



**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**

The Plaintiff herein was working for the Defendant Company, J.H. Safaris Limited, as the General Manager earning USD2,515 per month. The Plaintiff filed this suit on 8<sup>th</sup> November, 2007 after being declared redundant, seeking 2 months salary for leave earned but not given nor paid and one months' salary as redundancy pay and three months pay in lieu of pay.

The Plaintiff then filed this Chamber summons application under **Order XXXVIII rule 1, 2, 5 and 12 of Civil Procedure Rules** and **Section 3A of Civil Procedure Act**. He is seeking prayers 3, 4 and 5 of the application while the following orders are sought.

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 e 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 may outside the jurisdiction of this court either in the UK and USA were it does business considering that it sole director is not Kenyan.

The application is supported by the affidavit sworn by the Plaintiff dated 1<sup>st</sup> February, 2008. The gist of the affidavit is that the only active director of the Defendant Company is one Mrs. D. H. Shaw, a British National, who is in her 80s and who may avoid the court process or cause delay to avoid the court process by absconding from the court jurisdiction. The Plaintiff also deposes that the Defendant Company was in the process of disposing of its property to third parties.

The application has been opposed. The Defendant filed a replying affidavit sworn by DAVIDA HELEN SHAW, its Managing Director. In the said affidavit, Mrs. Shaw deposes that given the basis upon which the Plaintiff's dues were to be calculated the Defendant had over paid the Plaintiff and nothing was due to him. Mrs. Shaw also deposes that the

Defendant is a limited liability company and that she was not personally liable for the debts of the Company. Mrs. Shaw also deposes that the Defendant Company has a second director who is a Kenya citizen by name J.A. HOURY.

In a further affidavit, the Plaintiff deposes the Defendant's other director, J.A. HOURY was not resident in Kenya and that in the circumstances his application is merited, as Mrs. Shaw was not a citizen. The Plaintiff also answers other facts raised in Mrs. Shaw's replying affidavit including the competence of the suit against the Defendant Company. Mrs. Shaw also filed a further affidavit in answer to facts raised by the Plaintiff in the further affidavit.

I have considered all the affidavits sworn by the Plaintiff and Mrs. Shaw on behalf of the Defendant.

When the application came up for hearing on 19<sup>th</sup> June, 2008, the Respondent's counsel did not appear and so the application was argued by Mr. Onyango for the Plaintiff without any opposition.

**Order XXXVIII rule 1 of Civil Procedure Rules** sets out the grounds upon which a court may order a defendant to furnish security. It stipulates as follows:

***"1. Where at any state 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 fo 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."***

The Plaintiff has to show that with cogent evidence that the Defendant, with the intent to delay the Plaintiff or to avoid the process of the court or to obstruct or delay the executing of any decree that may be passed against him has either disposed off or removed from the local limits of the jurisdiction of the court his property or is about to abscond or leave the jurisdiction of the court. In the case of **KURIA KANYOKO T/A AMIGOS BAR AND RESTAURANT VS. FRANCIS KINUTHIA NDERU & OTHERS [1988] 2 KAR 126**, at page 129 the Court of Appeal considered the circumstances under which an order for attachment before Judgment can be made and held as follows:

***"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."***

The Plaintiff basis this application on the grounds that the Defendant is disposing of its property and its sole tour business to third parties and on the ground that the only local based Director of the Defendant Company was in her 80's and was a British citizen who could easily leave the jurisdiction of the court. The last ground relied upon by the Plaintiff is that the Defendant's other property may be outside the jurisdiction of this court in either UK or USA.

These three grounds if proved would constitute a strong ground upon which this court can grant the orders being sought in this application.

I have considered the affidavits sworn by Mrs. Shaw, the Defendants' local based director. In the first affidavit dated 18<sup>th</sup> February, 2008, Mrs. Shaw at paragraph 7 of the affidavit avers that at the beginning of March 2003, the Defendant

delivered to the Plaintiff its own office equipment as per a schedule she annexed marked DHS 4.

In paragraph 4 and 5 of same affidavit, Mrs. Shaw avers that it was a local agent of Park East Inc. a Company incorporated in the USA until the Agency was terminated effective 1<sup>st</sup> March 2003.

In paragraph 12 of the same affidavit, Mrs. Shaw confirms that she is a British Citizen and Director of the Defendant Company together with a Kenyan citizen one J.A. HOURY.

In Mrs. Shaw's further affidavit dated 7<sup>th</sup> March, 2008 no response is made to the Plaintiff's averment at paragraph 7 of the further affidavit dated 29<sup>th</sup> February, 2008 to the effect that J.A. HOURY, the other director of the Defendant Company was a resident of the Middle East.

Going by the averments in the affidavits sworn by Mrs. Shaw on behalf of the Defendant Company it can clearly be seen that the Defendant Company is in the process of winding up its business locally, that it is in the process of disposing off its property. It can also be seen quite clearly that the Plaintiff's apprehension is that the only locally based director of the Defendant Company Mrs. Shaw, may leave the jurisdiction of this court, is not without cogent basis.

As stated, the Court of Appeal in **Kuria Kanyotu's case**, supra, the sanctions provided under **Order XXXVIII rule 1** of the **Civil Procedure Rules** are intended to prevent the decree that may be passed from being rendered infractious.

I have carefully considered this application and the pleadings filed by both parties to the application. Having duly considered the application, I am satisfied that the Plaintiff has established that the Defendant Company is in the process of disposing off its properties and winding up its business locally and therefore there is ample basis upon which to find beyond per adventure, that this court's decree, if passed in the Plaintiff's favour, may be rendered infractious.

The Plaintiff's application dated 1<sup>st</sup> February, 2008 is therefore merited and is allowed under **Order XXXVIII rule 5** of the **Civil Procedure Rules** in the following terms:

- 1. The Defendant do furnish security by depositing with this court the sum Kshs. 4,800,000/- within 30 days from the date of this ruling.**
- 2. Alternatively the defendant to deposit with this court a Banker's Guarantor or such other security as may be approved by the court to satisfy the sum claimed under prayer (a) of the plaint.**
- 3. The Defendant will pay the costs of this application.**

Dated at Nairobi this 4<sup>th</sup> day of July, 2008.

LESIT, J

JUDGE

**Read, signed and delivered in the presence of:**

N/A for Mr. Onyango for Applicant/Plaintiff

N/A for Defendant

LESIT, J

**JUDGE**