



REPUBLIC OF KENYA

AT THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL CASE 221 OF 2007

PRISCILLA NYAMBURA.....PLAINTIFF/APPLICANT

VERSUS

MARATHON CORPORATION (K) KENYA LIMITED...1ST DEFENDANT/RESPONDENT

TADIRAN COMMUNICATIONS LIMITED.....2ND DEFENDANT/RESPONDENT

MOSHE NARKIS.....3RD DEFENDANT/RESPONDENT

AVI EVRON.....4TH DEFENDANT/RESPONDENT

R U L I N G

By a chamber summons dated 30th August 2007, Priscilla Nyambura, the plaintiff/applicant has come to this court under Section 3A of the Civil Procedure Act, and Order XXXVIII Rules 1, 2 and 12 of the Civil Procedure Rules seeking orders as follows: -

- 1.) That this application be certified as urgent and be heard ex parte in the first instance.
- 2.) That a warrant of arrest do issue against the 3rd respondent to show cause why he should not deposit his passport in court as security for his attendance.
- 3.) That a warrant of arrest do issue against the 4th respondent to show cause why he should not deposit his passport in court as security for his attendance.
- 4.) That in the alternative to prayers 2 and 3 hereinabove, a warrant of arrest do issue against the 2nd, 3rd and 4th respondents herein to show cause why an order to deposit into court Kshs.105,000,000.00 or such other sum as this court may order as security for their attendance should not be issued.
- 5.) That the costs of this application be borne by the respondents.

The application is premised on the grounds that the 2nd respondent is a foreign company which does not have any fixed assets within this country's jurisdiction. The 3rd and 4th respondents are both Israeli nationals having no fixed assets within this country's jurisdiction, and that the applicant has reason to believe that if the orders sought are not granted, the respondents may leave the jurisdiction of the court and the applicant may be obstructed in executing any decree that may be passed against them.

The applicant has sworn two affidavits in support of her application. In a nutshell the applicant maintains that her suit which she has filed against the respondents has a monetary value of about One Hundred and Five Million and that the respondents being foreign nationals having no landed property within the jurisdiction of this court, it is appropriate that the court grants the orders sought to protect the applicant.

The case of *Kuria Kanyoko t/a Amingos Bar & Restaurant vs Francis Nderu & Others [1988] 2 K A R 126* was relied upon by the applicant in support of her prayer for attachment before judgment.

The 4th respondent filed a replying affidavit in which He deponed that He is an Israeli national employed by Marathon Corporation Limited an international trading company, and that the 1st respondent is a fully owned subsidiary of Marathon Corporation duly incorporated in Kenya. He contended that the applicant has no cause of action against him and that in any case, the applicant's claim is against public policy as it is based on an illegality.

In opposing the application, the respondent's advocates submitted that under order XXXVIII of the Civil Procedure Rules, an order to furnish security cannot be merely based on the fact that the defendant is domiciled outside the court's jurisdiction, but that the onus is upon the plaintiff to show that the defendant with intent to delay, avoid, or obstruct any process of the court has either absconded or left the local jurisdiction of the court or is about to abscond or leave the local jurisdiction of the court; or has disposed of or removed his property from the local limits of the court or that He is about to leave Kenya under circumstances according reasonable probability that the plaintiff will be obstructed in the execution of the decree.

Counsel submitted that the applicant had failed to satisfy any of those conditions. He maintained that the mere fact that the respondents were foreign nationals or that they had no known assets in Kenya was not a sufficient ground for granting the application. Counsel for the respondent relied on the following authorities: -

- *Ndirangu vs Abdalla [1984] K L R 746.*
- *Kuria Kanyoko t/a Amingos Bar & Restaurant*

vs Francis Nderu & Others [1988] 2 K A R 126.

Order XXXVIII Rule 1 of the Civil Procedure Rules is very clear on the circumstances under which the court may call upon a defendant to furnish security for his appearance in court. The circumstances are set out in Rule I as follows: -

“ 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 applicant has not established that any of these circumstances is obtaining. The fact that the 2nd respondent is a foreign registered company and the fact that 3rd and 4th respondents are foreign nationals were matters which were known to the applicant at the time she entered into the transaction with the

respondents. The facts that they have no known assets in Kenya is neither here nor there. Those are risks which the applicant willingly undertook upon herself. The court can only come to her aid if there is evidence that the respondents are absconding from the local limits of this court or that they are removing their property from the courts jurisdiction. That is not the position herein. The respondents are simply operating between their country and other countries including Kenya as has been their normal cause of business.

I therefore find no basis upon which an order for security can be issued against the 2nd, 3rd and 4th respondents.

Accordingly, the chamber summons dated 30th August 2007, is dismissed with costs.

Dated, signed and delivered this 14th day of November 2007.

H. M. OKWENGU

JUDGE