



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 346 OF 2008

ARUA MERCANTILE LIMITEDPLAINTIFF

VERSUS

HUMHPREY BABUBIKA 1ST DEFENDANT

SEMILIKI MINERAL RESOURCES 2ND DEFENDANT

MUMIAS SUGAR COMPANY 3RD DEFENDANT

RULING

This chamber summons application dated the 28th day of June, 2010 and which is expressed to be brought under order 25XXXV rules, 1,4,5 & 6 of the Civil Procedure Rules, Section 3A of the Civil Procedure Code seek orders for the plaintiff to deposit in Court the sum of Ksh. 4 million or such other sum of money without such time and such terms as the Court may direct as security for 3rd Defendants costs.

The grounds being that the plaintiff is a company registered in and carrying on business outside the jurisdiction of this Court and Secondly, that the Defendant has a bonafide defence.

The company secretary of the 3rd Defendant depones that the plaintiff has no known assets or property within the jurisdiction of this Court of which the 3rd Defendant would recover its costs should the suit fail.

Further that the consignment of sugar the subject matter of the plaintiffs claim has been and continues to be held at the port of Mombasa on the strength of orders issued by this Court in Mombasa High Court Civil Case number 251B of 2007.

That this suit is an abuse of Court process in that the plaintiff ought to have sued the 3rd Defendant in High Court of Uganda at Kampala High Court Civil Case 198 of 2008 in which it had sued and obtained Judgment in respect of the same matter.

This application is opposed on grounds found in the replying affidavit of the Director of the plaintiff company who depones that the plaintiff has known assets in the form of twenty five (25) containers of sugar currently lying at the port of Mombasa.

Further that the basis upon which the 3rd Defendants defence is hinged on is unsustainable as;

(a) The plaintiff is not a party to Mombasa High Court Civil Case Number 251 B of 2007.

(b) This suit is not an abuse of the Court process as the plaintiff discovered the fraudulent collusion and misrepresentation between the Defendants herein after the suit in Uganda had been finalized.

Order 26 rule 4 of the Civil Procedure Rules 2010 provides,

“In any suit brought by a person not residing in Kenya, if the claim is founded on a bill of exchange or other negotiable instrument or on a judgment or order of a foreign Court, any order for security for costs shall be in the discretion of the Court”.

The applicant has therefore to satisfy this Court that the suit before the Court is one which is based on a bill of exchange or her negotiable instrument.

Secondly, that its one based on a Judgment or order of a foreign Court.

A perusal of the pleadings shows that the suit is one based on fraudulent collusion and misrepresentation by the three defendants.

It is therefore not a claim founded on a bill of exchange or a negotiable instrument nor is it one founded on a foreign Judgment.

Order 26 rule 3 provides,

“Where it appears to the Court that the substantial issue is which of two or more defendants is liable or what proportions of liability two or more defendants should bear no order for security of costs may be made”.

In the present case there are three Defendants and the substantive issue is which one is liable and in which or what proportions.

It is also noted that the applicant had made a similar application dated 25th February, 2009 which Hon. Azangalala Judge dismissed on 2nd July, 2009.

By reason of the foregoing I find this application to be without merit and to be without merit and its dismissed with costs.

Ruling delivered dated and signed this **9th** day of **April, 2014**.

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M. MUYA

JUDGE

9TH APRIL, 2014

In the presence of:-

Learned Counsel for the applicant Owino holding brief Otieno

Learned Counsel for the Respondent Mwawasi holding brief Asige.

Court clerk Musundi

M. MUYA

JUDGE

Court: Parties to be furnished with certified copies of the Ruling.

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M. MUYA

JUDGE

9TH APRIL, 2014