



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 321 OF 2015

BETA HEALTHCARE INTERNATIONAL LTD.....PLAINTIFF

- VERSUS -

STEPHEN MUKITA t/a

MUSTEKY ENTERPRISES a.k.a. MUSTIKY ENTERPRISES.....DEFENDANT

RULING

1. The plaintiff, **BETA HEALTHCARE INTERNATIONAL LIMITED** has filed an application pursuant to Sections 1, 1A, 3 and 3A of the Civil Procedure Act, as read together with Order 40 of the Civil Procedure Rules.

2. The following are the substantive reliefs sought by the plaintiff;

“b) THAT pending inter partes hearing, the Honorable court do issue warrants of attachment, tracing and identification of the defendant’s moveable and immovable property, to wit vehicles, parcels of land, jewelry, 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 all records of all proceeds from the sale of the goods delivered by the plaintiff worth Kshs. 42,271,684.22, or in the alternative, the Defendants be ordered to furnish within 14 days from this date hereof a banker’s guarantee to pay the plaintiff Kshs. 42,271,684.22, through the Plaintiff’s Advocates.

d) THAT this Honourable Court be pleased to make an Order for the Defendant to furnish security for the sum of Kshs. 42,271,684.22 within 14 days as claimed by the plaintiff in this suit.

e) THAT a temporary injunction do issue to restrain the defendant, or by its 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 defendant, either wholly or as a percentum of the total”.

3. The application was filed under a Certificate of Urgency on 6th July 2015. On that same day the application was heard, *ex parte*, in the first instance and the learned Judge ordered the defendant to deposit a Banker’s Guarantee in Court, immediately.

4. It was then ordered that the *inter-partes* hearing of the application would proceed on 20th July 2015.
5. On 17th July 2015 the defendant filed an application, seeking a stay of the Order which required him to provide a Bank Guarantee.
6. When the case came up in court on 20th July 2015, the plaintiff informed the court that the defendant had not complied with the Order pursuant to which he was to provide a Bank Guarantee.
7. Gikonyo J. directed that the application filed by the plaintiff be heard together with the defendant's application. Meanwhile, the learned Judge told the defendant that he had 21 days to provide the Bank Guarantee.
8. On 2nd September 2015 the case was mentioned before me. On that date the parties agreed to canvass the application through written submissions.
9. Notwithstanding that agreement, on how the applications would be dealt with, the plaintiff drew the attention of the court to the fact that the defendant was yet to provide the Bank Guarantee.
10. Mr. Nyang'au, the learned advocate for the defendant informed the court that he had written to his client about the court order.
11. The court then directed that the defendant would not be permitted to file his written submissions if he did not comply with the orders made on 6th July 2015.
12. As a result of the continued failure by the defendant to comply with the orders made on 6th July 2015, he did not file any submissions in respect to the 2 applications.
13. Order 40 of the Civil Procedure Rules makes provision for Temporary Injunctions and Interlocutory Orders. Rules 1 to 8 address temporary injunctions of a restraining nature.
14. Rule 9 deals with, inter alia, attachment before judgement.
15. Rule 10 deals with the Detention, Preservation and Inspection of property.
16. Finally, Rule 11 deals with the Deposit in court or the delivery to a specified person, of money or other deliverables.
17. The plaintiff did not specify the Rule or Rules, under Order 40, which it was invoking. Therefore, that rendered it challenging for the court to ascertain the question as to whether or not the plaintiff met the requirements of any of the Rules under Order 40 of the Civil Procedure Rules.
18. In my assessment of the reliefs sought by the plaintiff, none of them appears to fit within the ambit of Order 40 save for prayer (e).
19. And in relation to that relief for a temporary injunction, the plaintiff asked that it should be in respect to;

“Shares, equity, property or bank accounts from the jurisdiction of this Court...”

20. There is no indication of the companies in which the defendant has shares.
21. There is also no indication of particulars of the equity, property or bank accounts in respect to which the injunction would apply, if the court was minded to give the orders.
22. If the court were to issue the injunctive orders, yet there was no proof of the property or assets which

the order was directed against, it is possible that the Court would have made an order in vain.

23. It is a cardinal principle that Courts do not act in vain. That means, inter-alia, that when a court gives an order, it should be capable of enforcement. It is only when an order is clear, that the person it is directed at will know exactly what is required of them.

24. If the person fails, neglects or refuses to refrain from doing the specific thing which he was told not to do, he can then be cited for contempt of court.

25. But when an order makes reference to property or bank accounts or equity or shares which are not specified, it is conceivable that no such property, shares, equity or bank accounts exist. If that be either the position or a possibility, then the court would have given an order which was incapable of enforcement.

26. This court refuses to make orders which may be in vain.

27. Order 39 of the Civil Procedure Rules makes provisions for Arrest and Attachment Before Judgement.

28. Rule 1 gives particulars of the requirements which an applicant needs to meet, so that the court can then order a defendant to furnish security for his appearance.

29. It is to be noted that pursuant to Order 39 Rule 6;

“Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the court, the court may order that the property specified, or such portion thereof as appears sufficient to satisfy the decree which may be passed in the suit, be attached”.

30. That rule amplifies the need for an applicant to specify the property which could be attached if the defendant failed to provide security.

31. In this case, the only property whose particulars the applicant has is the defendant’s bank account which has already been closed. Obviously, it would not make any sense to attach the closed account.

32. I fully appreciate the plaintiff’s anxiety about the possible loss of goods worth more than Kshs. 42 million. The loss was attributed, by the plaintiff, to the defendant’s failure to pay for goods sold and delivered to him by the plaintiff.

33. The defendant has, on a *prima facie* basis, indicated that it should have paid for the goods which the plaintiff sold and delivered to him. I so find because the defendant issued cheques to the plaintiff in respect to the said goods.

34. In the circumstances, if the plaintiff had, through a report by an investigator, demonstrated to the court that the defendant has some particularized property or assets, the court would have granted the reliefs sought, or some of them. But because the plaintiff has not made available to the court, the particulars of the properties or assets against which the orders sought should be made, I decline to make a generalized order which may be incapable of enforcement.

What then should happen to the interim order directing the defendant to provide a security in the form of a Bank Guarantee?

35. The defendant’s position was that he did not have the means and ability to procure the requisite Bank Guarantee.

36. When a person has received your goods worth Kshs. 42 million, but he then says that he does not

have either the goods or the money equivalent to the value of the goods, it is most unlikely that you will believe him. It is therefore understandable that the plaintiff has fear and apprehension that it may not recover either its goods or the value of such goods, from the defendant, unless there is some quick intervention.

37. Order 39 Rule 5 (2) of the Civil Procedure Rules stipulates as follows;

“The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof”.

38. Order 39 Rule 5 (1) deals with situations in which an applicant seeks orders to compel the defendant to provide security.

39. And Rule (2) makes it clear that the applicant should specify the property required to be attached.

40. That implies that when the applicant seeks attachment before judgement, he needs to specify the property in respect to which he wishes the attachment effected. In this case the plaintiff specifically asked for attachment before judgement, but it failed to specify the property that ought to be attached.

41. Therefore, even if the plaintiff had invoked Order 39 of the Civil Procedure Rules, it would have been difficult for the court to grant orders for the attachment of unspecified property.

42. Regardless of the shortcomings in the evidence tendered by the plaintiff concerning the properties which it would like to take action against, I find that, on a *prima facie* basis, the defendant received goods from the plaintiff.

43. If he has the goods, he ought to return the same to the plaintiff. But if he sold them, then he cannot be heard to say that he does not have the proceeds of sale.

44. Justice demands that the defendant make full disclosure within the next **TEN (10) DAYS** of the following matters;

i) The exact quantity of goods he received from the plaintiff; and

ii) The full particulars of the person or persons he sold the items to, or if he did not sell them; the persons he gave the goods to; and

iii) The full particulars of his moveable and immoveable properties, including;

a) Land

b) Vehicles; and

c) Bank Accounts; and

iv) The full particulars of assets which he disposed of whether by sale or as gifts or in any other manner, during the period between 1st January 2015 and 17th November 2015.

45. The costs of the plaintiff's application dated 4th July 2015 are awarded to the plaintiff.

Meanwhile the interim order dated 6th July 2015 is vacated.

DATED, SIGNED and DELIVERED at NAIROBI this 17th day of November 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Nyamwata for Makoko for the Plaintiff

No appearance for the Defendant

Collins Odhiambo – Court clerk.