



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Civil Suit 225 of 2007

INLAND AFRICA LOGISTICS LTD.....PLAINTIFFS

VERSUS

1. AHMED ABDI JAMA

2. MOHAMED HUSSEIN ALI

3. MATHEW JOSEPH MBOLA.....DEFENDANTS

Coram: Before Hon. Justice L. Njagi

Mr. Omondi for Applicant

Mr. Njenga for 3rd Respondent

Court clerk - Ibrahim

RULING

This application is brought by a chamber summons dated 20th September, 2007, and is made under O. XXXVIII rules 1 and 2 of the Civil Procedure Rules, and section 3A of the Civil Procedure Act. The applicant thereby prays for four orders-

- 1. THAT the application be certified urgent and service in the first instance be dispensed with.**
- 2. THAT warrants of arrest be issued against the defendants herein to show cause why they should not furnish security for their appearance.**
- 3. THAT the defendants do furnish security equivalent to the sum claimed in the plaint herein**
- 4. THAT the costs be to the applicant.**

The application is supported by the affidavit of Roy F. Mwanthi, the managing director of the plaintiff company, and is based on the grounds, inter alia –

(a) That the defendants are indebted to the plaintiff in the sum of Kshs. 3,738,662/=

(b) That the defendants have been evasive and their abodes are not clearly known.

(c) That the plaintiff verily believes that the defendants are likely to evade the jurisdiction of this court by going underground and by concealing their attachable assets unless the orders sought herein are granted.

When this application was canvassed before this court on 29th October, 2007, the first two prayers had been spent. The focus remained on prayer 3. On the same date, the third defendant/respondent appeared in court with his counsel, and also filed a replying affidavit sworn on the same day.

Mr. Omondi for the plaintiff argued that it was not disputed that the 3rd defendant was the registered proprietor of motor vehicle Reg. No. KAW 532Y and trailer ZC, 5699; and that the trailer had the plaintiff's goods which went missing on 18th May, 2007. Since the disappearance of the consignment, the 3rd defendant had not assisted the plaintiff to undo the damage suffered; he was still evasive; and he had not specifically given his residential address, saying only that he resides at Machakos. In order to secure the decree which may be passed in this matter, Mr. Omondi urged, the 3rd defendant should furnish security as prayed. He asked the court to grant the application against the 3rd defendant with costs.

Opposing the application, Mr. Mwangi Njenga for the 3rd defendant relied on the replying affidavit. He submitted that rule 1(a) and (b) of O. XXXVIII under which the application was brought sets out 4 conditions under which a defendant may be called upon to furnish security, and that those conditions had not been met. Consequently, he further submitted, the plaintiff was not entitled to the orders sought. He also added that the 3rd defendant had given all his personal and business particulars and submitted that the orders sought were in the circumstances punitive and sought in bad faith. He then urged the court to dismiss the application and lift the warrant of arrest.

In his reply, Mr. Omondi maintained that the 3rd defendant was arrested and did not bring himself to court. In his replying affidavit, he does not deny that his address is in Nairobi. There was no evidence to sustain the allegation that the application was made in bad faith. Mr. Omondi then urged the court to allow the application

I have considered the application in the context of the pleadings and the submissions of counsel. Simply stated, the plaintiff's case is that each of the three defendants had a hand in the disappearance of a consignment enroute to Kampala. The 3rd defendant's role was that he was the owner of the lorry from which the consignment disappeared. It is also the plaintiff's case that all the defendants are slippery layabouts of unknown abode, and that there is a need for them to provide security otherwise they could evade the jurisdiction of the court by going underground. This led to the issue of a warrant of arrest before judgment so as to enable the defendants to appear in court and show cause why they should not furnish security for their appearance. It was in this context that the 3rd defendant appeared in court and filed a defence and a replying affidavit on 19th October, 2007.

It is noteworthy that the application under consideration is made pursuant to O. XXXVIII rules 1 and 2. Rule 1 sets out the circumstances under which a defendant may be called upon to furnish security for appearance. It states, so far as is relevant, as follows-

“1. Where at any stage of a suit...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 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,

the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish any security for his appearance ...”

In this matter, the plaintiff’s concern is that the 3rd defendant is a person of unknown nationality residing and working in Machakos. It is also its case that he has been evasive and his abode is not clearly known. The plaintiff therefore verily believes that the 3rd defendant, along with the others, is likely to evade the jurisdiction of this court by going underground and by concealing his attachable assets unless the orders sought herein are granted.

As observed earlier, the 3rd defendant came to court and filed a defence and a replying affidavit. Apart from a nagging suspicion on the part of the plaintiff, there is no evidence to date, that the 3rd defendant, with intent to delay the plaintiff, or to avoid any process of the court or to delay the execution of any decree that may be passed against him, has either absconded or left the local limits of the jurisdiction of the court; or is about to abscond or leave the local limits of the jurisdiction of the court; or that he has disposed of or removed from the local limits of the jurisdiction of the court, his property or any part thereof. There is also no evidence, at this stage, to show that he is about to leave Kenya under any circumstances affording reasonable probability that the plaintiff may be obstructed or delayed in the execution of any decree that may be passed against him in this suit.

On the contrary, the 3rd defendant has disclosed that he is a citizen of Kenya, holding National Identification Card Number 9851378, a copy of which he has enclosed, which shows that he was born in Machakos District. He has further divulged that he works for gain in Machakos Town as a businessman running a number of businesses under the firms names of **MATSUE ENTERPRISES** and **COPPERBELT TECHNOLOGY SYSTEMS**. He has exhibited copies of the registration certificates for those businesses. He has given the physical address in Machakos from where Matsue Enterprises is managed.

For what it is worth, the 3rd defendant has filed a defence which raises some arguable issues.

The totality of these circumstances leads me to the conclusion that it would be premature, at this stage, to condemn the 3rd defendant to furnish security for his appearance in terms of O. XXXVIII rule 1.

The application accordingly fails and it is hereby dismissed,

The warrant of arrest in respect of the 3rd defendant is hereby lifted.

Parties at liberty to apply.

Costs in the cause.

Dated and delivered at Mombasa this 16th day of November 2007.

L. NJAGI

JUDGE

