



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MALINDI**

**CIVIL CASE NO. 61 OF 2009**

**ROSSI  
RENATA.....PLAINTIFF  
FF**

**-VERSUS-**

**1. FABIO MARELLI  
2. SONGHAI INVESTMENTS LIMITED  
3. MOHAMED ESSAK  
BACHANI.....DEFENDANTS**

**RULING**

The Chamber Summons Application dated 11<sup>th</sup> October 2010 is made pursuant to order XXXVIII Rules 1, Order XXXIII Rules 1, 2, 9 & 12, Order XXXIX Rules 1 (A) (B) of the Civil Procedure Rules, section 3 and 3A of the Civil Procedure Act, seeking for orders of arrest before Judgement of the 1<sup>st</sup> Defendant (FABIO MARELLI) and 3<sup>rd</sup> Defendant (MOHAMMED ESSAK BACHANI) and they be brought to court to show cause why they should not furnish security for their appearance.

2. That the Defendant/Respondents do furnish security for the Principal amount which is more than Kshs.9,000,000/- due and payable to the Plaintiff/Applicant besides what is pleaded as other remedies, by attaching 2<sup>nd</sup> Defendant Respondent`s property known as KILIFI/JIMBA/1361.

3. The orders be executed by the Court Bailiffs with assistance of the OCS Malindi Police Station.

The application is based on grounds that;-

1. 1<sup>st</sup> and 3<sup>rd</sup> respondents are director of the 2<sup>nd</sup> Respondent (SONGHAI INVESTMENTS LTD).
2. The assets of the 2<sup>nd</sup> Defendant/Respondent are being disposed off through Court Cases.
3. The 1<sup>st</sup> Respondent has already absconded from the local jurisdiction of this Court, having left for

Italy.

4. There are several other cases pending against the Defendant/Respondent.
5. The 2<sup>nd</sup> Defendant has transferred its assets to a company known as MESSY INVESTMENTS CO. LTD, which company has always filed, objection proceedings whenever execution of a decree is issued against the 2<sup>nd</sup> Defendant/Respondent.
6. Unless the director or any of them available, furnish security, then any judgement or decree that may be passed may be obstructed and/or defeated in execution.
7. The 2<sup>nd</sup> Defendant owns a parcel of land known as KILIFI/JIMBA 1361 which has not yet been transferred and which property if not attached may also be transferred with a view to defeating the execution of any decree that may be passed in favour of the Plaintiff.
8. This court has already issued an order against the 1<sup>st</sup> Defendant/Respondent to furnish security for his appearance in Malindi HCCC 73 of 2009 but the said Defendant has since left the country.
9. The likelihood of 3<sup>rd</sup> Defendant absconding from the local jurisdiction of this Court is very likely due to overwhelming number of cases pending in this Court.

The application is supported by the affidavit sworn by **CARLA RONCAROLO** who says that she has filed suits along with the Plaintiff and since then, the 2<sup>nd</sup> Respondent has transferred all its assets to a Third Party known as **MESY INVESTMENTS CO. LTD**. The result is that whenever execution issues against the 2<sup>nd</sup> Defendant's property, this new company always files objection proceeds – such as the one marked CR 1. The 1<sup>st</sup> Defendant/Respondent has meanwhile left the jurisdiction of this Court, due to warrants issued in other matters, so the only way to realize fruits of judgement if any, is by way of security being deposited in Court and/or attachment before judgement, of the Defendant's immovable property to meet any decree that may be passed in their favour.

The application is opposed and in the replying affidavit sworn by **FABIO MARELLI** (1<sup>st</sup> respondent) he states that **CARLA RONCARLO** is **NOT** a plaintiff in this suit and has no claim whatsoever in this suit. He denies that 2<sup>nd</sup> Defendant has transferred all its assets to **MESSY INVESTMENTS CO. LTD** and says the company has raised an objection to attachment of only **ONE** property in HCCC NO. 86 of 2009. He also denies having absconded from the jurisdiction of this Court, saying he had gone to **ITALY** for medical attention on advice given to him by the doctors in **NAIROBI**. He depones that he has received treatment in **ITALY** and returned to **WATAMU, KENYA**, where he currently resides – copies of his medical reports are annexed as FM I. He also points out that Plaintiff had filed another application dated 24/06/09 seeking for his arrest before judgement on claims that he owed her Kshs.3,245, 288 and the same was dismissed on 29<sup>th</sup> September 2009. He further states that the Plaintiff has no claim against him as he was only a director of 2<sup>nd</sup> Defendant and therefore simply acted as an agent.

The matter was disposed of by way of written submissions. Ruling was scheduled for 15/06/11 but due to the volume of work, it was not delivered. **MR OTARA** submitted that the Plaintiff (**ROSSI RENATA**) has filed this application due to the recent conduct of Defendants against those who have obtained judgment against them. A company by names **MESSEY INVESTMENT CO. LTD** is suspected to have a close relationship with the 2<sup>nd</sup> Defendant/Respondent and the other Defendants because it always files objection proceedings to frustrate any bid to execute and the Defendants have transferred most of their assets to the said company. **MR OTARA** further submits that 1<sup>st</sup> Defendant has stated in paragraph 4 of the replying affidavit that 2<sup>nd</sup> Defendant has transferred its property to **MESSEY INVESTMENT** but not all and his contention is that it does not matter whether it is the whole property or part of it that has been disposed of – urging the court to be guided by Order XXXVIII Rule and the frustration of execution process is demonstrated in HCCC NO. 86 of 2009. He also points out that 1<sup>st</sup> Defendant/Respondent has not demonstrated that he has sufficient property to meet any decree that may be passed against him nor

shown how long he intends to remain in the country as he has failed to annex his passport to confirm that he is not holding a tourist visa.

The credibility of the medical reports is questioned as the same are not signed and **MR OTARA** submits that the same were prepared simply for purposes of this application. Further, that the subsequent prayers refer to the medical report from Aga Khan University Hospital, Nairobi which does not have a recommendation that 1<sup>st</sup> Defendant was referred to Italy for treatment.

Since no affidavit or grounds of opposition have been filed in respect of 2<sup>nd</sup> and 3<sup>rd</sup> Respondent, **MR OTARA** urges this Court to infer that they are not opposing the application. It is also drawn to this Court's attention that this Court has ordered the Defendants to furnish security in HCCC NO. 138 of 2006 (where Court ordered attachment of 2<sup>nd</sup> Respondent's property), HCCC No. 86 of 2009, and HCCC No. 73 of 2009. The applicant relies on the case of **KURIA KANYORO t/a AMIGOS BAR & RESTAURANT V FRANCIS KINUTHIA NDERU AND 2 OTHERS**.

In response, the Respondent's counsel **MR OTIENDE OF KANOTI & COMPANY ADVOCATES** submits that **CARLA RONCARLO** is not a Plaintiff to this suit but she is only a defendant to the counter claim herein and so she cannot apply for attachment before Judgement. Further that it is not clear why **ROSSI RENATA** has not sworn the affidavit in support of this application nor is there anything to show that she has authorized **CARLA RONCARLO** to swear the affidavit on her behalf and this alone makes the application incompetent.

Secondly the security sought for Kshs.9 million has no basis as nowhere in the plaint is such a sum pleaded. **MR OTIENDE** points out that 1<sup>st</sup> and 3<sup>rd</sup> Defendants are directors of the 2<sup>nd</sup> Company which is a limited liability company and there can be no reason for ordering the arrest of the directors, furthermore there have been no proceedings or order lifting the corporate veil. His contention is that the Plaintiff's case is infact based on a contract entered into with the company.

From a reading of the pleadings, **CARLA** is **NOT** a plaintiff in this matter and there is no way she can claim to have filed the suit with the other Plaintiff. She is however a party to this suit, being a Defendant in the counterclaim – how then she would seek for attachment against the Defendant is not clear. In her affidavit she does not even disclose what her relationship with the Plaintiff is so it is not clear where authority to swear this affidavit on behalf of the Plaintiff is derived from.

Secondly what is the basis for seeking security in the sum of Kshs.9 million? I think that comes from paragraph 11 of the plaint which states that 3<sup>rd</sup> Defendant was to carry out work on behalf of 1<sup>st</sup> and 2<sup>nd</sup> Defendant at an agreed consideration of 9,200,000/- and in breach of that agreement, the work was not completed. However paragraph 21 (a) of the plaint dated 19<sup>th</sup> June 2007 clearly states that Plaintiff's claim is for the sum of Kshs.2,680,000/- per day being penalty for the delay in completion and handing over the property – the task was to have been completed by 15<sup>th</sup> July 2008. There is also a prayer for Kshs.565, 288 being the cost of freight Plaintiff's household goods from Italy to Watamu Kenya – that forms the basis for the figure quoted by the applicant.

**MR OTARA** contests the issue of the Defendants transferring assets to **MESSEY**, saying there is no proof and the 1<sup>st</sup> respondent is back in the country and the mere fact of many cases being filed against Defendants should not be a reason to grant the orders sought. It is however conceded that **MESSEY** has filed objection proceedings in a matter where there was an attempt to execute against property initially owned by 2<sup>nd</sup> Defendant and surely it would be pretentious to then say that 2<sup>nd</sup> Defendant has not begun transferring its assets to the other parties – but the only snag is that how would this court justify granting of this orders to **CARLA** who is not the Plaintiff and who has not justified in what capacity she swears the affidavit in support of this application – being a defendant in counter claim contained in the amended statement of defence dated 23<sup>rd</sup> March 2010. Had **ROSSI RENATA** sworn an affidavit in support or had the relationship between **CARLA** been disclosed then the prayer would have succeeded as against 2 and

3<sup>rd</sup> respondents who have not filed any replying documents. As matters stand the application is incompetent and is dismissed with costs to the 1<sup>st</sup> Respondent.

**DELIVERED AND DATED this 8<sup>th</sup> day of July 2011**

**H A OMONDI**

**JUDGE**

Mr Shujaa holding brief for MR OTARA for applicant