



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**(Coram: Ojwang J.)**

**CIVIL SUIT NO. 413 OF 2009**

**SAMUEL MTAKAI.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**KENYA SHELL LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

The applicant moved the Court by Chamber Summons dated **10<sup>th</sup> May, 2010** and brought under Order 38, Rules 5 and 12 of the Civil Procedure Rules, and s.3A of the Civil Procedure Act (Cap.21, Laws of Kenya). The application carries one main prayer:

***“THAT the defendant do deposit security for the decree that may be issued herein in the sum of Kshs.1,500,000/= in Court or in a joint interest-bearing account of both counsel, within a reasonable period.”***

The grounds for the application are set out as follows:

- (i) *the plaintiff has a claim against the defendant for a total sum of Kshs.1,098,237/= plus costs;*
- (ii) *it has been reported on the media several times, that the defendant is in the process of selling and disposing of all its assets in Kenya, as part of a planned pull-out from Africa;*
- (iii) *the defendant intends to avoid Court process, and to obstruct the execution of any decree such as may be issued herein, as the defendant will have no attachable assets within the jurisdiction of this Court, with the effect that any decree issued will be rendered nugatory;*
- (iv) *it is necessary for the defendant to furnish security in the sum of Kshs.1,500,000/= to cover for decree and any costs such as may be issued against it in this suit.*

The applicant, in his supporting affidavit dated **10<sup>th</sup> May, 2010** avers that he has a claim against the defendant for a total of Kshs.1,098,237/=; and he annexes newspaper cuttings reporting that the defendant is in the process of selling and disposing of all its assets in Kenya.

**Catherine Musakali**, the defendant’s Company Secretary, swore a replying affidavit on **15<sup>th</sup> June, 2010** deposing as follows:

(i) *although Kenya Shell Limited's parent company intends to dispose of its shares in Kenya Shell Limited, "there is no intention of selling Kenya Shell Limited's assets"; and Kenya Shell Limited "does not intend to dispose its business or any of its assets".*

(ii) *"the shareholders of Kenya Shell Limited are entitled to deal with their shares as they find necessary"; and "it would be difficult/impossible to conduct business if parties were required to furnish security without any substantive basis or at the slightest instigation";*

(iii) *"Kenya Shell Limited owns substantial assets in Kenya whose value is in the billions of Shillings and there is no risk that the applicant will face if the orders sought are not granted";*

(iv) *"Kenya Shell Limited will continue trading as a going concern and therefore the plaintiff's fears are unfounded..."*

Learned counsel for the applicant, **Mr. Mulwa Nduya** entered upon his submissions with the contention that a decree issued in the suit herein, against the defendant, cannot be effected upon *new owners*: because *"the buying of the defendant company by the new entity will be subject to agreements between the parties therein, where [neither] the plaintiff nor this Court will be a party"*; because *"there is nothing that will prevent the defendant and the new company from agreeing and stipulating in the sale agreement that the new entity will not be assuming any pending liabilities"*; because *"the [Transfer] of Business Act [Cap.500, Laws of Kenya] and in particular ss.3, 4 & 5 [thereof], allow a party buying a business to refuse to accept any pending liabilities – and this will leave the plaintiff without any recourse in law"*; because, as it will turn out, *"the Court is being asked to leave the execution of its decree to be decided on by the defendant and third parties without the Court and the plaintiff [being] party to the said agreements."*

Counsel invoked a decided case to show the propriety, in this instance, of granting the prayer for security: **Mbaki Agric Inputs Limited v. Equip Agencies Limited**, Nairobi MCCC No. 581 of 2004 [2004] eKLR (**Kasango, J**); the relevant passage thus reads:

***"Order 38, Rule 2 states that where a defendant fails to show cause as required under Order 38, Rule 1, the Court can order the defendant to deposit money or other property sufficient to answer to the claim. Since the object of Order 38 that is, attachment before judgment, is to prevent a decree when passed from becoming [nugatory] ...I am minded to order that the defendant do deposit security."***

Learned counsel **Mr. Wanyonyi**, for the respondent, urged that the Court should decide the matter on the basis of two questions: (i) is the defendant in the process of selling or disposing of all its assets? (ii) if the answer to question (i) is in the affirmative, is the action of selling and/or disposing of the said assets done *with the intention* of obstructing or delaying the execution of any decree that may be passed by the Court?

Counsel submitted that the *"the defendant is not at all in the process of selling and/or disposing of all or any of its asset."* He discounted the relevance or validity of the newspaper report being relied on by the applicant: *"...the newspaper cutting talks of 'Senior Managers of Kenya Shell' without mentioning who these Senior Managers are. It also talks of 'people familiar with the matter' without mentioning who these people are. Finally...the newspaper cutting does not state who compiled the report and had it published in the newspaper. This amounts to hearsay..."* Counsel urged that such hearsay information be disregarded.

Counsel invoked the respondent's formal bulletin which was annexed to the replying affidavit, on the matter in issue; that bulletin indicates Kenya Shell Limited's intention to dispose of its shares, *"but there is no intention whatsoever of disposing of its assets."* Counsel contended that *"the plaintiff must have been misled and therefore acted under the false impression and relied purely on hearsay"*; and he submitted that it was the clear position that *"whereas the company may sell its shares, it continues to subsist as a going concern."*

Counsel next addressed the question whether the defendant would sell its assets with the intention of

obstructing or delaying the execution of any decree of a Court of law; and he submitted that there was no basis for such a possibility arising. Under Order XXXVIII, Rule 5(1) of the earlier edition of the Civil Procedure Rules, counsel urged, “the plaintiff has the onus of proving that the defendant has the intention of obstructing or delaying the execution of any decree.” Counsel submitted that apprehension alone, on the part of the applicant, be not upheld as it would cause injustice; for “*parties are entitled constitutionally to deal in their properties as and when they deem fit, unless there is a valid Court Order barring [this]*”. For this principle, counsel relied on the Court of Appeal decision, **Kuria Kanyoko t/a Amigos Bar and Restaurant v. Francis Kinuthia Nderu, Helen Njeru Nderu and Andrew Kinuthia Nderu** (1988) 2KAR 126, at p.127:

***“The power to attach before Judgment must not be exercised lightly and only upon clear proof of the mischief aimed at by Ord.38, r.5, namely that the defendant was about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him.”***

Counsel urged that the plaintiff had not proved to the Court that the “*intended sale by the defendant*” is aimed at obstructing the execution of any decree. He submitted, for effect, that “*the defendant owns vast properties in Kenya whose value is in billions and the plaintiff has not given any reason why he believes the defendant would sell its properties to avoid paying a decree of Kshs.1,500,000/= only.*”

Counsel also contested the plaintiff’s perception of the functioning of the Transfer of Business Act (Cap.500): on the basis that s.3 stipulates that in case of any sale of a business, the purchaser shall become liable in respect of all liabilities unless a notice has been given as provided under s.3(2); and in the instant case, no such notice had been given.

From the evidence, it is clear to this Court that what is on the works, at the defendant’s establishment, is sale of **shares**: the Court does not get the impression that a change to the substratum of the defendant-entity, or to the rule of perpetual succession attached to corporate status, is about to take place. The applicant has brought no evidence to the contrary – and so he has not placed his case within the ambit of the dispensations provided for in Order XXXVIII of the earlier edition of the Civil Procedure Rules.

The foregoing consideration, taken with the evidence presented in the depositions, and in particular the evidence of the substantial asset-accumulation in Kenya by the respondent, indicates to this Court that, in reality, the respondent is not seeking to defeat any likely decree of the Court, and is by no means unable to pay up any decretal amount such as may be adjudged due from it. The effect is that the application rests purely on an apprehension that has no practical or evidentiary basis. The prayers made cannot succeed, because the Court’s Orders must be issued on the basis of factual considerations, and not on hypothesis, nor on unfounded apprehension.

I dismiss the plaintiff’s application by Chamber Summons of **10<sup>th</sup> May, 2010**. Failing consent on costs, the applicant shall pay the taxed costs of this application.

**Orders accordingly.**

**SIGNED at NAIROBI .....**

**J.B. OJWANG  
JUDGE**

**DATED and DELIVERED at MOMBASA this 21<sup>st</sup> day of November, 2011.**

**H.M. OKWENGU**  
**JUDGE**