

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL CASE NO. 109 OF 2009

KASTURI LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

NYERI WHOLESALERS LIMITED.....DEFENDANT/APPLICANT

RULING

Nyeri Wholesalers Ltd., the Defendant/Applicant herein, took out the Motion dated 18th May 2011 whereof it sought for the following orders:

1. *That this application be certified as urgent and be heard exparte in the first instance due to its urgency.*
0. *The Honourable court be pleased to order the plaintiff's property, Title No. Nyeri/Municipality Block II/1007 be attached before judgment to satisfy the decree which may be passed against the plaintiff on the defendant's counter-claim in this matter, pending the hearing and determination of this application and the main suit.*
0. *In the alternative, the Honourable court be pleased to order the plaintiff herein to furnish security in the sum of Kshs. 6.5 million or as may be sufficient to satisfy the decree which may be passed against the Plaintiff on the defendant's counter-claim in this matter, pending the hearing and final determination of this suit.*
0. *Cost of this application be provided for.*

The Motion is supported by the two affidavits of Pravin S. Shah. Kasturi Ltd., the Plaintiff herein, filed the replying and a further replying affidavit of Bipinshandra P. Shah to oppose the Motion.

I have considered grounds set out on the face of the Motion and the facts deponed in the affidavits filed for and against the Motion. I have further considered the oral submissions of learned counsels. It is the submission of the Defendant that the Plaintiff intends to obstruct or delay the execution of any decree that may be passed in the Defendant's counter-claim. It is alleged that the Plaintiff is about to dispose of its only known asset i.e. Title No. **NYERI/MUNICIPALITY BLOCK II/1007**. It is also alleged that the Plaintiff has already sold Title **NYERI/MUNICIPALITY BLOCK II/978**. The Defendant is apprehensive that it may not have anything to attach if the property is not preserved. The Plaintiff on its part admitted having sold title No. **NYERI/MUNICIPALITY BLOCK II/978** to Mt. Kenya Bottlers Ltd. The Plaintiff denied it intended to dispose of Title No. **NYERI/MUNICIPALITY BLOCK II/1007**.

In the Motion the Defendant prays for the attachment before judgment of the Plaintiff's Title No. **NYERI/MUNICIPALITY BLOCK II/1007**. The Defendant has also sought for an alternative prayer for an order directing the Plaintiff to furnish security in the sum of Ksh.6.5 Million. A careful consideration of the provisions of *Orders 39 rule 5(1)* of the Civil Procedure Rules, will reveal that the aforesaid orders can only be granted if the court is satisfied that the Respondent is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court. Let me examine whether the Defendant has discharged that burden. I regret to state that the Defendant has failed to show that the Plaintiff intends to dispose of its Title No. **NYERI/MUNICIPALITY BLOCK II/1007**. The first prayer must therefore fail. In the alternative prayer, the Defendant has asked this Court to order the Plaintiff to furnish security in the sum of Ksh. 6.5 Million. With respect, I do not see any justification for the prayer. To begin with, there is no evidence that the Plaintiff is moving out of the jurisdiction of the Court nor is there evidence to show that the Plaintiff will be unable to satisfy the decree. In any case the counter-claim is yet to be heard and determined. From

the material placed before me, there is a dispute as to which lease should be used to calculate the outstanding rent. One lease fixes the monthly rent at Ksh.40,000/= while the other fixes the monthly rent at Ksh.60,000/=. The question is, which between the two leases should the Court go by? Again, I find the Motion to be unmeritorious. It is dismissed with costs to the Plaintiff.

Dated and delivered at Nyeri this 21st day of October 2011.

J. K. SERGON

JUDGE

In open Court in the presence of Mr. Kimunya for the Defendant and Mr. Kingori holding brief for Gori for the Plaintiff.