



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 212 OF 2011

CLEMENT MUTURI KIGANO.....PLAINTIFF

VERSUS

SHEGLI ENGINEERING CONSTRUCTION GROUP CO. LTD.....DEFENDANT

R U L I N G

The Plaintiff's claim in this suit is for damages in negligence arising out of a road accident. He has pleaded that the accident occurred as he drove along the Nairobi-Thika highway which is under reconstruction, and that it was caused by the Defendant's negligence in blocking the highway with concrete slabs without any warning sign and opening up an unmarked deviation, again without any warning. The Defendant is the company undertaking the reconstruction of the relevant portion of the highway.

The Plaintiff claims special damages of KShs 8,892,600/00, most of it being the value of his motor vehicle that was "written off" in the accident (KShs 8 million) and medical expenses (KShs 892,500/00).

The Plaintiff also claims loss of income at the rate of KShs 200,000/00 per day from 9th March 2011 "until recovery", and general damages for pain and suffering and future medical expenses.

The particulars of injuries pleaded are "extensive head/scalp injuries".

The Defendant has filed defence and denied the Plaintiff's claim. It has further pleaded that if the Plaintiff was involved in an accident as alleged, the same was due to the Plaintiff's own negligence. Particulars of negligence are given.

The Plaintiff has now applied by **notice of motion dated 16th June 2011** brought under **Order 39** of the **Civil Procedure Rules** (the **Rules**). **Sections 1A, 1B** and **3A** of the **Civil Procedure Act, Cap 21** are also cited.

The following main orders are sought: -

"1...

2.The court issues a warrant of arrest of the Director of the Defendant to show cause why the Defendant should not furnish security in the sum of KShs 50 million.

(a) In the form of an order of attachment directed at the Kenya National Highway Authority and the Permanent Secretary, Ministry of Finance (Department of External Resources) attaching and

retaining to the order of the court any moneys due to the Defendant on account of the rehabilitation and upgrading of Thika Road **A2 LOT 3 Kenyatta University–Thika Road** contract or any other moneys held by the said Kenya National Highways Authorities on account of the Defendant howsoever to the extent of KShs 50 million until further orders of this court; or alternatively,

(b) By depositing the same with this court; or

(c) By way of bond or guarantee issued by a Kenyan bank acceptable and/or approved by the court.”

The application is made upon the following grounds appearing on the face thereof: -

1. That the “completion of the contract whose engagement gave rise to the cause of action being rehabilitation and upgrading of Thika Road A2 LOT 3 Kenyatta University-Thika Road contract (will be in) July 2011”.
2. That the Defendant is a foreigner and there is real likelihood that it will leave the jurisdiction of this court upon completion of the said contract.
3. That save for machinery, equipment and other chattels involved in the works of the said contract, the Defendant has no other known assets in Kenya.
4. That the suit herein is *bona fides*.
5. That the Plaintiff’s cause of action is *prima facie* unimpeachable.
6. That it is in the interests of justice that the orders sought be granted.

There is a supporting affidavit sworn by the Plaintiff. It is deponed therein, *inter alia*, that the Defendant is a foreign company domiciled in China without assets in Kenya save for construction machinery, equipment and other chattels involved in the contract; that the contract was due for completion on 27th July 2011; that payments to the Defendant on account of the contract are made by the Department of External Resources of the Ministry of Finance through an “external account” in China against certificates forwarded to the department by Kenya National Highways Authority; that there is every likelihood that the Defendant will dispose of its said moveable assets and permanently leave Kenya on completion of the contract; that therefore the Plaintiff reasonably apprehends that if any judgment is passed herein in his favour, execution thereof shall be frustrated and the judgment rendered nugatory as it will be impossible to execute the same in the Republic of China; and that KShs 50 million as security is “based on the estimate of projected damages awardable to the Plaintiff”.

There are various documents annexed to the supporting affidavit, including a police abstract on the accident, a police medical examination report (P3) and a letter of demand.

The Defendant has opposed the application by replying affidavit sworn by one TIAN YUN FEI and filed on 10th August 2011. He describes himself as the Project Manager with the Defendant “in relation to the Nairobi-Thika Highway Improvement Project”. Grounds of opposition include: -

1. That the road works contract was not set to expire in July 2011, and in any case, after completion the Defendant would maintain the road for a year.
2. That the Plaintiff’s claim cannot make the Defendant leave jurisdiction of the court.
3. That in any event the Defendant is locally insured against “all risks” to cater for claims such as the Plaintiff’s including any decree that may be issued in his favour.
4. That the Plaintiff’s claims are exaggerated, speculative and not due.

5. That the security sought is “highly exaggerated” and not supported by evidence or law.
6. That the Plaintiff has no *prima facie* cause of action against the Defendant.
7. That the order for security is not deserved.

The Defendant filed a further replying affidavit to which it annexed its “all risks” insurance policy.

I have considered the submissions of the learned counsels appearing, including the cases cited.

Order 39 of the Rules makes provision for arrest and attachment before judgment. The order has some 11 rules, and it is not acceptable for a party to just throw the entire Order at the court without citing any particular rule. Is the court supposed to scrutinize the entire Order and then decide for the party applying what rule best suits its circumstances?

Be that as it may, **rules 1 and 2** of the Order provide as follows: -

“1. Where at any stage of a suit, other than a suit of the nature referred to in paragraphs (a) to (d) of section 12 of the Act, 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; or

(b) that the defendant is about to leave Kenya under circumstances affording reasonable probability that the Plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, 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.

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff’s claim; and such sum shall be held in deposit by the court until the suit is disposed of or until the further order of the court.

2. (1) Where the defendant fails to show such cause the court shall order him either to deposit in court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of the decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to rule 1.

(2) Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.”

The suits excepted (section 12(a) to (d) of the Act) deal with recovery of immovable property, with or without rent or profits; partition of immovable property, foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property; and determination of any other right to or interest in

immovable property. The present suit does not fall into any of these categories.

The Defendant has not denied that it is a foreign company domiciled in the **People's Republic of China**, or that it is in this country for the single purpose of executing its contract for reconstruction of a portion of the Nairobi-Thika highway. The Defendant has also not disputed that it will leave jurisdiction of the court after completion of the contract. What it has disputed is **when** the contract is to be completed.

It would appear from the material before the court that the contract was originally due to be completed in July 2011; but the contract appears in all likelihood to contain an extension clause. At any rate, it is now November 2011, and the portion of the highway that the Defendant is rebuilding is not yet completed and is still under reconstruction. Anyone who uses that road can see that for himself.

The Defendant has also stated that under the contract it is obliged to maintain the part of the road it is rebuilding for a period of one year after completion. That may well be so, and there is no reason to dispute it. But the point is that sooner or later, the Defendant's work in Kenya will come to an end (unless it gets another contract) and it will then leave Kenya. Given the slow pace of legal proceedings the Defendant will in all probability leave jurisdiction of this court long before the case is heard and determined.

I am therefore satisfied that in the circumstances of this case (particularly the Defendant's limited engagement in Kenya), the Defendant is about to leave Kenya under circumstances affording reasonable probability that the Plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the Defendant in this suit.

The Plaintiff has thus brought himself within Order 39, rule 1 (b). But before he can benefit from the court's discretion under this rule, the Plaintiff must demonstrate a cause of action that, *prima facie*, is unimpeachable.

What case has the Plaintiff placed before the court in his pleadings? It is that the Defendant is constructing a portion of the Nairobi-Thika highway; that while he was driving along that road at night on a smooth, tarmac section, the road suddenly ended without any warning and plunged into a deviation, again without warning, that had a loose surface, thus causing him to lose control of his motor vehicle which violently overturned. The motor vehicle was a total loss and he was seriously injured in the accident.

A police abstract of the accident has been exhibited, and there is a medical report and other documents that tend to indicate that the Plaintiff was seriously injured.

As to whether the Defendant was negligent as alleged, which it has denied, that will be a matter of evidence at the trial. But it cannot be said that the Plaintiff has brought to court a frivolous case without any chance of success.

The Defendant must therefore show cause why it should not furnish security for its appearance in this suit. The present application has afforded the Defendant opportunity to show such cause.

The power to order the furnishing of security under rule 1 of Order 39, just as the power to order attachment before judgment under rule 5 of the same Order, must not be exercised lightly, and only upon clear proof of the harm intended to be prevented. That harm is that the decree that may be passed in favour a plaintiff will be rendered useless if the defendant is no longer within jurisdiction for it to be executed against him.

The Defendant has stated that it will be within jurisdiction for at least a year after completion of the works. Completion was to have been in July 2011, but in all probability that date was extended. But the new completion date has not been disclosed.

The Defendant has also stated that in any event it is insured against all risks connected with the contract,

including claims such as the Plaintiff's. But obviously such contract of insurance is between the Defendant and its insurers. It has not been demonstrated that the Plaintiff would be entitled to execute the decree against the Defendant's insurers.

I am satisfied that in the circumstances of this case it is necessary for the Defendant to furnish security for its appearance to satisfy any decree that may be passed against it in this suit.

What now remains to consider is the amount and type of the security that would serve the ends of justice.

The Plaintiff has not pleaded in the plaint with any specificity the nature and extent of his injuries. He has pleaded only that the injuries were "extensive head/scalp injuries". He has not pleaded the nature of "future medical expenses" that will be required.

The Plaintiff has also claimed loss of income of KShs 200,000/00 per day without any particulars beyond the plea that he is an advocate of this court in private practice.

The claim connected with loss of his car also appears exaggerated on account of the fact that he has already been compensated for that loss by his insurers who are apparently also the Defendant's insurers.

The documents annexed to the supporting affidavit would seem to indicate that the Plaintiff may have suffered serious injuries which may have required extensive treatment. But he ought to have given full particulars in his plaint or supporting affidavit.

It is clear to me that the security of KShs 50 million sought by the Plaintiff is not supported by the material now before the court. Doing the best that I can with the material now before the court, I hold that security of KShs 10 million will serve the ends of justice in this case.

I will therefore allow the application by notice of motion dated 16th June 2011 in the following terms (and **not** in the terms sought by the Plaintiff):-

1. The Defendant shall within fourteen (14) days of delivery of this ruling furnish security in the sum of KShs 10 million either by depositing the said sum in court or by way of a bond or guarantee (unlimited by time) issued by a reputable bank carrying on business in Kenya.
2. In default the Defendant's moveable properties to the value of KShs 10 million shall be attached and held to the order of the court, and at the Defendant's expense, until conclusion of the case.
3. Costs of the application shall be in the cause.
Those shall be the orders of the court.

DATED AT NAIROBI THIS 1ST DAY OF NOVEMBER 2011.

H.P.G. WAWERU
JUDGE

DELIVERED AT NAIROBI THIS 4TH DAY OF NOVEMBER 2011.