



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

Civil Suit 749 of 2007

MOHAMED ABDI OMAR.....PLAINTIFF

VERSUS

1. IBRAHIM MOHAMMED ISMAEL

2. YASSIN MOHAMMED ISMAELDEFENDANTS

AND

SHOBA ROBA.....INTERESTED PARTY

R U L I N G

1. The amended chamber summons dated 9th October, 2008 was brought under **Order XXXVIII** of the then **Civil Procedure Rules** (the **Rules**) and **section 3A** of the **Civil Procedure Act** (the **Act**). The application mainly seeks orders:-

(i) That the Defendants do appear before the Court to show cause why they should not furnish security for their appearances.

(ii) That in the alternative, the Defendants do deposit in Court KShs. 10,000,000/- or other property sufficient to answer the claim against them pending hearing and determination of the suit and in satisfaction of any decree that may be passed against them.

(iii) That in default of the Defendants showing cause why they should not furnish the security required within the time fixed by this Court, their respective properties or portions thereof sufficient to satisfy any decree which may be passed against them be attached.

2. The application is grounded on the allegation that the Defendants are Tanzanians and are about to leave the country; that the Defendants do not have any defence to the claim; that the 2nd Defendant has already been interdicted by Kenya anti-corruption authorities and if he leaves the country any judgement obtained against him will be stale; and that both Defendants have engaged in rapid relocation of all their assets from Kenya to other countries.

3. The 1st Defendant filed a replying affidavit in opposition to the application. In it he denies any possibility of him leaving the country and states that due to the Plaintiff's failure to furnish court with

sufficient evidence to that effect, the application ought not to be allowed. The 2nd Defendant on his part has never participated in this suit whatsoever.

4. Under order XXXVIII rule 5 of the Rules the Plaintiff is required to prove that the Defendants with the intent to avoid the process of the court or to obstruct or delay the execution of any decree that may be passed against them has either disposed of or removed from the local limits of the jurisdiction of the court their properties or are about to abscond or leave the local jurisdiction of the court.

5. For the order of attachment before judgment to be issued, the court must be satisfied on balance that the Defendants intend to abscond from the jurisdiction of the court or dispose of their assets with a view of defeating the cause of justice. A mere apprehension that the Defendants may sometime in the future leave the jurisdiction of the court is not a sufficient reason to entitle a court to order furnishing of security.

6. In **Savings & Loan Kenya Ltd Vs. Eustace Mwangi Mungai Nairobi HCCC No. 715 of 2001 (Milimani) (unreported), Ringera J.** (as he then was) stated:

“Be that as it may, I think that howsoever well-grounded the plaintiff’s apprehension might appear to be, it remains just that; well-grounded apprehension. Without evidence that the defendant intends to do what is feared, the court cannot grant the order of pre-trial attachment of the defendant’s property or ask him to furnish security. Is there any such evidence here? I fear not. There is no deposition of any positive fact tending to show that the defendant intends to dispose of his assets. Such positive facts might have included the fact that the defendant is either negotiating the sale of his properties or entering into an agreement to sell the same.”

7. Other than speculation, there is no evidence to support the Plaintiff’s contention that the Defendants intend to dispose of their assets to defeat the cause of justice.

8. As to the allegation that the Defendants are about to leave the jurisdiction of this court, it is to be noted that the 1st Defendant has shown good faith by participating in the suit herein and therefore he ought to be given the benefit of doubt.

9. I therefore hold that the Plaintiff has not discharged the burden placed on him to enable this court grant the orders sought against the 2nd Defendants. In the event the application is refused with no order as to costs.

10. The delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now regained my full health.

DATED AT NAIROBI THIS 11TH DAY OF SEPTEMBER 2012

H. P. G. WAWERU
JUDGE

DELIVERED AT NAIROBI THIS 14TH DAY OF SEPTEMBER 2012