



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

**Civil Case 205 of 2004**

**MARY NJERI KIMORI.....PLAINTIFF**

**VERSUS**

**ANNE WANGARI GICHARU.....DEFENDANT**

**RULING**

This is an application made pursuant to Order 38 rules 5, 6, 7 and 12; Order 50 rule 7; and Section 3A of the Civil Procedure Act.

Through the application, the plaintiff is seeking the following three substantive reliefs:

- “1. THAT the Defendant do furnish security in the sum of KShs.1,553,000/= together with costs and interest and do produce and place at the disposal of this Honourable Court all her property or such portions thereof as may be sufficient to satisfy the decree herein.**
- 2. THAT the Defendant’s property Plot No. 161 L.R. No. 209/12221/339 Nairobi, situate at Five Star Estate South “C” or such portion thereof as may be sufficient to satisfy the decree which may be passed in this suit, be attached.**
- 3. THAT the Defendant be restrained by itself, its servants and/or agents from selling, disposing of and/or otherwise alienating PLOT No. 209/12221/339 Nairobi.”**

When prosecuting the application the Plaintiff told the court that the defendant had promised to provide her with some second-hand clothes, which were to be procured by the defendant from the United Kingdom. The plaintiff says that she did remit payments to the defendant, amounting to KShs.1,553,000/=, which sum was supposed to be used to procure the clothes.

However, it is the plaintiff’s case that the defendant failed to deliver the clothes, and later also failed to refund the money which had been given to her.

In the meantime, the defendant is said to be busy disposing of all her assets. Indeed, it is said that save for the real property which is identified as Plot 161, L.R. No 209/12221/339, the defendant had already sold off all her other assets. Therefore, the plaintiff says that unless the defendant was stopped from selling that property, the suit herein would be in futility.

When the court asked the plaintiff to explain the failure to exhibit the title document for the property in issue, the plaintiff said that L.R. No. 209/12221/339 Nairobi was the title of the whole of residential area

known as FIVE STAR ESTATE, SOUTH “C”.

In the light of that candid concession on the part of the plaintiff, this court holds the considered view that it would be completely inequitable to issue any orders which would have the effect of paralysing dealings involving all the housing units in a whole residential estate, whereas the plaintiff had no contractual or any other legal dealings with the persons who own the said houses.

At any rate, the title document for that property was not made available to the court. Therefore, there was no way of ascertaining the ownership of L.R. No. 209/1221/339, for not even a certificate of official search was produced in evidence.

Meanwhile, as regards the specific plot, which the plaintiff says belongs to the defendant, there were similar shortcomings. In other words, there was no documentary proof of ownership of Plot No. 161.

In the circumstances, the court would not proceed to issue any orders touching on it, lest it later turn out not to belong to the defendant. My considered view is that the plaintiff had failed to provide the court with sufficient material from which the court could establish the ownership of the property L.R. No. 209/12221/339, and therefore this court is unable to either have the said property attached, or alternatively order that the defendant be restrained from selling, disposing of or otherwise alienating it.

As the plaintiff was not able to demonstrate her assertion as to the ownership of the property in issue, I hold that she was also not able to satisfy the court that the defendant was about to dispose of the whole or any part of L.R. No. 209/12221/339. I say so because unless it was first shown that the property belonged to the defendant, there would be no way of showing that she was about to dispose of it, as envisaged by Order 38 rule 5 (1) (b) of the Civil Procedure Rules.

In any event, the question that arises is whether or not the orders sought could be granted if it appeared to the court that the plaintiff’s claim against the defendant appeared probable. That question arises from the fact that the plaintiff has tried to demonstrate the strengths of the suit.

In the case of **JIWAJI V SAHEB & ANOTHER [1990] KLR 732**, Bosire J. (as he then was) held as follows, after setting down the provisions of Order 38 rule 1 of the Civil Procedure Rules:

**“From the foregoing it is quite clear that the court can only order a defendant to furnish security where one or a combination of the grounds set out in the rule are established. The court when considering an application under the rule is not at all concerned with the merits or otherwise of the plaintiff’s claim as Mr. Kassim Shah claimed. The decision he cited merely held that a plaintiff must lay a firm basis as envisaged by that rule before a court can exercise its jurisdiction either to order attachment before judgement or to order security to be furnished by a defendant.”**

Although those words were used by the learned judge in relation to Order 38 rule 1, I have not the slightest doubt that they would apply, with equal authority in relation to Order 38 rule 5 (1) of the Civil Procedure Rules. In other words, when the court was giving consideration to an application under that rule, the court is not to be concerned with the merits or otherwise of the plaintiff’s claim. The court is only supposed to consider whether or not the defendant was either disposing of his property or alternatively removing such property or part thereof from the local limits of the jurisdiction of the court. If that were happening, the court would ask itself if the said actions of the plaintiff were being carried out with intent to obstruct or delay the execution of any decree which may be passed against him.

In this case, the plaintiff says that the defendant had already disposed of all her moveable assets. However, it is not stated when that happened. Therefore, the plaintiff was not able to connect the disposal of the assets to any particular intention of the defendant.

A perusal of an affidavit which was sworn by the plaintiff on 11<sup>th</sup> February 2000, discloses that even prior to that date, the defendant was said to have already sold off all her moveable assets.

Given the fact that it was not until 19<sup>th</sup> January 2006 that the HON. WAWERU J. granted leave to the plaintiff to serve the defendant by way of substituted service, that would imply that the defendant had already disposed of her moveables long before she became aware of this suit. Therefore, it cannot be said that the moveable assets were disposed of with a view to obstructing or delaying the execution of any decree which the plaintiff may get against her.

According to the plaintiff's earlier affidavit, the defendant had already run away to the United States of America prior to 11<sup>th</sup> February 2000. Indeed, it is said that she is a holder of an American Green Card. If that is the correct factual position, it would imply that even if the defendant were to take steps to dispose of such property as she may still own in Kenya, it may be because she no longer had use for it, as the defendant only visited Kenya sparingly nowadays. Of course, that does not necessarily imply that the disposal of property, by the defendant could not be calculated to delay or obstruct execution of any decree which may be passed against her. However, it was upto the plaintiff to satisfy the court as to the intentions of the defendant.

If, as in this case, the plaintiff failed to establish, to the satisfaction of the court, that the defendant was disposing of her property so as to delay or obstruct the future execution of such decree as may be passed against her, the application must fail.

For those reasons I am disinclined to grant the orders sought, with the result that the application dated 16<sup>th</sup> March 2006 fails. It is therefore dismissed with costs.

Dated and Delivered at Nairobi, this 31<sup>st</sup> day of July 2006.

**FRED A. OCHIENG**

**JUDGE**