



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

Civil Case 313 of 2003

PATRICK OTEMBO PLAINTIFF

V E R S U S

AFRISPACE KENYA LIMITED..... 1ST DEFENDANT

THE WORLD SPACE CORPORATION 2ND DEFENDANT

ANITHA SONI3RD DEFENDANT

EPHRAM MURAGE4TH DEFENDANT

R U L I N G

This is a composite ruling concerning the Plaintiff’s Notices of Motion dated and filed on 31-10-2003, (*1st Notice of Motion*) and dated 1-12-2004 and filed on 2-12-2004 (2nd Notice of Motion).

In the first Notice of Motion, the Plaintiff/Applicant (*the Applicant*) sought orders to certify the application as **urgent**, and this was done, and in respect of the other five prayers sought, the Applicant was granted the following prayers-

- (1) *the application was certified as urgent as stated above.***
- (2) *the 1st Defendant by itself its servants or agents are hereby restrained by private treaty or public auction or from transferring its broadcast licences, the process feeder link station, satellite dishes, recorders, decoders, computers, printers, broadcast frequencies, computers, printers, motor vehicle and all its moveable assets until the inter-partes hearing.***
- (3) *that the 1st Defendant be and is hereby restrained by an order of injunction from transferring or assigning those contracts entered by and between itself and the Kenya Institute of Education, the Kenya Broadcasting Corporation, Capital Group Limited as Capital Group Limited Trading as Capital FM and Radio Limited as Kiss FM until the inter-partes hearing.***

These interim orders were extended from time to time until now. It is also necessary to mention for the purpose of record in this Ruling that both the two applications were argued by the parties respective counsel. The Plaintiff obtained orders for the production of the 1st Defendant’s particulars from the Registrar of Companies Mr. Joseph Mwangi an Executive Officer from the Registrar of Companies gave

evidence and produced records for the years 1998-2000 which showed that Hon. Philip Okoth Okundi was the only constant director, and some 2 American (US) citizens.

Evidence was also taken from Bekele Yadetta Alie which showed that he was the Country manager and was at times referred to as “**Country Director.**” This information is important from the point of view of the 2nd Application which seeks orders for the committal of the directors of the 1st Defendant to civil jail for disobedience of the above captioned interim orders.

In addition to the prayers covered by the interim orders, the plaintiff also sought the following orders in the 1st application, namely-

(a) that the court order the Defendants to furnish security for the sum of Kshs.38,101,700/= (say Kenya shillings thirty eight million, one hundred and one thousand and seven hundred only) being the equivalent of US\$ 482,300 claimed in the plaint and Kshs.3,000,000/= being reasonable costs.”

(b) that in alternative and without prejudice to the

foregoing, the court do appoint a Receiver and place in his possession, custody and management of all the moveable assets of the 1st Defendant including but not limited to Broadcast Licences, the Process Feeder Link Station, Satellite Dishes, Recorders, Decoders, Broadcast Frequencies Equipment for the Transmission of Radio Frequencies, Computers, Printers, Motor Vehicles and all the moveable assets and the accounts stated in the prayer.

In the event, the interim orders granted did not cover this prayer, and passing mention of it was made during argument of this application. The appointment of a Receiver in an on-going enterprise in Kenya is not to revive and give it life. It is like giving it a certificate or Vote of no confidence, a Kiss of death as all financiers, all suppliers will avoid it like a leper. I decline to consider it further, and therefore decline to grant it for those reasons.

The 2nd Application prayed for orders firstly declaring that the 1st Defendant has disobeyed the order of the court of injunction granted on 31-10-2003 (***i.e. prohibiting the sale of any of its moveable assets***), and that the principal officers of the 1st Defendant, namely Philip Okoth Okundi one of its directors, and Bekele Yadetta Alie its Country Manager or Director being contemnors of the court order be detained in prison for a period of not exceeding six (6) months.

For the Plaintiff, Mr. Amolo relied upon the grounds set out in the respective applications, and the Supporting Affidavit of the Plaintiff sworn on 31st October, 2003 (***in support of the 1st Application***), the Supplemental Affidavit of the Plaintiff sworn and filed on 16-12-2003 (***in reply to the Replying Affidavit of Bekele Yadetta Alie sworn and filed on 9-12-2003***), the Affidavit of the Plaintiff sworn on 1-12-2004, and filed on 2-12-2004 (in support of the 2nd Application dated 1-12-2004, and filed on 2-12-2004), and the Skeleton arguments dated 22-07-2005, and the Skeleton Argument dated 8-10-2005 and filed on 11-10-2005, (***in Reply to the skeleton Submissions*** of the 1st and 2nd Defendants/Respondents).

For the 1st and 2nd Defendants Mr. Kiragu Kimani relied upon ***firstly***, the Grounds of opposition dated and filed on 7-11-2003; ***secondly***, the Replying Affidavit of Bekele Yadetta Alie sworn and filed on 9-12-2003, ***thirdly*** the further affidavit of Bekele Yadetta Alie sworn on 11-02-2004 and filed on 12-02-2004, ***fourthly***, the Grounds of opposition dated and filed on 14-12-2004 to the Notice of Preliminary Objection (dated 10-12-2004 and filed on 14 -12-2004, that **(i)** the orders disobeyed have not been properly extracted, signed and sealed by the court as required by the Civil Procedure Rules, and **(ii)** the said orders have not been personally served on Hon. Philip Okoth Okundi or Mr. Bekele Yadetta Alie and **(iii)** no penal notice was attached to the orders as required by law), ***fifthly*** the Replying Affidavit of Bekele Yadetta Alie sworn and filed on 7-01-2005 (***in relation to the 2nd Application***) and ***sixthly*** skeleton submissions both dated 31st August, 2005, and filed on 2-09-2005, and relating respectively to 1st application dated 31-10-2003, and dated 1-12-2004 and filed on 2-10-2004.

I have considered these documents very carefully and I set out my opinion on the two applications, following herein the order of their filing and subsequent arguments.

The first application is for a claim for security for the Plaintiff's suit in the colossal sum of Kshs.38,100,700/= or equivalent in US \$482,300,000 and costs in the sum of Kshs.3 million and pending the determination of the suit, an interlocutory injunction to restrain the 1st Defendant and 2nd Defendants from selling whether privately or by public auction of the 1st Defendant's assets set out in the Application.

The application is premised upon the provisions of Section 3A and 63(a) (b) & (C) of the Civil Procedure Act, which Mr. Amolo learned Counsel for the Plaintiffs urged that they should be read together. These provisions in my consideration come last in the determination of the first Application. The operative provisions for the prayers are governed by Orders XXXIX Rule 1 (b), Order XXXVIII Rule 5, Order XL, Rule 1 (a) (b) (c) and (d) and Order L Rule 1 of the Civil Procedure Rules.

I will commence with Order L Rule (1) which merely states that save where otherwise expressly provided for under these rules, all applications shall be by motion, and shall be heard in open court. This is a procedural requirement. The substantive and operative provisions are orders XXXVIII, XXXIX, and XL under which the 1st application are brought.

Order XXXVIII Rule 12, provides that, applications under this Order (***except those brought under rule 3 (1) for discharge of a surety***) shall be by Chamber Summons. Similarly applications under Order XXXIX rule 1 & (2) like in this case, shall be by summons in chambers. The method for applications under Order XL (***Appointment of Receivers***) is not provided, and may thus be by motion under Order L Rule 1 (this prayer is not however in issue here) and technically the 1st Application ought to have been brought by way of Chamber Summons. The issue was however not raised by the Defendant's counsel and perhaps properly so for under Order L rule 12, failure to state the order, rule or provision under or by virtue of which any application is made is not a ground for refusing it, and by analogy the mention of a wrong provision should not be a ground for refusing to consider an application on its merits.

Order xxxviii rule 5 of the Civil Procedure rules provides 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 dispose 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 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.

(2) The Plaintiff shall, unless the court otherwise directs specify the property required to be attached and the estimated value thereof.

The critical determination in the said order and Rule are these-

“that the defendant with intent to either obstruct or delay the execution of any decree that may be passed against him has –

(a) disposed his property

(b) is about to remove from the local limits of jurisdiction the whole or any part of his property.

Mr. Amolo, learned counsel for the Applicant submitted that the court must give these rules a broad and not restrictive interpretation as adopted by the defendants. Counsel submitted that the 1st and 2nd defendants are engaged in the business of Information and Communication Technology and the medium of use of such technology is a satellite which orbits in space and is thus impossible property to attach. As to ***intent to obstruct***, counsel submitted that “***intent***” was equivalent to “***mens rea***” in the criminal law, or malice aforethought in the offence of murder. It is again nigh impossible to prove. Counsel reiterated the truism that “***the devil himself knoweth not the intentions of man***” and that if there was any doubt, the 1st Defendant had sold its tangible assets (***motor vehicles***), and this was proof of intent to dispose of its assets.

Counsel urged the court to give effect to the substance and spirit of the law. Rule 5 (1) Counsel submitted is in two segments. The first segment deals with what the court must first establish, on the balance of probability and if it so finds ***intent*** to obstruct, then only, could the Court direct a defendant to furnish security in such amount and time as the court may specify. Order 5 (2) requiring the Plaintiff to specify the property only applies where the Plaintiff has asked for attachment of any property.

For these views, the Plaintiff’s Counsel relied upon among other authorities, the provisions of Section 112 and 119 of the Evidence Act which says-

112. In Civil proceedings, when any fact is specifically within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

and Section 119 –

“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case,”

By reference to the provisions of the Evidence Act, the Plaintiff’s Counsel is, as I understand it, inviting the court to shift the burden of proof of the “***intent***” either to obstruct or “***delay***” the execution of any decree that may be passed in the Plaintiff’s favour upon the Defendants. Counsel is also inviting the court to assume “***intent***” as a matter specially within the knowledge of the Defendants or as the 1st and 2nd Defendants are juridical persons within the special knowledge of the juridical person’s human agents. The said Counsel is also inviting the court to assume “***intent***” to have happened in the common course of natural events, human conduct and public and private business.

I am afraid, I am not persuaded by this argument at all. Even the “***devil knoweth not the mind of man***” as the Applicant’s Counsel aptly put it. To my mind, even if there was an assumption that the applicant had an overwhelming chance of success in its claim against the Respondents, the Plaintiff would have to show “***intent***” to ***obstruct*** and ***delay*** the execution of any future decree in his favour by showing some covert act by the Defendants in respect of their property, which the Plaintiff clearly identifies as Information Communication Technology, and in the form of broadcast licences, and contracts with agencies of government and private broadcast media.

That covert act would be something like notice to abandon the frequencies, to assign the contracts to some other persons or entities, or some negotiations to that effect. It is not, in my opinion sufficient to show “***intent***” to say that-

“- it has come to the Applicant’s knowledge that the

2nd Defendant is scaling down its operations around the globe,

- the 2nd Defendant does not hold any moveable property in Kenya,

- the 1st Defendant has surrendered one floor of its lease at the rented premises,

- the 1st defendant has sent out to the Africa Satellite Network and other persons that it is interested in disposing off its business and assets in Kenya.”

Even if all of these bold assertions were correct, they do not prove “*intent*” to *obstruct* and *delay* the execution of any decree against the Defendants. Many multinational businesses operating in different countries and diverse cultures are constantly restructuring their businesses whether scaling down or not, to make them leaner and more profitable and many others are opting out of one country to another, many such as the 2nd Defendant do not hold, and do not have any immovable property in the countries in which they operate directly or through subsidiaries. It is sufficient that they hold some choses in action. It is not compulsory to do so. It is not a basis or ground for granting an applicant an order for security for costs or to furnish security.

The position in this matter appears to be this. The 1st Defendant is an affiliate of the 2nd Defendant. From the Applicant’s affidavit the Applicant admits that the 1st Defendant has both lucrative and long term contracts with *inter alia*, Kenya Institute of Education and Kenya Broadcasting Corporation (both premier government agencies in both broad-cast and electronic media), and the Capital Group Limited and Radio Africa, and likely to get contracts in the region. The Applicant also admits that the 1st Defendant has vast potential in Kenya alone and the region and further asserts that the 1st Defendant is strategically positioned with sufficient contracts to sustain itself.

On the 1st Respondent’s part, it is its case that, it is an affiliate of the 2nd Respondent. It has long term contracts with the agencies and bodies cited above, and that it has no intention of leaving the country. It has a seven year lease at Rahimtulla Towers and only surrendered part of its office in a cost-cutting or saving move and aimed at a more efficient and profitable operations. In paragraph 24 of the Replying Affidavit of Bekele Yadetta Alie, sworn on 9-12-2003 in reply to the 1st Application (of 31-10-2003), the 1st Respondent had assets in Kenya in excess of Kshs.68 million.

In specific refutation of the allegations concerning the scaling down of the 2nd Respondent’s operations worldwide, the 1st and 2nd Respondents, say that Worldspace UK and Ghana Office are operational. The Plaintiff admits in paragraph 20 of the Supplementary Affidavit sworn and filed on 16-12-2003 that he is not concerned about the 1st Defendant’s long term contracts, or about the 1st Defendant’s leaving the jurisdiction. The Plaintiff thus confirms the 1st Defendant’s position that it has long term interests in Kenya. Having abandoned the claim against the 3rd and 4th Defendants, and Philip Okoth Okundi, not being a party to these proceedings, it is not clear what prudent interest the Applicant is seeking against them.

What does judicial precedent say about the granting of orders of attachment before judgement?

In *Sai Sports Limited –Vs- Navinder Singh ruopra & Others*(Milimani commercial Courts H.C.C.C. No. 2022 of 1996) I referred with approval to the case of *Kanyoro t/a Amigos Bar and Restaurant –Vs- Francis Kinuthia Nderu*. I stated that courts should be slow in considering the attachment of a defendants’ property before judgment not because it is hardly consistent with justice to exact punishment before the defendant’s liability to execution is established and because of the tardy and time consuming process of the courts the rights and liabilities of the parties may not be determined for a long time, and possibly years. This case is an example. Since it was filed, there have already been more than times three lengthy interlocutory applications and the parties are nowhere near to the actual ventilation of their respective claims.

In overturning the judgment of the Supreme Court of Kenya, in the case of *Standard Goods Corporation –vs- Harahlichand & Co. [1950] Vol. XLII, 99*, the Court of Appeal for Eastern Africa held that it was well settled that where an affidavit is made on information it should not be acted upon by any court unless the source of the information is specified. It is not sufficient for the Plaintiff to merely depone that “*matters have come to his knowledge*.” From whom, and what sources? This runs contrary to the provision of Order XVIII Rule 3(1) requiring the disclosure of sources with regard to statement made or

sworn on information. This requirement is not cured by reference to the provisions of Section 112 and 119 of the Evidence Act cited above, as it can be said that there was no fact hidden which was within the special knowledge of the Respondents or which court could presume from the common course of natural events.

The judgment of Duflus J.A. in the Case of POTGIETER –VS- STUMBERA (1967) E.A. 609 at page 613 letters G H is to the point-

..... It is clear in my view that the provisions of order XXXVIII (0 38) only apply to a defendant who is about to leave Kenya or is about to remove any of his property out of jurisdiction of the court, that is, out of Kenya.....”

To say, as the Plaintiff says in his Affidavit that it has come to his knowledge, that the 1st and 2nd Defendants are scaling down its operations” is not synonymous with either leaving Kenya or removing any of its property from Kenya. In any event as already stated, the 2nd Defendant’s interest in Kenya consist of choses in action in respect of the 1st Defendant otherwise, the 2nd Defendant not having a place of business in Kenya has no juridical presence in Kenya, and cannot be said to be about to move out either itself or its assets out of the jurisdiction of Kenya. It has never been within the jurisdiction of Kenya in the first place.

Mr. Kimani Kiragu, learned Counsel for the 1st and 2nd Defendants also referred to the case of Comec Garage Transport Ltd –Vs- Tao Xango Xango shoutang (H.C.C.C. 847 of 1995) where it was held that **“fear alone unsupported by such evidence, of imminent departure will not suffice to move the court to exercise its discretion.”**

Finally, I will refer to the Z Limited –Vs- A and others [1982] I ALL – ER. 556 in which KERR LJ discussed at pages 571-572 of his speech the origin and purpose of a Mareva injunction, their evolution into general application to other areas of claims such as matrimonial, personal injury and Fatal Accident cases and notes that the concept ought not to be taken too far.

The original justification for the Mareva injunction was that foreign defendants should not by removing his assets out of the jurisdiction be able to deprive a Plaintiff of the fruits of a judgment in his favour when it appears to the court that the Plaintiff is likely to succeed in his claim

..... The danger of assets being removed from the jurisdiction is only one **“ploy”** of a defendant to make himself **“judgment proof”** by taking steps to ensure that there are not available or traceable assets on the day of judgement, not as a result of using his assets in the ordinary course of business or for living expenses but to avoid execution by spiriting his assets in the interim.

Useful as the procedure is, it must not be abused continued Kerr L.J. Circumstances of an abuse include application for an injunction where there is no real danger of the defendant dissipating his assets to make himself **“judgement proof”** where it is invoked almost as a matter of course by a Plaintiff in order to obviate security in advance of any judgment which he may obtain and where its real effect is to exert pressure on the defendant to settle the action.

To obviate such incidents of abuse Kerr L.J. suggested at page 572 (**paragraph d**) of his speech, two tests, and which tests, I accept, agree with and adopt, that a mareva injunction should only be granted-

- **Firstly when it appears likely that the Plaintiff will recover the judgment against the defendant for a certain or approximate;**

- **Secondly, where there are also reasons to**

believe that the defendant has assets within the jurisdiction to meet the judgment, in whole or in part but may well take steps designed to ensure that these are no longer available or traceable when

judgment is given against him.”

So far as the first test is concerned, the Plaintiff's claim is for Kshs.38,101,700/= equivalent to US\$ 482,300/= and costs in the sum of Kshs.3,000,000/=. The Plaintiff claims that the Defendants do provide security for this entire sum. If we were to apply the tests suggested by Kerr L.J. in the ***Z Limited –vs- A*** and others case cited above, and further considering the Defendants ***Amended Defence*** dated and filed on 19-10-2003 to the ***Re-Amended Plaintiff*** dated 3-10-2003 and filed on 6-10-2003, I am unable to say that the Plaintiff has either under the said Re-Amended Plaintiff or indeed the 1st Application established a prima facie case or an arguable case that he is entitled to, or will recover the entire sum claimed in the Re-Amended Plaintiff.

As also stated in the foregoing passages of this Ruling, the Defendants assets are comprised ***Communication Information Technology*** (C.I.T.) and the contracts it has subsisting with the agencies of Government and other broadcast media in Kenya. There has been no suggestion that the Defendants have on their part abrogated or caused to be abrogated those contracts and licences. On the contrary, the Defendants have in the course of ordinary business, and not by way of dissipating their assets replaced two motor vehicles with increased value. The Defendants have through the Affidavit of Bekele Yadetta Alie deponed that they have assets worth over Kshs.68 million and since both the Plaintiff and Defendants acknowledge the ***“Vast Potential”*** in ***C.I.T*** in Kenya, these assets are more likely to increase than to diminish. There is therefore no suggestion that the Defendants are taking or have taken any steps to ensure that either the potential disappears or that the current assets are dissipated or spirited away from jurisdiction. The Plaintiff fails Kerr L.J. second test for grant of a Mareva injunction.

For these reasons the Plaintiff's prayer for attachment of either the general assets of the Defendant fails and is struck out.

As the application was brought under Order XXXVIII generally, it also fails for purpose of order XXXVIII rule 5 (2) for failure to point out a specific asset and the value of such asset thus rendering this leg of the application equally incompetent and the same is dismissed.

APPLICATION OF 1-12-2004

This application sought orders under Order XXXIX rule 2 A (2) of the Civil Procedure Rules to find that the 1st Defendant has disobeyed a court order, and that its Chief Officers, namely Philip Okoth Okundi a director, and Bekele Yadetta Alie, a Chief Officer, be condemned to detention in prison for a period not exceeding six months.

Order XXXIX rule 2A (2) provides as follows-

“12A (1) In cases of disobedience or breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term of not exceeding six months unless in the meantime the court directs his release.”

Before determining this issue, it is necessary to visit the application the basis of which the orders now sought against the 1st Defendants and its officers were initially granted. In addition to this it is also necessary to look at the prayers sought in the Re-Amended Plaintiff dated 3-10-2003, and filed on 6-10-2003. The prayers sought in the Re-Amended Plaintiff were, judgement for –

- (a) the sum of US \$454,300,000 being 2% commission on the sum of US \$22,715,00000.***
- (b) the sum of US\$28,00000 as pleaded in paragraph 36 of the Plaintiff.***
- (c) the amount claimed to be paid in Kenya shillings at the exchange rate prevailing as at 10-2-1003 being Kshs.79/= to one US Dollar.***

(d) Costs of the suit.

In the application dated and filed on 31-10-2003, the Plaintiff made fresh claims quite outside the suit, and was granted these orders restraining the 1st Defendant from offering for sale by private treaty or public auction or from transferring its broadcast licences, decoders, broadcast frequencies, equipment for the transmission of radio frequencies, computers, printers, motor vehicle and all its moveable assets until the *inter-partes* hearing. A similar order was made restraining the 1st Defendants from transferring or assigning the contracts referred to earlier between the 1st Defendant and the named government agencies and private broadcast houses also first referred to above.

The thesis behind these orders was that the frequencies, and the contracts formed the 1st Defendant's major assets and if they were disposed of in any way, and were the Plaintiff to be successful as he confidently believes, then there would be no assets to satisfy any decree which may be passed against the Defendants.

The Defendants' first answer to this thesis is that rule 2A (2) of Order XXXIX is of no avail to the Plaintiff because the application under which the orders impugned were granted [*that is Order XXXIX rule 1 (b)*] are not available to the Plaintiff for purposes of enforcement of orders granted under Order XXXIX rule (b). I agree with this submission. Rules 1 (b) and for that matter, rule 1 (a) specifically apply to threats of alienation or wastage of property (Rule 1 (a)], and removal of that property in circumstances affording reasonable probability that the Plaintiff would be obstructed or delayed in execution of a decree [Rule 1(b)].

On the other hand Order XXXIX rule 2 specifically applies to injunctions to restrain the *breaches of contract*; and which the court may grant in terms as to an inquiry as to damages, the duration of the injunction keeping of accounts, giving of security or otherwise at the discretion of the court (rule 2 A (1)) It is only in cases of disobedience of the orders granted under Rule 2 that the person guilty of such disobedience or breach of such terms may be committed to prison for a term not exceeding six months.

In the instant case, there was no application before court in terms of order XXXIX rule 2, and there were consequently no orders in terms of rule 2A, thereof, and there could therefore be no case of disobedience of non-existent orders to attract either an application or punishment in terms of rule 2A (2) of the said Order XXXIX. This application is therefore quite incompetent, and does not lie at all. There is nothing to suggest that rule 2A (2) was intended to apply to situations in Rule 1 of the said order.

In my view, even if it were to apply (I hold, that it does not apply to situations under rule 1) the Plaintiff is not entitled to these orders at all. He never prayed for them in the plaint giving rise to the application of 31-10-2003. Both rules 1 and 2 of Order XXXIX clearly *predicate* any such application to prayers contained in a suit-

- (a) Where in *any suit* it is proved by an affidavit (*underlining mine*) (Rule 1), and
- (b) *In any suit* for restraining the defendant from committing a breach of contract (*underlining mine*).

Although the authorities sometimes suggest that there is no requirement that applications brought under Order XXXIX rule 1 of the Civil Procedure Rules in which temporary injunction is sought must itself be one in which restraining orders are sought, the situation with regard to Order XXXIX rule 2 is quite different. It is an express requirement that the suit in which the temporary injunction is sought must be one for restraining which itself seeks orders restraining the Defendant from committing a breach of contract or committing the tort complained of. See the case of *KIHARA –VS- BARCLAYS BANK (K) LTD.*

Clearly the Plaintiff's case did not sound in Order XXXIX rule 2 and no orders were granted in terms of rule 2A (1) thereof, and consequently no orders can be founded on rule 2A (2) thereof. This application fails on this as well as other grounds which I propose to deal with under the following sub-topics-

- (a) *lack of personal service upon the 1st Defendant's officers, namely Bekele Yadetta Alie, and Engineer Philip Okundi.*
- (b) *absence or lack of penal notice,*
- (c) *Delay and lack of good faith,*
- (d) *1st Defendant's assets have been preserved and enhanced,*

Lack of Personal Service upon a Contemnor and lack or Penal Notice

Commenting upon Order XXXIX rule 2A of the Indian Civil Procedure Code a provision which is in ***pari materia*** with rule 2A of our own Civil Procedure Rules says at page 2502 – under paragraph “6.”

“6” *Detention for Breach – ”*

A person alleged to have committed a breach of injunction cannot be detained for such breach without giving him a clear idea and notice as to the precise act done by him in breach. Proceedings under Order 39, Rule 2A are quasi-criminal, as the contemnor stands to be imprisoned as consequence thereof. It is therefore necessary that he must have a clear idea and notice as in a criminal case as to what he has to meet so that he could adduce evidence accordingly. (emphasize added).

The Court of Appeal was of the same vein in the case of **OCHINO & ANOTHER –VS- OKOMBO & 4 OTHERS [1989] K.L.R. 166,** at pages 167-168.

“The power to deal with contempt of court is provided for under Section 5 of the Judicature Act (Cap 5) and Order 39 Rule 2 (3) of the old rules) (now rule 2A (2) as introduced by L.N. 36 of 2000 of the Civil Procedure Rules. We have to follow the procedure in England. As we read the law, the effect of the English provisions is that as a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been sent personally on the person required to do or abstain from doing the act question.”

The copy of the order is required to be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to obey. Echoing its decision in **MWANGI –VS- NAIROBI CITY COUNCIL (C.A. No. 95 of 1988)** the court said-

“This requirement is important because the court will only punish a competent breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of the terms and that breach of the injunction has been proved beyond reasonable doubt.”

Halsbury’s Laws of England, 4th Edition Vol. 9, paragraph 61 (of personal service) is to the same effect.

Delay and lack of Good Faith

The orders giving rise to the application for contempt were given and issued on 31-10-2003. The alleged contempt complained of is said to have been committed in the month of February 2004. There is no explanation for the gap for nearly 11 months. In **the Kileleshwa Service Products Ltd –Vs- Kenya Shell Ltd (2006) LLR 1622 (CCK), Mbaluto J.** held that a delay of 15 months was unreasonable and had all the characteristics of laches and agreed with Counsel in that case that the circumstances under which the application (for contempt) was brought suggest that it is not ***bona fide*** and was solely brought to scuttle the hearing of the main suit.

The circumstances here are not very dissimilar. The delay of 11 months was unreasonable in view of the importance attached by the Plaintiff upon the orders allegedly breached by the Defendants. As the Defendants had already restored the vehicles allegedly sold in contempt of the court order such contempt,

if any, had already been purged and cured by the Defendants by the time application of 1-12-2004 was made. The right to bring the application was already lost by the time the application was filed. For this reason also the application to commit the officers of the 1st Defendant to prison fails.

The last issue is whether or not the assets of the 1st Defendant have been dissipated or otherwise sequestered. This has not happened. I have observed in the course of this Ruling that the injunction granted by the Court in relation to the disposal of the 1st Defendant's assets did not extend or mean, the keeping of obsolete and expensive to maintain assets. The restraining order did not prohibit the 1st Defendant from disposing such assets in the course of business and not by way of diminishing their value or selling them with a view to defeating any final judgment the Plaintiff may obtain.

To recapitulate and sum up this long Ruling, the Plaintiff prayed for orders to –

(a) restrain the Defendants from disposing of any of their property and certain existing contracts stated in the application;

(b) in addition to those prayers, the Plaintiff also sought in the 1st application two orders in the alternative –

(i) a security of the sum of Kshs.38,101,700/= or its equivalent in US Dollars, and costs in the sum of Kshs.3 million or

(ii) the court appoint a receiver and place in his possession all the moveable assets and all the CIT assets of the Defendants.

Among the moveable assets covered by the interlocutory restraining orders were two motor vehicles. The 1st Defendant sold and replaced these vehicles with others of more value. This action was cause for the 2nd application which sought orders to have the 1st Defendant's principal officer, namely Hon. Engineer **Philip Okoth Okundi**, and Bekele Yadetta Alie, the 1st Defendant's Country Manager or Director committed to jail for a period not exceeding six months.

In addition to all the other submissions and case law referred to by Mr. Amolo learned Counsel for the Plaintiff, Mr. Amolo invoked the Court's discretion under Section 63 of the Civil Procedure Act to make such orders as would ensure if the Plaintiff were in the end successful in his claim against the Defendant, would meet and so prevent, the ends of justice, from being defeated. Counsel pleaded that unless these prayers were granted in the interim, any decree eventually granted to him would be rendered entirely nugatory. There would be no assets to meet any decree issued in his favour. The defendants would have been granted **carte blanche** cheque to dissipate and sequester their assets without reference to the Plaintiff's suit.

I have demonstrated in the foregoing passages of this Ruling the heavy burden which rests upon a Plaintiff to show facts justifying orders for attachment before judgment. The power to attach before judgment must not be exercised lightly and only upon clear proof of the mischief aimed at by Order XXXVIII Rule 5, namely that the defendants was about to dispose of his property or to remove it from jurisdiction with intent to obstruct or delay any decree that may be passed against them. Such an order would be contemplated only if the Plaintiff had a judgement or appears likely will recover judgment against – the defendants for a certain or approximate claim, and that there are reasons the Defendant will dispose of its assets to avoid execution.

There was a dearth of evidence before the court that the Plaintiff had on the face of it a meritorious claim against the Defendants subject to proof of the allegations in the Plaint that the Defendants with intent to delay the execution of any decree that may be passed against them had absconded or left the local limits of jurisdiction of the court or were about to abscond or leave the local jurisdiction or were about to leave Kenya in 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 them in the suit. It was

common knowledge in any event that the 2nd Defendant has no permanent establishment in Kenya and is strictly out of the jurisdiction but is defending this suit as an investor in the 1st Defendant.

I have also demonstrated that to appoint a receiver or manager upon the business of the 1st Defendant would be tantamount to placing a ***kiss of death*** on its operations. Appointment of Receivers or Managers is a matter of which the courts should take judicial notice that there are few (***if any***) businesses in Kenya upon which receivers and managers have been appointed and prospered. Such receivers have included those appointed by secured creditors like banks.

According to the authors of ***Kerr on Receivers*** 14th Edition.

“ A receiver can only be properly appointed for the purpose of getting in and holding or securing funds or other property, which the court at the trial, or in the course of the action, will have the means of distributing amongst or making over to the persons or person entitled thereto. The object sought by such appointment is therefore the safeguarding of property for the benefit of those entitled to it. There are two main classes of cases in which the appointment is made:

(i) to enable the persons who possess rights over property to obtain the benefit of those rights and to preserve the property pending realization where ordinary legal remedies are defective;

(ii) to preserve the property from some danger which threatens it;

In the case of ***Anvarali Adamali & 2 others –Vs- Gulam Hussein Mulla Alibhai*** (Civil Appeal No. 26 of 1974), Wambuzi P. at page 5 of his judgment before citing the above passage of ***Kerr on Receivers*** observed that ***“the guiding principles must be the justice and convenience of the particular case”***

The justice of this case and no doubt the convenience of all parties is that this case be heard as soon as possible so that the Plaintiff may ventilate his case, and have his claim vindicated at trial instead of seeking piecemeal orders the proper basis of which cannot as shown above be justified either in law or fact at the interlocutory stage.

In the result therefore the Plaintiff’s applications dated 31-10-2003, and filed on that date, and the other dated 1st December, 2004 and filed on 2-12-2004 fail and are dismissed with costs.

Dated and delivered at Nairobi this 30th day of March, 2006.

Anyara Emukule

JUDGE.