



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL SUIT NO 174 OF 2013**

**1. N W N (Minor suing through next friend, the 2<sup>nd</sup> Plaintiff)**

**2. P N M.....PLAINTIFFS**

**VERSUS**

**1. SYNOHYDRO CO LTD**

**2. MOSES NDUNGU NJOROGE**

**3. JAMES NJUHO.....DEFENDANTS**

**R U L I N G**

1. The Plaintiffs are, respectively, a minor and her father. They claim special and general damages in negligence following a road accident along Thika Road. The 1<sup>st</sup> Defendant is a foreign company duly registered under the *Companies Act, Cap 496*. The Plaintiffs' case is that one of the two motor vehicles involved in the accident in which they were injured was owned by the 1<sup>st</sup> Defendant and was negligently driven or controlled by its servant or agent. In its statement of defence the 1<sup>st</sup> Defendant has denied that it owned the motor vehicle in question, or that an accident as pleaded occurred. It has also pleaded in the alternative and without prejudice that if an accident occurred as pleaded the same was caused by the negligence of the Plaintiffs, and also of the driver of the other motor vehicle involved.

2. The Plaintiffs have now applied by **notice of motion dated 18<sup>th</sup> November 2013** brought under **Order 39 of the Civil Procedure Rules, 2010 (the Rules)**. No particular rule in Order 39 (which has 11 rules) has been cited. **Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21** have also been invoked. The application seeks the following main orders –

(ii) That the court be pleased to issue warrants of arrest of the Director of the 1<sup>st</sup> Defendant, and for him to show cause why the 1<sup>st</sup> Defendant should not furnish security in the sum of KShs 30 million.

(iii) That the court be pleased to issue an order of attachment directed at the *Kenya National Highways Authority* and the *Principal Secretary of the National Treasury (Department of External Resources)* -

(a) to attach and retain to the order of the court any monies due to the 1<sup>st</sup> Defendant on account of the **Rehabilitation and Upgrading of Thika Road A2, Lot 2: Muthaiga Interchange–Kenyatta University** contract, or any other monies held on account of the 1<sup>st</sup> Defendant howsoever to the extent of KShs 30 million, until further orders of the court; or

(b) deposit the said sum KShs 30 million with the court; or

(c) by way of bond or bank guarantee issued by a leading Kenyan Bank acceptable and/or approved by the court.

3. The main ground for the application is that the 1<sup>st</sup> Defendant is a foreign company which has completed its engagement in Kenya and therefore likely to leave jurisdiction of the court; and that save for machinery, equipment and other chattels involved in its line of work, it has no other known assets in Kenya as would be sufficient to satisfy any decree that the Plaintiffs might obtain against it in this suit.

There is a supporting affidavit sworn by the 2<sup>nd</sup> Plaintiff.

4. The 1<sup>st</sup> Defendant has opposed the application by a **replying affidavit filed on 3<sup>rd</sup> April 2014** which is sworn by one **Peng Gong Ran**, its assistant business manager. Grounds of opposition emerging from the replying affidavit include -

(i) That the application is misconceived and incompetent.

(ii) That the application is merely speculative and not supported by evidence.

(iii) That in any event the 1<sup>st</sup> Defendant is adequately insured under the relevant laws of Kenya against risks arising out of its line of work (including the Plaintiffs' claims).

(iv) That as a matter of fact the 1<sup>st</sup> Defendant is not leaving Kenya any time soon as it has a number of other lucrative contracts with the Government of Kenya and other organisations, which contracts will take from 2 to 3 years to complete.

(v) That the value of the 1<sup>st</sup> Defendant's movable property in Kenya (machinery, motor vehicles, etcetera) is more than sufficient to meet any judgment that may be passed against it in this suit.

(vi) That the Plaintiffs have not satisfied the stringent requirements under Order 39 for the reliefs sought in the application.

5. I have considered the submissions of the learned counsels appearing, including the cases cited. I have also read the provisions of Order 39 of the Rules.

6. I will not dwell over the technicality that the Plaintiffs have not cited any particular rule in Order 6. It is clear that their application is brought under rules 1 and 5(1) of Order 39. Those rules provide -

**"1. Where at any state of a suit, other than a suit of the nature referred to in paragraph (a) to (d) of section 12 of the act, the court is satisfied 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 party 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 may 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 until the suit is disposed of or until the further order of the court."**

**"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 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".**

7. As for the application in so far as it is made under rule 1, the Plaintiffs must tender evidence that the 1<sup>st</sup> Defendant, with the

**intention to delay the Plaintiffs, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against it in this suit, has absconded or left the local limits of the jurisdiction of the court; or as is about to abscond or leave the local limits of the jurisdiction of the court; or has disposed of, or removed from the local limits of the jurisdiction of the court its property or any part thereof.**

Whereas the fact of being a foreign company may be indicative of a probability or even a likelihood of leaving the jurisdiction of the court, that fact of itself alone is not evidence that the company has absconded or left the jurisdiction of the court, or is about to abscond or leave the jurisdiction of the court, or that it has disposed of or removed from the jurisdiction of the court its property or any part thereof. There must be empirical evidence of these. There is no such evidence placed before the court.

8. There is also no evidence of any **intent** on the part of the 1<sup>st</sup> Defendant to delay the Plaintiffs, or to avoid any process of the court, or to delay the execution of any decree that may be passed against it. It was incumbent upon the Plaintiffs to place before the court necessary evidence. They have not done so.

9. Alternatively, the Plaintiffs could have laid before the court

**evidence that the 1<sup>st</sup> Defendant is about to leave Kenya under circumstances affording reasonable probability that the Plaintiffs will, or may thereby, be obstructed or delayed in the execution of any decree that may be passed against the 1<sup>st</sup> Defendant in this suit.**

They have not placed any such evidence before the court. On the contrary, the 1<sup>st</sup> Defendant has demonstrated in the replying affidavit that it is still very much active in Kenya and will be so for the next

2 to 3 years, if not longer. The 1<sup>st</sup> Defendant has placed before the court documentary evidence of its further contracts with the Government and other organisations in the country. Above that, the 1<sup>st</sup> Defendant has demonstrated that it is adequately insured under the relevant laws of this country against third party risks associated with its line of work (including the Plaintiffs' claims in this suit). It has also been deponed on behalf of the 1<sup>st</sup> Defendant that the value of its road construction machinery and equipment (including motor vehicles) far exceeds the sum of KShs 30 million that has been floated by the Plaintiffs.

10. In these circumstances the Plaintiffs' application as made under rule 1 of Order 39 must fail.

11. As for the application in so far as it is made under rule 5(1), the Plaintiffs needed to place before the court credible evidence that the 1<sup>st</sup> Defendant,

**with intent to obstruct or delay the execution of any decree that may be passed against it in this suit, is about to dispose of the whole or any part of its property; or is about to remove the whole or any part of its property from the local limits of the jurisdiction of the court.**

There is no evidence of the **ill-intent**, or of **execution of the ill-intent** by disposal or removal of the 1<sup>st</sup> Defendant's property or part thereof. The Plaintiffs' application in this regard is at best speculative and founded only on the mere fact that the 1<sup>st</sup> Defendant is a foreign company.

12. The Plaintiffs' fears that precipitated this application ought to be assuaged by the evidence that the 1<sup>st</sup> Defendant has placed before the court of its continued business activities in Kenya for the next 2 to 3 years. What they now need to do is to process their suit for trial without further delay.

13. For all the reasons given above the Plaintiffs' application must be refused. It is hereby dismissed with costs to the 1<sup>st</sup> Defendant. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 4<sup>TH</sup> DAY OF AUGUST 2014**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF AUGUST 2014**