REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL CASE NO.5 OF 2013

IN THE MATTER OF:

KANDUYI HOLDINGS LIMITED :::::::::::::::: PLAINTIFF/APPLICANT

~VRS~

BALM KENYA FOUNDATION ::::::::::::::1ST DEFENDANT/RESPONDENT

SUSAN OMBUNYA :::::::::::::: 2ND DEFENDANT/RESPONDENT

RULING

The Application

[1] I am called upon to determine the application dated 31/1/2013 which is seeking either an order for:

a) The Defendants/Respondents to furnish security in the sum of Ksh.4, 162,500 for satisfaction of the decree that may be issued in this case, or

b) The following properties to be attached and kept by Eshikhoni Auctioneers:

i) Motor vehicle reg. no. KBT 859 P

ii) Motor vehicle reg. no. KBP 832 P, and

iii) All office furniture at the Defendants offices at National Cereals Board, Kakamega.

[2] The application was supported by the affidavit of *Moses Sudi Otoa* and of *Gibson Mawelele Walutila*, the grounds cited on the face of the application and others adduced at the hearing.

[3] The major grounds of the application are:

i) That the Defendants are about to dispose of the whole of their properties.

ii) That the Plaintiff is likely to suffer substantial loss unless the orders sought are granted.

[4] *Moses Sudi Otoa*, who is the Managing Director of the Plaintiff Company herein has averred in his affidavit sworn on 3/1/2013 that:

a) In the year 2012, the Defendants purchased assorted food stuff valued at over Ksh.6 million.

b) The Defendants issued local purchase orders (LPO) for the said goods.

c) The Plaintiff Company issued several invoices for payment of the outstanding sum on the purchases by the Defendants.

d) The Defendants signed delivery notes on receipt of the goods herein.

e) The Defendants issued bad cheques to the Plaintiff purportedly for the payment of the goods supplied.

f) The Defendants made several promises to pay the outstanding sum of Ksh.4, 162,500/= but none were honoured.

g) He has reliable information that the Defendants intend to dispose of the whole of their properties and leave the jurisdiction of the court.

h) The Defendant Company is already experiencing cash problem.

I) The Defendants have been dishonest and fraudulent in their dealing with this claim.

j) The court should make the orders sought to avoid prejudice being suffered by the Plaintiff.

[5] Counsel for the Plaintiff, urged the court to grant the orders sought. She submitted that the claim for Ksh.4, 162,500 is for money owed for goods supplied to the Defendants. She referred to annexure **MSO 10-** a letter from the Defendants' advocates admitting a debt of Ksh.4,827,500 less Ksh.700,000/= which the Defendants had paid.

[6] Counsel argued that a sum of Ksh.1.5 million was paid and accordingly credited to the account of the Defendants. But they continued to receive supplies. The total sum claimed is the balance after taking into account all payments made by the Defendants. The Defendants did not pay the amount claimed. They only issued the Plaintiff with bad cheques that were dishonoured by the respective banks on which they were drawn.

[7] On the replying affidavits filed by the Defendants, counsel for the Applicant/Plaintiff observed that they were full of contradictions. For instance, paragraph 8 admits a debt of Ksh.2, 736,000, paragraph 14 alleges the balance owing is only Ksh.107, 250/=. The truth of the matter is that paragraph 14 negates all the previous paragraphs, and the balance according to their revelation, on simple mathematics, would be Ksh.1, 236,000/=. The Defendants have not shown the basis for arriving at Ksh.107, 250/= as the outstanding debt. They have also not offered any explanation for the bounced cheques.

[8] According to counsel for the Applicant/Plaintiff, the application before the court is proper under Order 39 of the Civil Procedure Rules (CPR). The Defendants have acted mischievously and they intend to block the realization of a decree that may be entered against them in this suit.

[9] The Plaintiff/Applicant has established a *prima facie* case for the orders sought to be issued. Further, the Plaintiff will suffer prejudice should this court not issue the orders sought.

[10] On the joinder of the 2nd Defendant/Respondent counsel argued, was proper as the 2nd Defendant/Respondent was the one receiving and signing for the goods.

THE RESPONDENTS' CASE

The 1st Respondent

[11] The 1st Respondent/Defendant through its Director Milcah Bulenywa filed a replying affidavit to the application dated 31/1/2013. The affidavit was sworn on 6/2/2013.

[12] In the affidavit, the 1st Respondent acknowledges that there were commercial transactions between the Applicant and the 1st Respondent except he denies that the 1st Respondent owes a sum of Ksh.4, 162,500/=. He claims that only some of the goods indicated in the annexed LPO's that were delivered.

[13] He further avers that the 1st Respondent only acknowledges a debt of Ksh.107,250/= after paying Ksh.2,628,750/= out of an initial total debt of Ksh.2,736,000/=.

[14] He avers further that the Applicant has not shown anything tangible to prove that the 1st Respondent is in the process of disposing of its assets and quit the jurisdiction of the court. The onus of proving that the 1st Respondent is about to wind up its business and move away for the jurisdiction of the court lies on the Applicant, and has not discharged the said burden. The said director of the 1st Respondent claimed in his affidavit and the declaration that he filed that the vehicles being sought to be attached do not belong to the 1st Respondent. Motor vehicles registration number KBT 859 P and KBP 832 P belongs to one Edwin Ndengwa Mureithi and the 2nd Respondent respectively.

The 2nd Respondent

[15] The 2nd Respondent filed a replying affidavit sworn on 6/2/2013 and a declaration dated 11/2/2013 where she claims:

a) She has been wrongly joined in these proceedings.

b) She is just a director of 1st Respondent.

c) She did not enter into any commercial transactions with the Applicant; the 1st Respondent did.

d) Neither the payments, nor the cheques were done in her name.

e) The 1st Respondent is a legal person and she cannot be held accountable for its liabilities.

f) No evidence to show that she is relocating.

g) That motor vehicle reg. no. KBP 832 P belongs to her and some furniture identified or attachment belongs to National Cereal and Produce Board.

h) The 1st Respondent is not relocating or in the process of seeking any of its properties.

[16] She prays for the application to be dismissed with costs.

[17] K.N. Wesutsa & Co filed submissions on behalf of all Respondents. In those submissions counsel argues that the Respondents do not owe the sum claimed. He also submitted on the sharp contradiction in paragraphs 8 and 9 of the affidavit on behalf of the Applicant sworn on 31/1/2013.

[18] Counsel objects to the use of communication made on a without prejudice basis in evidence in these proceedings. Finally, he says there is no evidence provided to the court in support of the application under consideration, and so, orders should not issue.

[19] Mr. Mukhooli, who held brief for the advocates for the Respondents made brief submissions which simply reinforced the submissions filed by the substantive advocates for the Respondents.

COURT'S RENDITION

Question of joinder

[20] I will not determine the question of joinder of the 2nd Defendant as that will need a motion by itself, to be canvassed by parties on requisite evidence provided under the law.

Basis for relief under Order 39 rule 5&6

[21] The application beforey me is founded on Order 39 rules 5 and 6 of the CPR. Our Order 39 rule 5 and 6 could be said and is a statutory codification of an interlocutory relief commonly known as *Mareva Injunction* or *freezing order* in the UK. The principle was laid down in the case of ***Mareva Compania Navierra SA v International Bulkcarriers SA* [1975] 2 Lloyd dis Rep 509**.

Scope of relief under Order 39 rule 5&6

[22] Accordingly, Order 39 Rules 5 and 6 of the CPR should operate within known dimensions of law drawing from the above case and other judicial precedents on the subject. Order 39 rule 5 and 6 of the CPR is not to be used: 1) to pressure a defendant; or 2) as a type of asset stripping (forfeiture); or 3) as a conferment of some proprietary rights on the Plaintiff upon the assets of the Defendant. The purposes of any order that should be issued under Order 39 Rules 5 and 6 of the CPR is to prevent the Defendants or would be judgment-debtor from dissipating his assets as to have the effect of obstructing or delaying the execution of any decree that may be passed against him.

Onus of proof

[23] Given the scope and tenor of the relief under Order 39 Rule 5 and 6 of the CPR, the Plaintiff has the onus of proving that the Defendants:

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.

Courts have held that the Plaintiff must establish a *prima facie* case on the above elements within the thresholds for grant of interlocutory injunction in ***Giella v. Cassman Brown***. The Court of Appeal in the case of ***Kuria Kanyoko t/a Amigos Bar and Restaurant v. Francis Kinuthia Nderu & Others* [1985] 2 KAR 126 p. 126** had the following to say on the Order 38 Rule 5 of the previous CPR (equivalent of current Order 39 rule 5 and 6) that:

> ***The power to attach before judgment must not be exercised lightly and only upon clear proof of the mischief aimed at by Order 38, rule 5 namely that the Defendant was about to dispose of his property or to remove it from the jurisdiction with the intent to obstruct or delay any decree that may be passed against him.***

[24] *Moses Sudi Otoa* in his affidavit avers that the 1st Defendant Company is winding up its operations and intends to dispose of the whole of their property and leave the jurisdiction of the court. The basis for this averment is in paragraph 15 of his affidavit which is premised on information he allegedly received from his employees in Bungoma who had in turn received information from the Defendants' employees at Kakamega, that the Defendants/Respondents intend to dispose of the whole of their properties and leave the jurisdiction of this court.

[25] There are some averments that have attracted the curiosity of the court in the affidavit of *Moses Sudi Otoa* in paragraphs 17, 18 and 19 to wit;

a. The need to prevent the plaintiff company's operations from grounding to a halt due to non-

payment of the sums herein that are colossal;

b. The plaintiff Company is already experiencing financial hiccups due to none payment of the debt; and
c. This court should act swiftly in this matter and save the plaintiff company from imminent collapse

[26] I will revert to these issues later as they will need clarification for a better understanding of real ground for grant of relief under Order 39 rule 5 and 6 of the CPR.

[27] I resume the matters in the preceding paragraphs. The reasons provided under paragraphs 17, 18 and 19 of the affidavit of *Moses Sudi Otoa* are not good for an application under Order 39 rule 5 and 6 of the CPR. They could be useful in the trial. To say the least, under Order 39 rules 5 and 6 of the CPR, relief will not be granted in order to aid a party to survive financial difficulties or pressure the Respondents because the Plaintiff is likely to collapse due to the non-payment of the debt in question, or give the plaintiff proprietary rights on the respondent's property, or to forfeit the Respondent's property. What is useful, perhaps, and on appropriate proof, are reasons contained in paragraphs 10, 11, 12, 15 and 16 of the affidavit of *Moses Sudi Otoa.* I will consider them within the broad spectrum of evidence before the court.

[28] I have observed that the Applicant identified the following properties for attachment herein:

1. Motor vehicles KBT 859 P,

2. KBP 832P and

3. Office furniture at the Defendants' office at National Cereals Board, Kakamega.

The directors of the 1st Defendant have filed affidavits and declarations where they claim that these vehicles do not belong to the 1st Defendant but to Edwin Ndegwa Mureithi, and the 2nd Defendant. They have also averred that the furniture belongs to the land lord, National Cereals and Produce Board. These revelations leave a lot to be desired with regard to the general probity of the 1st Defendant as an enterprise. The fact of issuance of bad cheques by the 1st Defendant is also deplorable way of doing business; could be criminal even. The evidence on those aspects of this case is telling and indicative of some inability of sort which may as well raise evidential burden on the 1st Defendant. See the case ***Tarbo Transporters Limited v. Absalom Ndova Lumbasi*** **[2013] eKLR** when this court rendered itself thus;

The burden of proving that the Respondents will not be able to refund to the Applicant any sums paid to the Respondents lies on the Applicant. But where the record shows some financial limitations on the part of the Respondent, it may as well raise evidential burden on the Respondents to file an affidavit of means. See the case of ***ICDC V DABER ENTERPRISES LTD, COURT OF APPEAL CIVIL APPLICATION NO NAI 223 OF 1999.***

[30] Further, the mode of operations of 1st Defendant Company and the fact that they are operating on hired properties is a matter that would pull the court to agree with the Plaintiff that the 1st Defendant is likely to leave the local limits of this court. I am convinced from the evidence on record, that, the Applicant/Plaintiff has established a *prima facie* case that the 1st Defendant is likely to dispose of its property and leave the local limits of this court.

Orders of Court

[31] The claim before the court is not a demurrer whatsoever and in that breath there would be need to request for some security for any decree that might be issued in this case. Accordingly, I order:

1. That the 1st Defendant to furnish security by depositing a sum of Ksh.4, 162,500/= within 30 days from this ruling.

2. Alternatively, the 1st Defendant to deposit with this court a Banker Guarantor or such other security as may be approved by the court to satisfy the sum of Ksh.4,162,500/= within 30 days.

3. That costs to be in the cause.

Dated, signed and delivered in open court at Bungoma this 16th day of May, 2013

F. GIKONYO

JUDGE

In the presence of:

Khisa Court Assitant

Murunga holding brief for Risper for the Plaintiff

No appearance for Defendants

COURT: Ruling delivered in open court.

F. GIKONYO

JUDGE