



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 161 OF 2012**

FREIGHT FORWARDERS KENYA LIMITED. ....PLAINTIFF

VERSUS

AYA INVESTMENT UGANDA LIMITED .....DEFENDANT

**RULING**

There are two applications before this Court for determination. The first one is the plaintiffs Notice of Motion dated 2nd April, 2013 and the second one is the Defendants Notice of Motion application dated the 25th day of April, 2013.

The plaintiff seeks several prayers

1. Spent
2. That the honourable Court be pleased to direct that the Defendant do show cause within 21 days why it should not furnish security in the sum of us dollars 92,544 or such other sum as this honourable Court deems sufficient and
3. That the Honourable Court be pleased until such time as the Defendant appears before the honourable Court to show cause why it should not furnish such security. **To attach forthwith** container numbers UESU4530840, IMTU9005988, GVC5259265, AND GESU6185565 landed at the port of Mombasa on board MV DAMALI consigned to the Defendant and currently stored at customs warehouse facilities within the Kilindini Harbour – Kenya Ports Authority Mombasa.

The Defendants application seeks to set aside or discharge the orders made exparte on the plaintiffs motion.

The plaintiffs application is supported by the Affidavits of its account manager Farouk Swaleh .

The first one is dated 2nd April, 2013 and the second one filed on 28th May, 2013 in reply to the Defendants Motion.

The Defendants application is also supported by two affidavits. The first one having been filed on 25th April, 2013 and further affidavit dated 5th June, 2013 sworn by the Defendants General Manager Abdal Latief Hamid Mohamed.

Sometimes in the month of April, 2012 four containers numbers UESU 4530840, IMTU9005988, GVCU 5259265 and GESU6185565 imported by the Defendant were shipped to Mombasa on board MV DAMALI. Upon discharge they were stored at a customs warehouse within Kilindini Harbour Mombasa

Port.

The Defendant requested the plaintiff to clear the containers, who in turn pledged a security bond for Ksh. 6,135,589/= towards clearance of the same.

The plaintiff incurred expenses in the performance of its obligation under the agreement.

It is the plaintiff's contention that it incurred expenses by way of charges totalling US dollars 186,902.68 wherein the Defendant made payments in the sum of US dollars 94,544 leaving a balance of US dollars 92,348.68 which now forms the basis of this suit.

Several demands have been made to the Defendant to make good the said balance but all in vain.

It is further contended that the Defendant has admitted owing the plaintiff US dollars 84,911.00.

The Defendant maintains that while the plaintiff's contested claim is for US dollars 92,348 the accrued port charges alone amount to Ksh. 10 million which excludes other charges such as container demurrage.

Order 39 Section 5(1) of the Civil Procedure Act provides thus,

**“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 the whole or any part of his property; or**

**(b) is about to remove the whole or any part thereof 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.**

**(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.**

**(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified”.**

The Court of Appeal had the occasion to deal with a similar matter in the case of **Kuria Kanyoko t/a Amigos Bar and Restaurant Vs Francis Kinuthia Nderu & others (1988) 2KAR 126** and rendered itself thus,

**“ The power to attach before Judgment must not be exercised lightly and only upon clear proof of 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 intent to obstruct or delay any decree that may be passed against him”.**

The import that can be derived from the above is that the applicant must prove that the Respondent's objective and main goal is to obstruct or delay any decree that may be passed against him.

The plaintiff maintains that proof that the Defendant intended to obstruct or delay execution of a decree is found in the actions of one Peter Mambembe who purporting to be the Defendants clearing

agent attempted to substitute the customs bond tendered by the plaintiff and obtain a zero manifest to facilitate the release of the cargo.

This is countered by the Defendant at paragraph 20 of the affidavit of Abdal Latif the General Manager of the Defendant dated 17th April, 2013 wherein he depones that the plaintiff moved to the Court on account of the fact that its mandate over the goods has been lawfully terminated by KRA by issuance of form 89 (Zero manifest) which enables the importer to engage another customs agent. Further that Mr. Mwambembe was lawfully appointed to follow up the goods with a view to establishing why they were not being moved.

It is common ground that the plaintiff submitted itself to the task of clearing the Defendants four containers at a fee. This entailed facilitating the clearing and removal of the goods to the Defendants place of business which is Kampala Uganda. In the course of clearing a misunderstanding arose as to who owed who and what amounts.

The plaintiff has made concerted efforts to have the goods detained at the port on account of moneys allegedly owed to it by the Defendant.

When the Defendant contacted another agent to help release the goods an application for attachment was filed in Court and orders for attachment before Judgment were granted.

The main issue before the Court for its determination is whether the Court is satisfied that the orders should stand or they be discharged or set aside.

I am satisfied that the plaintiff agreed to act as a clearing agent for the Defendant in respect of the four containers subject matter of this suit.

The transaction was vide a transit bond which means that the goods had to be transported across the Kenya Uganda border.

At the inception of the agency parties contemplated that the goods had to be removed from the port of Mombasa to Kampala – Uganda.

Each party appears to have substantive claims against each other.

The containers have been lying at the port of Mombasa for a considerable period (said to be one year). No doubt there has been a substantial accrual of various port charges.

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 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.

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

In the main, I am not satisfied that the plaintiff has bought itself within the requirements of order 39 rule 5. The plaintiffs Notice of Motion application dated 2nd April, 2013 is hereby dismissed with costs.

The Defendants application dated 25th April, 2013 is allowed with costs and the orders of attachment set aside as prayed.

Ruling dated and delivered this **30th** day of **July, 2013**.

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**M. MUYA**

**JUDGE**

**In the presence of:-**

Learned Counsel for the plaintiff (absent)

Learned Counsel for the Defendant Mr. Mwakisha

Court clerk Musundi

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**M. MUYA**

**JUDGE**

**30TH JULY, 2013**