



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
COMMERCIAL SUIT NO. 39 OF 2010

MABATI ROLLING MILLS LTDPLAINTIFF

VERSUS

M.A. BAYUSUF & SONS LTD DEFENDANT

Coram:
Mwera J.
Njeru for plaintiff
Omondi for defendant
RULING

In the motion of 2/11/11 the plaintiff invoked the powers donated under O 39 r 5 (i) 12, (3) of Civil Procedure Rules and S. 3A of the Civil Procedure Act. The prayers therein are for;

(i) an injunction to restrain the defendant from disposing of :-

(a) Seven (7) Motor Vehicles Nos. KAU 908x, KAQ 413Z, KAK 485 T, KAJ 127, KAE 292 E, KAT 086 Z and KAU 907 X – all prime movers with trailers.

(b) Eight (8) Plots of land: Nos. 94 Section X, 278 Section II, No. 17/XL section 7, XI/72, IMN 6652, IMN 6204, IMN 10919, and IMN 6585.

(ii) An order of conditional attachment of the stated motor vehicles and plots of land;

(iii) An order for the defendant to furnish security of Us \$ 339568.02 or its equivalent in local currency being the amount claimed in this suit or property whose value equals the claim herein.

The grounds put forward were that the court had jurisdiction to grant the orders sought and the plaintiff would suffer prejudice if orders sought are not granted.

Anthony Kungu, the legal compliance manager of the plaintiff company swore the supporting affidavit that as soon as pleadings herein were closed, the plaintiff company got information that the defendant had ceased operations and its directors were disposing of its assets. So the plaintiff instructed M/S Rapid Investigation Services to verify the information and render a report. That was done (Ann. AK 1) with the findings that the defendant company had sold its plot in Nairobi –LR No. 9042/6o9 to M/s Padding (K) Ltd for shs. 90m. It was in the process of selling off its yard and offices in Mombasa on plots. No. VNM 624, 625 at Jomvu. The report also revealed that the defendant had sold 4 of its motor vehicles to various buyers. The motor vehicles registration numbers and the buyers were stated in the report. That the selling took place between May and July 2011. And further that seven (7) other motor vehicles had been lined up for sale. Their registration numbers were given in the report. The deponent claimed that for the past one year the defendant had been disposing of its assets to defeat the plaintiff’s claim of money owed.

And that the 8 parcels of land listed above, the investigator added, were available and likely to be sold soon. The investigator was however not furnished with the files for those plots at the land registry for perusal. So the plaintiff had concluded that the defendant was indeed disposing of its assets so that at the conclusion of the proceedings herein, there will be no assets to satisfy the resultant decree. May the orders sought issue.

The defendant filed five grounds of opposition contending that the present application was based on mere speculation with no cogent evidence. There was a valid defence with triable issues on record. The plaintiff had not established a *prima facie* case with probability of success. The application was frivolous, vexatious and an abuse of the process of court and:

“5. The plaintiff should instead expeditiously prosecute the suit to enable the defendant vindicate its defence.”

Directed to submit the plaintiff remained of the view that the facts stated and findings of the investigation had not been controverted by a replying affidavit at all. So they remained solidly before court, based on the supporting affidavit and the findings in the M/S Rapid Investigation Services report.

The contents of O 39 r. 5 Civil Procedure Rules were reproduced with a conclusion that indeed the defendant was intent, by its actions, to obstruct or delay the decree of execution that may be passed in these proceedings- selling its assets in advance. Four relevant cases were placed before the court for

perusal to the effect that security be furnished or conditional attachment be ordered.

The defendant who did not file a replying affidavit again repeated that the plaintiff's claims were speculative. Anthony Kungu had not disclosed those persons who informed him that the defendant company had ceased doing business. Such could not be relied on.

The report of the investigation (above) with its findings was questioned as to its credibility because it was prepared by a person not party to these proceedings or a person who did not swear an affidavit to introduce that report. It was admitted that the plot LR No. 9042/609 (Nairobi) was sold for shs. 90m but this was done on 21/10/10 while the suit was filed on 22/11/2010. The two should not be linked. The rest of the submissions regarding other properties appeared to be denied by way of submission and not suitably a replying affidavit, and so all appeared rather untenable. The defendant did not deny that the properties stated in the investigation reports belonged to it. Especially the motor vehicles said to have been sold. Nothing could have been easier than to produce their records here. The defendant concluded that by this it was in order to oppose this application by way of grounds of opposition only, while the burden to establish a *prima facie* case at this point lay with the plaintiff. The defendant did not intend to obstruct or delay the execution in this matter and the application should thus be dismissed. And several cases were cited to bolster the defendant's said.

May it be stated at the outset that at this point in such proceedings the court is not required to delve into what would otherwise constitute evidence well-suited for the trial of the dispute in court. The court only needs be content that a *prima facie* case is made out – by the applicant to warrant the orders sought.

The provision of law under which this application was filed, O 39 r 5 Civil Procedure Rules reads:

“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 the whole or part of his property;

b) is about to remove the whole of or any part of his property from the local limits of the jurisdiction of the court,

the court may direct the defendant with time fixed by it, either to furnish security in the sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property thereof as may be sufficient to satisfy the decree or to appear and show course why he should not furnish security.

(2).....(3).....”

In this court's view the plaintiff has shown that the defendant is about to dispose of its assets with a view to defeat or delay execution of the decree that may be passed against it.

The plaint herein was filed on/about 22/11/2010. A defence followed on 6/12/2010. The claim was for US \$339,568.02 or equivalent in local currency. The defendant admitted that it sold its plot in Nairobi but that was on 21/10/2010 before the suit was filed. But it has said absolutely nothing about the four (4) motor vehicles it sold between May and July 2011. The plaintiff charged that sale, and the intended sale of other motor vehicles plus parcels of land, are with the view to defeat execution of decree herein. Save for terming the plaintiff's claim as speculative in the submission, the better course and credible one here could have been to controvert facts on affidavit by an affidavit in reply. Indeed the defendant/respondent can elect to oppose an application by filing either a notice of preliminary objection or grounds of opposition or a replying affidavit or even a combination of these. But where a case clearly requires rebutting by an affidavit, one is better advised to file one and not attempt to answer facts by way of submission as the defendant tended to do here. The maker of the investigation report need not have filed an affidavit with the report.

It is evidence to be adduced at the trial in the event it is so needed. But at this point Kungu was in order to exhibit it and the defendant was at liberty to counter it appropriately.

In sum this court directs that the defendant do furnish security by depositing in court US \$339,568.02 or its local currency equivalent in the next sixty (60) days or it shall exclude itself from participating in these proceedings further. The defendant has expressed a wish that this suit be diligently prepared and finally heard so that it can be vindicated. The parties are therefore directed to prepare this suit for trial by exchanging witness statements, bundles of paginated copies of documents plus issues by the mention date at the expiry of the 60 days stated above.

Cost to the plaintiff.

Dated, signed and delivered this 27th day of March, 2012.

J. W. MWERA

JUDGE