesaid supplementary affidavit on the basis of which the Applicant was able to bring before this court the aforesaid valuation of the Ngara Property said to be Kshs.45,000,000/= and which property the Plaintiffs states is charged to the 1st Defendant. The Plaintiff's case is that since the property is worth Kshs.45,000,000/= it is enough security for any sums which may be owed to the Defendant, which by the Defendants admission is no more than Kshs.24.5 million.
 - k. The first issue to note is that the alleged land security was not referred to in the Ruling of the 17th March 2014. The security referred to was a money deposit or bank guarantee. However placed before court now is L.R. No. 209/2490/2 which belongs to the Plaintiffs but which is in the custody of the 1st Defendant as a sort of security. The Plaintiff has also disputed the sum of Kshs.24,557,488.48 alleged by the Defendants to be due. However, there is no express denial that the Defendant is holding the Plaintiff's title to the said Ngara Property valued at Kshs.45,000,000/=. That is not a small property. In any event the title is in possession of the 1st Defendant's lawyers and even if the same has been charged, still the 1st Defendant has possession of the title documents.
 - l. With the foregoing in mind, I make the following orders:-
 - a. ***The value of the said Ngara property being LR No. 209/2490/2 at Kshs.45,000,000/= or thereabout is adequate security for any sums which may be found due to the Defendant.***
 - b. ***Costs shall be in the cause.***

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI

THIS 29TH DAY OF MAY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Mureithi holding brief for Ndege for the Plaintiffs

Ms Mathenge holding brief for Hira for the Defendants

Teresia – Court Clerk