



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Commercial 164 of 2006

SHASHIKANT CHANDUBHAI PATEL.....PLAINTIFF

VERSUS

ORIENTAL COMMERCIAL BANK.....DEFENDANT

RULING

This is an application by the plaintiff for one primary order that the defendant be ordered to deposit as security the sum of Kshs. 6,137,661.00 or its equivalent pending trial and determination of this suit. The application is expressed to be brought under the provisions of Order XXXVIII Rule (1) 5 and Sections 3, 3A and 63 of the Civil Procedure Act. Sections of the Civil Procedure Act have wrongly been invoked as there is a specific rule which deals with the relief sought by the applicant. That is Order XXXVIII Rule 5 (1) which reads as follows:-

“5 (1) where at any stage of a suit the court is satisfied by affidavit or otherwise that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him –

(a) is about to disposed of the whole or any part of his property; or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order to produce and place at the disposal of the court when required the said property or the value of the same or such portion thereof as may be sufficient to satisfy the decree or to appear and show cause why he should not furnish security.”

It can be seen quite clearly that the power to order a defendant to furnish security is provided under the sub rule cited above and the inherent jurisdiction of the court should not have been invoked by the plaintiff. The same interpretation was given in **Ryan Investments Ltd & Another – v – The United States of America 1970 EA 675** where the Court of Appeal held as follows:

“(iv) It is only where there is a specific remedy provided by the Law that the inherent jurisdiction of the court cannot be invoked.”

Ringera J, as he then was, was of the same view in **Corner Garage Transport Ltd – v – Tao Xanga &**

Another HCCC No. 847 of 1995 where he observed as follows:

“I observe in passing that section 3A of the Civil Procedure Act is wrongly invoked for the power and procedure relevant to attachment and/or arrest before judgment are expressly provided for in Order XXXVIII of the Civil Procedure Rules.”

As Bosire J, as he then was, held in **Jiwa – v – Saheb & Another** the court can only order a defendant to furnish security where any one or a combination of the grounds set out in Order XXXVIII Rule 1 of the Civil Procedure Rules are established. Has the plaintiff done so in this case? I have perused the plaintiff’s supporting affidavit. There is no allegation in the entire affidavit that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against it, is about to dispose of any property or is about to remove its property or any part thereof from the local limits of this court’s jurisdiction. The plaintiff’s contention is that the defendant has closed down two of its main branches and laid off staff; that the defendant has been unable to meet obligations to pay sums agreed; that the defendant has a history of financial instability; that the plaintiff genuinely believes that the defendant is preparing to close down and that the plaintiff’s success in the suit would be rendered nugatory if no security is given. In a nutshell all that the plaintiff is saying is that the defendant is experiencing financial hardship and may close down. Those allegations in my view are not enough. Even if proof were furnished it would not advance the plaintiff’s application.

To succeed the plaintiff had to show that the defendant is about to dispose of its property or part thereof or is about to remove its property or part thereof from the court’s jurisdiction with intent to obstruct or delay the execution of any decree that may be passed against it. The plaintiff, I am afraid has not done so. He relies on transactions going back even before he instituted this suit some of which transactions occurred when he was in the defendant’s employment. It cannot therefore be said that the defendant has brought onto itself the financial hardship with intent to obstruct or delay any execution that may be levied against it.

In any event even if the defendant may have been going through lean times, no challenge has been raised against its asset strength. The defendant has deponed that its total asset base is in excess of Kshs. 1 billion. Indeed according to the plaintiff, the same stood at 1.449 billion as in the year 2006. That in my view suggests that even if the defendant has liquidity problems, it has assets more than sufficient to satisfy any decree that may be passed against it in this suit.

In the premises, I am not persuaded that the plaintiff has established the prerequisites for the grant of the relief sought. Accordingly, the plaintiff’s application is dismissed with costs.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 3RD DAY OF APRIL 2008.

F. AZANGALALA

JUDGE

Read in the presence of:

Weloba for the applicant and Ileli for the respondent.

F. AZANGALALA

JUDGE

3RD APRIL 2008