



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)**

**CIVIL SUIT 354 OF 2011**

**LANTech AFRICA LIMITED.....PLAINTIFF**

**VERSUS**

**PAN AFRICAN BUILDERS & CONTRACTORS LTD .....DEFENDANT**

**RULING**

The application before the court is brought by a Chamber Summons dated 9<sup>th</sup> August, 2011, and taken out under **Order 39 Rules 1 and 2** of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, and all other enabling provisions of the law. The Applicant thereby prays for orders that this honourable court be pleased to order that the Respondent herein should deposit, as security before judgment, the sum of Kshs4,601,046.85 and that upon granting that prayer, the court be pleased to order that the sums herein be attached from the funds held by NSSF on account of the Defendant Company.

The application is supported by the annexed affidavit of Aquinas Wasike, the director of the Applicant company, and is based on the ground that the applicant's claim against the Respondent arose out of works undertaken by the Plaintiff as a subcontractor of the Respondent. The Respondent has refused and ignored to pay the sums due to it. The Applicant has now learned that the Respondent's sole shareholder and principal Director, Harbhinder Singh Sethi has willfully absconded the jurisdiction of this honourable court and is now domiciled in Sandton, Johannesburg, in the Republic of South Africa. The Respondent's other director, Fauz Qureishi, has also left the jurisdiction of this court and is now domiciled in England. The Applicant has also learned that the Defendant company won an award in Arbitration with the NSSF and that the said NSSF are holding monies due to the Respondent for payment to it. This is the only asset known to the Applicant that belonged to the Respondent.

Opposing the application, the Respondent filed a replying affidavit sworn on 20<sup>th</sup> September, 2011, by its principal director, one Harbinder Singh Sethi. In that affidavit, the deponent denies having absconded from the jurisdiction of this court. He also avers that the Respondent company is still in operation and continues to carry on business in Kenya. Secondly, PS. Bhagra, the nominal director of the Respondent, is duly authorized by the Board of Directors to handle and transact every business of the company in Mr. Sethi's absence. He denies in paragraph 3(e) of his affidavit having absconded or evaded service of any court process and avers that he does not intend to do so.

During the oral submissions, Ms Lugunya for the Applicant emphasized that the Respondent's directors

were out of jurisdiction in South Africa and England, respectively, and that if judgment is entered against the Respondent, it will be next to impossible to attach. Furthermore, it would be impossible to arrest the Respondents as they are out of jurisdiction.

In his response, Mr. Tamata for the Respondent relied on the replying affidavit of Harbinder Singh Sethi, and paragraph 7 and 8 of the supporting affidavit of Aquinas Wasike, a director of Applicant company. He submitted that the Respondent was a locally registered company with employees and a local director in charge of transacting the company's business. He also argued that the application was overtaken by events and that the court should not make orders in vain. He finally submitted that attachment before the hearing is a drastic remedy coming before any hearing, and should be exercised in exceptional circumstances which have not being established in this case.

Replying to that response, Ms Ligunya argued that Order 39 of the Civil Procedure Rules envisages protection of the Plaintiff where such a Plaintiff satisfies the court that the Defendant has absconded from Jurisdiction.

I have considered the application and the submissions of both Counsel. Having done so, I find that the main issue for determination is whether the Applicant has satisfied the conditions for the grant of security for costs as provided for in Order 39 Rules 1 and 2. It is instructive to note that Order 39 Rule 1(a) provides as follows:-

**“ 1. Where at any stage of a suit, other than a suit of the**

**nature referred to in paragraphs (a) to (d) of section**

**12 of the ct, the court is satisfied by affidavit 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 part thereof...**

**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 ...”.**

It is clear from the wording of this rule that the same does not apply where a defendant has merely absconded or left the local limits of the jurisdiction of the court. In addition, it must also be shown that the Defendant's intention in absconding was 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.

On the facts of this case, the Applicant's contention is that Mr. Harbinder Singh Sethi left the country and relocated to South Africa while the Respondent's other director, Fauz Qureshi, is now domiciled in England. In reply to this allegation, Mr. Sethi deposes in his replying affidavit that the Respondent is a locally registered company and continues to carry on construction business in Kenya within the

jurisdiction of this court. He further avers that PS. Bhagra, the nominal director of the defendant company, is duly authorized by the Board of Directors to handle and transact every business of the company in Mr. Sethi's absence. Since the company is still carrying on business in Kenya, it is the company which should be pursued. In any event, directors are not personally liable for a company's debts. Generally that liability rests with the company itself.

In some respect, I fault the Applicant's language as rather exaggerated. For instance, paragraphs 5 and 6 of the grounds on which the application is based state as follows-

- “ 5. The plaintiff has now learnt that the defendant's sole shareholder and principal director Harbhinder Singh Sethi has willfully absconded the jurisdiction of this honourable court and is now domiciled in Sandton, Johannesburg in the Republic of South Africa.**
- 6. That the defendant's other director Fauz Qureshi has also left the jurisdiction of this court and is now domiciled in England.”**

It is noteworthy from paragraph 5 that Mr. Sethi, the plaintiff's principal director, is said to have “willfully absconded the jurisdiction of this court” and is now domiciled in South Africa. However, I note from his replying affidavit that Mr. Sethi uses a Nairobi postal address, and that his replying affidavit was sworn in Nairobi before a Commissioner for Oaths. In my view, that is not a person who has relocated to another country, at least not for now.

Secondly, paragraph 6 of these grounds gives the distinct impression that Fauz Qureshi was the company's only other director. But in his affidavit, Mr. Sethi speaks of yet a third director, referred to as “the nominal Director”, one PS Bhagra, who is authorized by the Board of Directors to handle and transact every business of the company in Mr. Sethi's absence. Yet, paragraph 5 states that the applicant has now learned that “the defendant's sole shareholder and principal director” absconded to South Africa. The expression “sole shareholder” implies that there is only one shareholder in the defendant company. That is not possible because the law clearly prescribes a minimum number of 2 shareholders in a private company, while a public company must have a minimum number of 7 shareholders. All these statements give one the impression that the plaintiff is exaggerating matters.

In sum, I find that the applicant has not established that the Respondent's directors have absconded with the intention to delay the Applicant or to avoid any process of the court, or else Mr. Sethi would not have sworn his affidavit in Nairobi. This application accordingly fails and it is hereby dismissed with costs.

Order accordingly.

**DATED and DELIVERED at NAIROBI this 26<sup>th</sup> day of April, 2012**

**L. NJAGI**

**JUDGE**