



REPUBLIC OF KENYA

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

Civil Case 1962 of 1999

AWO SHARIFF MOHAMED *t/a*

ASMI SERVICE STATIONPLAINTIFF

VERSUS

CALTEX OIL KENYA LTD.DEFENDANT

RULING

The application is brought under provisions of **Order 38 Civil Procedure Rules** which is headed “Arrest and Attachment before Judgment”. **Rule 1** sets out instances where the court may be called upon to order defendant to furnish security for appearance, namely where 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 may be passed against him (i) has absconded or left the local limits of 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 jurisdiction of court his property or any part thereof.

(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 issue a warrant to arrest the defendant to show cause why he should not furnish security for his appearance.

The plaintiff’s case is that the defendant, an International Corporation, is making arrangements to leave Kenya, the limits of jurisdiction of this court and is taking steps as outlined in the plaintiff’s affidavit in support of this application.

In its application the plaintiff seeks several orders the important of which are:

(a) That the defendant do forthwith appear before this court to show cause why it should not furnish security in the sum of Kshs.184,531,554/16 principal sum and interest thereof at the rate of 12% from 24/12/1999 and costs.

(b) That the defendant do pay Kshs.400,000,000/= being the principal sum, interest and estimated party and party costs into an interest earning Account in joint names of Advocates for the Defendant and Plaintiff on account of security for the eventual decretal sum costs and interest.

(c) That the said sum be held in deposit by the said respective advocates until determination of this suit or until further court orders.

(d) That in default of compliance with the above orders the defendant's property be attached and sold.

These orders are sought on the grounds that the defendant is in the process of selling and disposing of the whole of its business undertaking in the Republic of Kenya the proceeds of which will be transferred to Overseas to Chevron, its holding Company leaving the defendant a shell and that the sale of assets will avoid, obstruct delay or defeat execution of any eventual decree costs or interest ordered against the defendant and this suit will be rendered nugatory.

In response the defendant/respondent has filed grounds of opposition and a Replying Affidavit sworn by Mrs. Edith Malombe. The defendant states that the application is premature, misconceived and is largely speculative. The requirements set out under **Order 38 rule 1** are not established and that the applicant relies on misapprehension of facts, has misconceived the nature of the transaction on which the defendant is carrying on a market research which is for the purpose of assessing the viability of selling the business as a going concern and not of disposing of the assets of the company as alleged by the plaintiff. Furthermore, the information the plaintiff relies on is unreliable having been formed from newspapers, reports and internet. The plaintiff has not exhibited any firm information of any decision reached by the defendant to sell its assets or to leave the jurisdiction of the court.

It is the defendant's contention that the plaintiff has not satisfied the court that the defendant is acting with intention to frustrate the plaintiff in prosecution or execution of his case or to defeat the cause of justice. In any case the transaction is subject to the provisions of **Restrictive Trade Practices Monopolies and Price Control Act, Cap.504 Laws of Kenya**. There will be ministerial approval and the transaction should be advertised in the Kenya Gazette. Upon examining the arguments of both parties it is clear that the plaintiff has to satisfy the court that the defendant with the intention to defeat the plaintiff's case is about to abscond or leave the local limits of jurisdiction of court. To abscond is to depart secretly or suddenly especially to avoid arrest, prosecution or service of process or to leave a place usually hurriedly with another's money or property. That is the definition of the word abscond as in Black's Law Dictionary 8th Edition at page 7. The information placed before the court in this case is contained in Newspapers which are published widely in the country and elsewhere on 15/4/2008 and on 29/4/2008. Also on the internet it is not correct then that the defendant is about to abscond within the meaning of **Order 38 of Civil Procedure**. Regarding the sale of assets or removal of the same from the jurisdiction of the court the defendant has shown by affidavit that it has not sold and is only carrying out research on viability of such a prospect. In case of sale it is hoped the sale would be as a going concern in which case all company's assets would be transferred as an active business with future earning power as opposed to the liquidation of the business or its assets. In such an eventuality any decree that is passed for plaintiff would be included in the liabilities of the company. This evidence is not contradicted. It cannot therefore be said 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 in this suit.

In passing the record shows that this suit was filed in the year 1999. The plaintiff should have finalized the prosecution within a reasonable time thereafter.

I have perused the authorities cited by the parties. The plaintiff has relied on the authority of **Jiwaji vs. Saheb & Another (1990) KLR 752** (Bosire, J. as he then was). The application was under **Order 38 rule 1** it was held (holding 3) that when the court is considering an application under **Order 38 rule 1** it should not at all be concerned with the merits of plaintiff's claim. (Holding 4) A mere apprehension that the defendant may sometime in the future be caused to leave the jurisdiction of the court is not sufficient reason to entitle the court to order furnishing of security.

The second authority by the plaintiff is **Kanyoko t/a Amigos Bar & Restaurant vs. Nderu & 2 others [1988] KLR 169**. The Court of Appeal held:

(a) (Holding 1) that the burden of showing that the appellant had disposed of his properties or removed them from court's jurisdiction or was about to abscond in either case with the object of defeating any decree that may be passed against him lay on the respondents.

(b) (Holding 5) Courts should be extremely slow in ordering attachment of a defendant's property before judgment not only because it is hardly consistent with justice to exact punishment but also because of the time-consuming process of the courts, the rights and liabilities of parties may not be determined for a long time.

(c) (Holding 2) The power to attach is not to be exercised lightly without proof of the mischief aimed at and on vague allegations.

The two authorities were adopted in the case of Atul Shah & another vs. Bharat Doshi & Another, Civil Case No.294/2006 (Lesiit, J.) where the court said that Jiwaji set out the principles which are good guidance to a court considering an application under **Order 38 rule 1 and 2** of the **Civil Procedure Rules**. In the case of Savings & Loan Kenya Ltd. vs. Eustace Mwangi Mungai – Nairobi HCC No.715/2001 Milimani the court stated: Ringera, J. (as he then was).

“I think that however well grounded the plaintiff's apprehension might appear to be, it remains just that; well ground apprehension. Without evidence that the defendant intends to do what is feared the court cannot grant the order of pretrial attachment of the defendant's property or ask him to furnish security”.

On the issue of proof of intention as required Hon. Justice Kimaru on Bangrauf Grain Millers vs. Bread Kenya Ltd. stated:

“The plaintiff is required to prove that defendant with intent to delay the plaintiff or to avoid the process of court or to obstruct or delay execution has either disposed of 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”.

It is my view that the interpretation of the provisions of **Order 38** is clearly set out in the above authorities. The purpose of the procedure is to secure the plaintiff against any attempt on the part of the defendant to defeat the execution of any decree that may be passed or to delay the proceedings in the plaintiff's case. But because the court has not had opportunity to try the case yet the court has to act carefully and not to grant orders lightly. Always remembering that justice demands that both parties be heard before the dispute is determined. Therefore the requirements of the provisions of the **Order (38)** must be complied strictly.

I have considered the material placed before the court by the plaintiff/applicant. I find that the intention is not proved; the act of absconding is not proved. The transaction was widely advertised and that the transaction is under the provision of **The Restrictive Trade Practices Monopolies and Price Control Act, Cap.504, Laws of Kenya**. It is not possible to conduct the transaction in secrecy. Also sale is not proved. I have also perused the affidavit of Ms. Edith Malombe and I come to the conclusion that what she swears is more in favour of not granting the order as her information is based on the facts she is conversant with, while the plaintiff's is on more or less hearsay.

It is my conclusion therefore that the defendant has shown cause that the order should not be made against it. The application is dismissed with costs in the cause.

DATED and DELIVERED this 25th day of August 2008.

JOYCE N. KHAMINWA

JUDGE