



REPUBLIC OF KENYA
HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 56 OF 2013

MARITIME FREIGHT CO. LIMITED.....PLAINTIFF

-versus-

AYA INVESTMENTS UGANDA LIMITED.....DEFENDANT

REASONS FOR THE RULING

DELIVERED ON 20TH DECEMBER, 2013

INTRODUCTION

1. The Application before court is dated 14th May 2013.
2. On 15/5/2013, Muya, J. granted an order that the subject containers be attached until the Defendant appears in court to show cause why it should not furnish security.
3. The Defendant was therefore required to show cause why it should not be ordered to furnish security as prayed by the Plaintiff.

THE ARGUMENTS

The Plaintiff's Case

4. The Plaintiff argues that the Defendant should be ordered to furnish security in the sum of US\$ 75,000.00 because the Defendant has attempted to remove the subject containers from the limits of this Honourable Court's jurisdiction with the sole intent of obstructing and/or delaying the execution of any decree that may be passed against it.

The Defendant's Case

5. The Defendant's case is that the order requiring it to deposit security should not be granted for the following broad reasons:
 - i. That the Application is misconceived as the circumstances obtaining herein do not lend themselves to grant the order for attachment before judgment.
 - ii. That in so far as seeks to invoke Order 39 Rule 5, the material considerations upon which the relief whether by attachment before judgment or the setting down of security will issue remain the

same, and the present case does not satisfy those conditions.

THE ISSUES

6. The main issue is whether the Defendant has shown sufficient cause why it should not be ordered to furnish security of US\$ 75,000.00.

DISCUSSION OF THE ISSUES

7. The Plaintiff submits that the Defendant's intent of obstructing and/or delaying the execution of any decree that may be passed against it is demonstrated by the fact that the Defendant has engaged an alternative agent other than the Plaintiff to have the goods zero manifested in order to transship them to Uganda.
8. In response the Defendant submits that it is a Ugandan company that is engaged in the business of importing goods through the Port of Mombasa and the Plaintiff is a customs agent involved in clearing goods for onward transportation to their destination. That the Plaintiff had accepted the Bill of Lading in respect of the subject containers for the sole purpose of shipment to Uganda and any movement of the same out of Kenya would therefore be in furtherance of that object. As such, the Defendant submits, any removal of the goods out of the Port of Mombasa and onward to their intended destination cannot possibly come within the definition of the goods being removed out of jurisdiction for the purpose of defeating or obstructing any eventual decree as contemplated by Order 39.
9. The Defendant relied on the case of **Freight Forwarders Kenya Limited V Aya Investment Uganda Limited Mombasa High Court Civil Suit No. 161 of 2012 (unreported)** where Muya, J. held as follows at pages 7 and 8:

“The Defendant intends to remove its goods from the port for onward transmission to Uganda but can it be said that its intention is to obstruct or delay any decree that may be passed against it?

As pointed out earlier from the word go, parties understood that the contractual obligation thrust on the Plaintiff was to clear the goods for transportation to Uganda. This was even before any misunderstandings arose between them and the charges payable.

The lawful clearing of goods by a recognized agent or authority is a legitimate business or process and it cannot be said to be tantamount to obstructing or delaying a decree and consequently not the mischief contemplated under Order 39 Rule 5 of the Civil Procedure Act.” (emphasis added)

10. I agree with the above holding. The Plaintiff submitted itself to the

task of clearing the Defendant's containers and has in fact admitted to clearing most of the containers save for the subject three. The Plaintiff was at all material times aware that the goods would be removed to their ultimate destination which in this case was Uganda.

11. Order 5 Rule 1 of the Civil Procedure Rules 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.”

12.The key phrase in Order 5 Rule 1 is “**with intent to obstruct or**

delay...”. Where the Plaintiff was aware that the goods would be transported to Kampala Uganda upon clearance, and the Defendant has taken steps to ensure the goods are transported to their designated destination, then in my opinion, the Plaintiff cannot say that the Defendant had **intent** to obstruct or delay the ultimate decree.

13.Order 5 Rule 2 of the Civil Procedure Rules provides as follows:

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

14.The Plaintiff has listed the reference numbers of the containers he is

seeking to attach. However, it has not given any value of those containers. This issue was raised by the Defendant's counsel and in response, Mr. Khagram, learned counsel for the Plaintiff referred court to paragraphs 6 and 8 of the Application. With due respect to the Plaintiff's learned counsel, paragraphs 6 and 8 of the Application, if anything, only relate to the quantum of the Plaintiff's claim against the Defendant. They do not give the value of the three containers the subject of the Application. Mr. Khagram also referred the court to page 51-61 of the Plaintiff's bundle of documents in support of the Application to prove that the value of the containers has been given. I have carefully scrutinised those pages and I must say that I cannot see clearly the value of the containers. The closest is page 51 which gives a figure of Dirhams 20,084.00. That figure is not only in some strange foreign currency but also seems to refer to two containers as indicated therein as “**BEING 2 CTR NO. INKU 6218347/FCIU 4562156 EXPORT TO UGANDA 14-2-5-13285504**”. There is no indication that the Invoice relates to the subject containers.

15.On that count also, the Plaintiff should fail as was rightly held by

Muya, J. in the case of **Freight Forwarders Kenya Limited** quoted before at page 8:

“Secondly, order 39 rule 5(2) requires that the plaintiff unless the court otherwise direct, specify the property required to be attached and estimated value thereof. A perusal of the application shows that this has not been complied with”

CONCLUSION

16.For the foregoing reasons, it is my opinion that the Plaintiff has not

satisfied the requirements of Order 39 Rule 5 of the Civil Procedure Rules. For the reasons given above I reiterate the orders made by the Court on 20th December 2013 which were that the Plaintiff's application dated 14th May 2013 be dismissed and the costs thereof are awarded to the Defendant. The interim orders of attachment be discharged.

DATED and DELIVERED at MOMBASA this 20TH day of MARCH, 2014.

MARY KASANGO

JUDGE