



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 153 OF 2014

OMAR SALEH SHERMAN.....APPLICANT

-V E R S U S-

**BIANCHI UMBERTO VANT T/A BIANCHI PLANT AND MACHINERY.....
RESPONDENT**

RULING

1. The Plaintiff, Omar Saleh Sherman, has filed this suit against Bianchi Umberto Vant t/a Bianchi Plant and Machinery the Defendant, claiming various sum in special damages totaling Kshs 14,916,955.34. He also sought that an order made requiring the Defendant to furnish him with detailed account of the transaction of their business.
2. The Plaintiff's claim is based on an alleged joint venture agreement between him and Defendant by which he provide finance for the purchase and importation of second hand work and Metal Machinery from Italy. Plaintiff's claim is that the Defendant failed to account for the sales and profits in the business. That the Defendant failed to give account despite numerous requests. That the Defendant, who was involved in the day to-day running of the business, "deserted" a second shipment of goods and left the responsibility on the Plaintiff to sell those goods.
3. Plaintiff has filed an interlocutory Notice of Motion dated 15th December 2014. He seeks the following orders:
 - a. **THAT this Honorable Court be pleased to certify the application as urgent and the same be directed to proceed to hearing *ex-parte* in view of its urgency.**
 - b. **THAT the Respondent/Defendant (hereinafter referred to as the "Respondent") do furnish an account and delivery of all records and documents regarding the business transaction and sale of wood work and metal work machinery imported in Kenya.**
 - c. **THAT the Respondent do forthwith appear before this Honorable Court to show cause why he should not furnish security in the sum of Kshs. 14,916,955.36 being the principal sum claimed by the Plaintiff/Applicant (hereinafter referred to as the "Applicant").**
 - d. **THAT the Respondent do pay the sum of kshs.15,916,955.35 being the principal sum claimed by the Applicant, interest and estimated party and party costs as security until the determination of this suit an/or further Court orders.**
 - e. **THAT a temporary injunction restraining the Respondent, his servants, agents or employees from removing, transferring, disposing, charging or in any other way dealing with their property wheresoever situate and in particular woodwork and metal work machinery held at Oceans Engineering Limited godown situate on Lumumba Road Mombasa.**
 - f. **THAT in default of compliance with the above orders the Respondent's property above be**

attached and sold.

- g. THAT the costs of this suit and the costs of this application be provided for.**
- h. ANY other or further relief that the Court may deem fit in the interest of justice.**

4. In respect to prayer (b) above, it is clear that the same cannot be granted in an interlocutory application. That is a prayer that can only be granted when parties have adduced evidence. Prayer (c) and (d) are based on Order 39 of the Civil Procedure Rules. Rule 1 and 2 of that order provides:

“Where at any stage of a suit, other than a suit of the nature referred to in paragraphs (a) to (d) 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 any 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.

2. Security [Order 39, rule 2.]

(1) Where the Defendant fails to show such cause the court shall order him either to deposit in court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of the decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the Defendant under the provision to rule 1.”

- 5. In my view those provision of Rule 1 and 2 are very clear. They do not require the court to inquire into the disputes in the case. Not at all. But that is what the parties have engaged in, in their affidavits and written submissions. It is clear from Rule 1 that the Plaintiff is required to show that the Defendant with intent to delay, avoid or obstruct execution of any decree has absconded and left local limits of the court’s jurisdiction; is about to abscond; has disposed or removed his property from the local limits of the court’s jurisdiction, or that he is about to leave Kenya in circumstances that afford reasonable probability he intends to delay execution of decree.
- 6. Bearing in mind the above threshold that the Plaintiff must meet what did Plaintiff bring to court to meet it. The Plaintiff in his affidavit in support of the application sworn on 15th December 2014 had this to say:

“THAT there is reasonable probability that I may be obstructed or delayed in the execution of any decree passed against the Respondent bearing in mind that Respondent has no identifiable property within the local limits of the court’s jurisdiction nor am I aware of any property belonging to the Respondent in Kenya save

for goods which have been recently imported by the Respondent and are currently being held at Oceans Engineering Limited Godown on Lumumba Road for the purposes of sale.

THAT I am apprehensive that if the goods are sold I will be denied a chance to execute any decree passed upon the Respondent.

THAT the Respondent is an Italian National and is a likely flight risk especially considering his lack of property within Kenya.”

7. The fact the Plaintiff does know the property owned by the Defendant is not a ground of granting the orders he seeks for security to be provided. The fact that the Defendant may have Italian origin is also not ground to be consider. In any case the Defendant attach to his replying affidavit a Kenyan National Identity Card. It follows the deposition that he is an Italian is in correct. He is now a Kenyan National, by virtue of that National Identity Card. A case that comes to mind is **TOM MBOYA OPIYO –V- AUNDRAE EUGENE CASSELL [2005] eKLR** where the judge faced with almost similar facts to this case stated:

“I am not satisfied that the Defendant, with intent to delay the Plaintiff, or to avoid any process of the court or to delay or obstruct the execution of any decree that may be passed against him, is about to abscond or leave the local limits of the jurisdiction of the court, or is about the 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 this suit. If the Defendant has such intent would he have loudly announced his travel arrangements to the Plaintiff as he did in the letter dated 28th February, 2005? I think not. It seems to me that this application is not brought in good faith. The Plaintiff simply wants the defendant’s freedom of movement curtailed to ensure that he attends hearing of the suit on 7th June, 2005. But, obviously, the pendency of a *suit per se* cannot be a sufficient reason to deny a litigant his freedom of movement, including the freedom to travel abroad. That is why rule 1 of order 38 (now 39) requires more, much more.”

8. Another case in point in **LABH SINGH HARMAN SINGH LIMITED –V- ALFA MOTORS LIMITED & ANOTHER [2013] eKLR** where the court cited a court of appeal viz:

“In Kanyoko t/a Amigos Bar Vs Nderu [1988] 2 KAR 126 at 133 the Court of Appeal held:

“If the result of this case teaches anything, it is that courts should be extremely slow in ordering attachment of a defendant’s property before judgment, not only because it is hardly consistent with justice to exact ‘punishment’ before the defendant’s liability to execution is established but also because in view of the tardy and time consuming process of the courts, the rights and liabilities of the parties may not be determined for a long time, possibly years.”

9. In my view considering the totality of the parties evidence and submission there is no sufficient ground to grant the orders sought. Accordingly that prayer for security fails.
10. The Plaintiff sought temporary injunction to restrain the Defendant from selling or interfering with “their property”. The Plaintiff failed to itemize the goods to which the injunction would be directed towards. An injunction order cannot be issued where the subject property is not identified. How else would the court know if the Defendant has disobeyed its order.
11. The only deposition directed at that prayer is in Plaintiff’s affidavit of 15th December 2014 where the Plaintiff stated:

“That I seek orders restraining the Respondent from dealing with the goods in any manner until the determination of this suit and or further orders of the court”.

There is no sufficient particularity to enable this court issue an injunction.

12.The Defendant was also correct in his submission that since the loss the Plaintiff alleges he has incurred has been quantified in this case the prayer for injunction fails the second limb of the principle of granting an injunction as set out in the case **GIELLA –V- CASSAMAN BROWN & CO LTD [1973] EA 358**, that is:

“An injunction will not normally be granted unless the applicant might otherwise suffered irreparable injury.”

If the amount the Plaintiff alleges he will suffer has been quantified he will not then suffer irreparable injury.

13.The prayer for injunction therefore fails.

14.The prayer for attachment of Defendant’s property in default of providing security fails because the court declines to grant the prayer for provisions of security.

15.In the end I grant the following prayer:

The Notice of Motion dated 15th December, 2014 is dismissed with costs to Plaintiff.

DATED and DELIVERED at MOMBASA this 25TH day of JUNE, 2015.

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

C/A Kavuku

For Plaintiff:

For Defendant:

Court

Ruling delivered in their presence/absence in open court.

MARY KASANGO

JUDGE