



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI**

Civil Suit 73 of 2009

DANIELE SCOLAROPLAINTIFF

VERSUS

**FABIO MARELLI.....1ST DEFENDANT
SONGHAI INVESTMENTS LTD.....2ND DEFENDANT
MOHAMED ESSAK BACHANI.....3RD DEFENDANT**

RULING

The Chamber summons application dated 01-03-10 came up for hearing alongside the Notice of Motion dated 08-03-10. At the hearing Mr. Otara for the applicant indicated that he wished the court to consider the motion dated 08-03-10 and all the affidavits as a reply to the chamber summons dated 01-03-10 (which by the deponent seeking that orders given on 03-03-10 for respondents arrest an application dated 01-03-04 be vacated)

The chamber summons dated 01-03-10 seeks for orders under Order XXXVIII Rules 1, Order XXXIII Rules 1, 2, 9 and 12, Order XXXIX Rules 1(a) (b) Civil Procedure Rules of the Civil Procedure Rules seek;

- (1) For the purposes of this application HCCC suits No. 72, 74 and 75 all of 2009 be consolidated with this file.
- (2) An order for arrest before judgment of 1st and 3rd defendant/respondents i.e Fabio Mareli and Mohamed Essak Bakari, be issued, and they be brought before court to show cause why they should not furnish security for their appearance
- (3) That the 1st and 3rd defendant/respondents do furnish security for the principal sum of Kshs. 57,000,000/- being the amount due and payable to the applicants besides what was pleaded as other remedies.
- (4) The orders sought be executed by the Officer-In-charge Malindi Police Station.

The grounds on which the application is founded are that:

- (a) 1st and 3rd respondents are the directors of the 2nd respondent
- (b)The assets of the 2nd respondent are being disposed off through some court cases
- (c) The 1st respondent has already absconded from the jurisdiction of this court, having left for Italy.
- (d)There are several other cases pending against the respondents.
- (e) The 2nd respondent has transferred its assets to a company known as Messy Investment Co. Ltd which has always filed objection proceedings whenever execution of a decree is issued against the 2nd respondent.

- (f) Unless the directors furnish security, then any judgment or decree that may be passed by this court may be obstructed and/or defeated in execution.
- (g) This Court has already issued an order against the 1st respondent to furnish security for his appearance in Malindi HCCC 22 of 2008, but respondent has since left the country.
- (h) The likelihood of 3rd respondent absconding from the local jurisdiction of this court is high due to the overwhelming case pending in this court.

The affidavit supporting this application is sworn by the applicant who depones that since filing of the suits, 2nd respondent has transferred all its orders to a third party namely Messy Investment and the only way he can realize fruits of judgment is by security being deposited in court, to meet the decrees.

Mr. Otara submitted on behalf of the applicant that the 1st defendant has left the country and his date of his return is unknown. To demonstrate the mischief that applicant fears, Mr. Otara states that in HCCC 86 of 2009 Ali Bakari Mohamed v Songhai Investment and Favio Marelli, the minute execution process began, Messy Investments Co. came in by way of filing objection proceedings.

He points out that the financial status of the 3rd respondent is unknown and with the 1st respondent gone, and objection proceedings by Messy being in the offing in the event of a favourable judgment for applicant, then applicant may never realize the fruits of the judgment.

In response, the respondents filed a notice of motion dated 8th March 2010, seeking for setting aside of the exparte orders given by this court on 03-03-10 for the arrest of 1st and 3rd respondent on grounds that there is no evidence that the 3rd defendant is about to abscond or leave the jurisdiction of the court nor does the third respondent have any such intention. He refers to **Potgetter v Stunbery (1967) EA 609**. Further, the 1st respondent has left the jurisdiction of this court, only because he required specialized medical attention which was not available in Kenya. In the replying affidavit sworn by Mohamed Essack Bachani, (the 3rd respondent) he depones that he is a Kenyan by nationality and carrying on business in Mombasa as a director of Airlite Electronics Ltd, a company which runs an electronics shop off Msanifu Kombo Road on Mombasa Island. He also owns immovable property at Kikambla in Kilifi District – he has annexed copies of the Title Deed as MEB 1 and copy of his passport and identification card as MEB2. As regards 1st respondent, it is deposed that prior to his departure, he had been admitted at the Aga Khan Hospital Nairobi with a brain tumor and was required to undergo a brain biopsy which necessitated his travel to Italy — annexed is a medical report MEB.

Mr. Omollo submitted on behalf of the respondents that the allegation about 3rd respondent leaving the jurisdiction of this country is incorrect as his passport shows that even after the institution of this case, he left Kenya in the normal course of his business, and returned. He wonders whether 1st respondent ought to have foregone medical treatment on account of having suits pending against him.

What about the purported transfer of 2nd respondent's assets to Messy Investments? Mr. Omollo submits that the objection proceedings filed relate to only one property, which does not constitute all the property owned by 2nd

respondent.

In any event, it is argued that 1st and 3rd defendants/ respondents cannot be punished for the acts of 2nd respondent which is a limited liability company. Mr. Omollo argues that no search has been carried out to dent 3rd respondent's claims about the property he owns in Kilifi and urges the court to be guarded by two decisions i.e **Kuria Kanyoro t/a Amigos Bar v Nderi (1988) 2 KAR pg 126** where the Court of Appeal held that this burden would only be discharged upon proof of the alleged intention.

Mr. Omollo urges not to use the amount involved as a prerequisite for ordering arrest or attachment before judgment.

He also wonders the basis for seeking that these orders do apply in HCCC 72, 73 and 75 as those are different cases with different parties. Further that it is not clear where the figure of Kshs 57,000,000 (million) comes from as the prayers sought are declaratory in nature and there is no claim or Kshs. 57million.

Mr. Otara's reply to these is that the copy of the Title Deed is not accompanied by any certificate of official search and in any event that property is owned by two people whose shares in that property is not known.

Further that the 3rd respondent's passport in fact demonstrates that he can leave the country at any time if things get worse.

As for the 1st defendant, Mr. Otara points out that the medical report is dated 23-08-09 and there is no report in his current medical status and 1st defendant/respondent has in any event not sworn any affidavit – so 3rd defendant cannot be the one to depone to these issues.

Mr. Otara also submits that the mere fact that 3rd respondent is a Kenyan national does not in any way guarantee his remaining in the country, in view of the fact that the amount involved is large and scary, and is what has caused 1st respondent to leave Kenya.

Mr. Otara urges his court to consider the fact that part of 2nd defendant's property has already been transferred as an intention to defeat any decree applicant may obtain in its favour.

Order XXXVIII Rule 1 sets out what must be satisfied before an order for arrest on attachment before judgment can issue.

It must be demonstrated that;

The defendant with intent to delay the plaintiff, or to avoid any process of the court or obstruct or delay the execution of any decree that may be passed against him –

(a) has absconded or left the local limits of the court's jurisdiction OR

(b) is about to abscond or leave the local limits of the jurisdiction of the court OR

(c) has disposed of or removed from the local limits of the jurisdiction of the court, his property OR and where the defendant fails to show cause for his arrest, the court money or other property sufficient to answer the claim or furnish security or his appearance.

In the present instance, it is not denied that 1st respondent is already outside Kenya, there is no suggestion as to the date of his return. What is presented to this court are medical records issued to him in the year 2009 – there is no further report from Italy to even confirm that he is receiving medical attention – indeed there is no affidavit sworn by him – in this age of the information highway which has made communication so fast and convenient, surely there would have been no difficulty in getting an affidavit sworn by the first respondent and a report for the doctors in Italy to confirm that he is still undergoing medical care – that confirms the they the applicants fear that 1st respondent has left the country and may never return, so as to avoid any execution process which may result against him from this litigation.

From what is presented regarding 3rd respondent and his response – It is evident that he enters and leaves Kenya frequently on his business travels – which he could well use as an opportunity to leave and avoid execution process if the litigation succeeded – Portgeiter distinguished.

Although he claims to be director of Elite Electronics Ltd – no evidence has been presented to confirm that. He also seeks to rely on the tile documents annexed as MEB 1 – but show there is a co-owner of the said property and it is not clear what 3rd respondent's shares amount to. In any event the 3rd respondent has not presented a recent search document to confirm that todate he and the other partner still own the properties herein.

1st and 3rd respondents do not deny that they are directors of the 2nd respondent. It is not even denied that 2nd respondent has already transferred some of its assets to Messy Investment Co. or that where execution process has begun against 2nd respondent, Messy Investment has stopped the same by filing objection proceedings. Instead, all that 3rd respondent adopts is a hands off mode of operation saying 2nd respondent is a limited liability company and they shouldn't have held responsibility for its acts. This may well be so but a Ltd liability company operates through the human hands – and I recognize that in some instances, especially when the issue of execution arises, a court may even be asked to lift the veil of the company so as to deal with the directors. The 3rd respondents attempt to give particulars of this landed property are not watertight and remain unsatisfactory, the averments that some of the 2nd respondent's property have already been transferred to another company are not denied nor rebutted, that 1st respondent/defendant has left the jurisdiction of this court is a fact, and since no information is being offered regarding the likelihood of the date of his returns gives reason to infer that he is not likely amening due process in this matter with an intention to eventually block execution. My finding is that the applicant has satisfied he requirement under Order XXXVIII Rules 1. It is however not clear to me how Mr. Otara arrived at the figure of Kshs. 57m – seeing that no liquidated sum is pleaded – and indeed as Mr. Omollo points out what is sought are declaratory orders and a penalty to be levied against respondents for not competing task within the agreed period.

To my mind only prayer (a) in the plaint would be defeated were the respondents to abscond/leave this court's jurisdiction – to that extend I direct that 1st and 3rd respondent do deposit the sum of Kshs. 500,000/- (five hundred thousands) being security to be held by the court until the suit is disposed off. This sum must be deposited within fourteen (14) days from the date of this order.

I fail to comprehend how these orders relate to suits No. 72, 74 and 75 all of 2009, as it is not disclosed who the parties are, or whether it affects the same subject matter, so I declare to make orders sought thereto.

I order that costs of this application shall be borne by respondents.

Delivered and dated this **21st** day of **June 2010** at Malindi.

H. A. omondi
JUDGE

Mr. Shujaa holding brief for Otara for plaintiff

Mr. Maosa holding brief for Omolo for defendant