REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY COURTS

CIVIL CASE NO. 521 OF 2010

STUART IVAN KEMP .....:PLAINTIFF/APPLICANT
- VERSUS -

ADAM TULLER ..... DEFENDANT/RESPONDENT

R U L I N G

Before the court is a Chamber Summons application dated 29th July 2010 seeking now only two prayers namely:-

1. That the Defendant/Respondent be ordered to deposit in court the sum of Kshs.7,589,061/= or other property sufficient to answer the claims against him as security for his attendance.

2. That the costs of this application be borne by the Defendant/Respondent.

Other prayers have been dispensed with in the cause of time. The brief history of the application is that by a Plaint filed in court on 30th July 2010 the Plaintiff alleges that on diverse dates between January and August 2004 he loaned the Defendant Kshs.7,589,061/= which money was supposed to be refunded but the Defendant has refused or declined to do so and hence this suit. In his Defence filed in court on 11th February 2011 the Defendant/Respondent categorically denies the claim. The Plaintiff now believes that the Defendant is selling his property in the country and is about to vacate Kenya in which event the Plaintiff is apprehensive that his suit, if successful, would not be realized. Thus, the Plaintiff has made the application for the security of the suit.

The application is supported by the Plaintiff's affidavit dated 29th July 2010 and a further affidavit dated 20th November 2011 with their annextures. It is further supported by an affidavit of Mr. Paul Antrobus dated 29th July 2010. These affidavits attempt to establish that the Defendant indeed owes the Plaintiff the amount claimed. On the other hand the Defendant denies the allegations through his affidavit in reply dated 25th August 2010.

I have considered the application, the opposing affidavits and the counsel submissions. From the outset I must restate that the application Order 39 (1) and (2) is not concerned with the merits of the case that is, whether there is a *prima-facie* case. Of course if there is a *prima-facie* case at the outset this can be an added advantage. At this stage however, it is the apprehension or lack of it of the Applicant that if the Defendant vacates the jurisdiction it would be different for the Plaintiff to execute, if successful, a decree. This is what the court is concerned with at this stage. So, the issue is: is the Plaintiff's apprehension justified? And is the Defendant's response valid? Relevant parts of Order 39 (1) reads thus:-

39 (1) Where at any stage of the suit . . . 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."

I have considered the application in light of the above section. It does not matter at this stage that the Plaintiff may have a *prima-facie* case. The Plaintiff must provide evidence showing that the Defendant has absconded, is about to abscond or leave the local limits of the jurisdiction of the court, or that the Defendant has sold or removed his property from the local limits of the jurisdiction of the court.

The Plaintiff has attached an Agreement dated 26th April 2010 of Sale of Property on L. R. No. 3734/15 and known as apartment C4. That may be an evidence of intention but it is not enough to show that the Defendant is planning to vacate the local limits of the jurisdiction of the court. The Defendant still, in spite of the suit, has a life to live. This includes buying and selling of property. Apart from this one property there is no evidence that there are other properties being sold including even shares, or any other obvious activity on the part of the Defendant that he is planning to vacate the local limits of the jurisdiction of the court.

Further, the Defendant has himself stated that he is a citizen of Kenya, and that he has nowhere to run to. This has not been challenged. The Plaintiff himself has given the local address of the Defendant. It is not even suggested where the Defendant would be running to. It is not shown that the Defendant has sought a visa of any country; or that he has been paying his debts or releasing his employees, or liquidating his interests on limited liability companies in readiness for a flight.

The affidavits in support of the application only seek to establish that the Defendant owes the Plaintiff the sums claimed in the Plaint. The affidavits do not go any further. In other words the threshold required for the grant of the prayers under Order 39 (1) and (2) have not been met. The Plaintiff is better off setting the suit for a full trial. This application was filed in July 2010 on allegations that the Defendant was about to leave the local limits of the jurisdiction of this court. That two years down the line the Defendant is still within the jurisdiction of this court is an additional reason for this court to dismiss the application as I hereby do, with costs to the Respondent.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 24TH DAY OF APRIL 2012.

E. K. O. OGOLA
JUDGE
PRESENT:

Grace Kanyiri for the Plaintiff/Applicant

Wachira Kabanye for the Defendant/Respondent

Teresia – Court clerk