



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 589 of 2007

JERRY NJUGUNA.....PLAINTIFF

VERSUS

J.H. SAFARIS LIMITED.....DEFENDANT

R U L I N G

This is a Chamber summons application brought under Order XXXVIII rule 1, 2, 5 and 12 of Civil Procedure Rules and Section 3A of Civil Procedure Act. The Applicant seeks prayers 3, 4 and 5 as follows:

- 3. THAT the defendant does appear in court to show cause why it should not furnish security for its appearance.**
- 4. THAT if the defendant fails to show cause it does forthwith deposit in this court money or other property sufficient to answer the claim against it herein pending the determination of this suit and until the satisfaction of the decree that may be passed against it.**
- 5. THAT costs hereof be to the Applicants.**

There are three grounds for the application which are:

1. THAT the defendant's sole active director is a foreigner (British) and a very old lady in her 80s and she intends to avoid the process of the court or to delay any decree that may be ultimately be passed against her by absconding from the jurisdiction of the court.
2. THAT the defendant is disposing of its property and its sole tour business to third parties.
3. THAT the defendant's other property mainly outside the jurisdiction of this court either in the UK and USA where it does business considering that it sole director is not Kenyan.

The Plaintiff's application dated 1st February, 2008 was initially heard, determined and a ruling made on 4th July 2008 granting it. That ruling and order was set aside on application by the Defendant herein on grounds it was not represented when the application was argued before the court.

The court has heard afresh the Plaintiff's application dated 1st February, 2008 in which orders are set out herein above and on grounds as set above are sought.

I have now had an opportunity to consider the submissions by both counsels, cases relied upon, the affidavits filed for and in opposition to the application in both parties. Order XXXVIII rule 1 of the Civil Procedure Rules sets out the principles to be had while considering an application of this nature. It provides:

“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 he 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.”

This court will also be guided by the principles set out by the Court of Appeal in the case of Kuria Kanyoko t/a Amigos Bar and Restaurant vs. Francis Kinuthia Nderu & Anor [1988] 2 KAR 126. 129 thus:

“The power to attach before Judgment must not be exercised lightly and only upon clear proof of the mischief aimed at by Order 38, rule 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.”

Having considered the affidavit sworn in support of this application and grounds on face of the application, it is quite clear that the basis of this application is that the Defendant's active director is a foreigner, is aged; and that the Defendant company is in the process of disposing off the only known assets it has locally.

Even though the Defendant company has through one of its Directors denied that it is winding up its business, there is very clear evidence before the court that it sold off some of its property to the Plaintiff, a matter which has been deponed to by the Director of the Defendant company. There is clear evidence of downsizing the company.

Having considered all the circumstances of the case and those of the Defendant company, I am of the view that the Defendant should give security for the sum claimed in this judgment. I will however not require the Defendant company to deposit the entire sum claimed in the plaint. I am of the view that the Defendant should deposit about half of the sum claimed in the plaint.

In conclusion, I will allow the Plaintiff's application dated 1st February, 2008 by directing the Defendant to deposit with this court the sum of Kshs. 2.2 million within 30 days from the date hereof with either party having leave to apply.

Dated at Nairobi this 10th day of July, 2009.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of:-

N/A for Mr. Khayega for the Applicant

Miss Gulenywa holding brief Mr. G. Murugara for the Respondent

Dated at Nairobi this 17th day of July, 2009

LESIIT, J.

JUDGE