

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL CASE 56 OF 2005

GUILLAUME PETRUS DE LEEUW.....PLAINTIFF

V E R S U S

SAYED AZHAR HUSSEIN KARDI

TIMBONI TRADERS LIMITEDDEFENDANTS

R U L I N G

The suit herein was filed at Mombasa on 19th May 2003 before it was transferred to Malindi on 28th April, 2005. The dispute involves highly specialist and costly machinery whose value has been estimated by the plaintiff at KShs.9,241,657.70. There has been an interlocutory injunction pending hearing of the suit since 8th November, 2004. What this means is that since November, 2004 the machinery in question have been wasting away as the defendant has been restrained by that injunction from using or in anyway dealing with the same.

The plaintiff has given an undertaking as to damages. However, the defendant has now brought an amended chamber summons dated 3rd October, 2005, to which this ruling relates. It is seeking orders that the plaintiff do provide security in the sum of KShs.15,000,000/= in addition to the undertaking as to damages. It further seeks that the plaintiff do provide security for costs of this suit in the sum of KShs.650,00/= with interest at court rates.

The application is based on the grounds that the plaintiff has no fixed abode and is a foreign national without tangible property in Kenya. Further that his immigration status are currently unknown. It is also alleged that he has no known bank account in Kenya. That on those grounds the possibility of the plaintiff absconding once he loses the suit is very high.

Before the amended chamber summons, the plaintiff had replied to an earlier application which was amended by the present one. He has also filed a further affidavit. He has averred in both that he has a permanent residence at House No.26, Watamu and has lived in Kenya since 1990 with his wife.

That he has a class "H" Entry Permit and has been involved in constructing weigh bridges. That he has machinery valued at KShs.7m which he uses in Kenya, Tanzania and Uganda. Above all he also claims ownership of the machinery in dispute herein, besides household goods and motor vehicles valued at over KShs.5m.

The defendants' application is stated to be taken out under Order 39 Rules 2A (1) and 4 and Order 25 rules 1 and 5 of the Civil Procedure Rules. The purpose of citing Order 39 rules 2A (1) and 4 is not clear to me.

Rule 2A (1) deals with the grant of injunction subject to damages, and so on. The plaintiff has already filed an undertaking as to damages and this application is not concerned with that. Rule 4 is completely inapplicable as it deals with the setting aside or discharge of an injunction. The correct provision, which has also been cited is Order 25. The defendant is relying on rule 1, which donates to the court a discretion to order that security for costs be furnished in any case if it thinks fit.

The principle upon which this rule rests is clear. It is important that a person instituting legal proceedings

in this country, who is not generally resident within the court's limits of jurisdiction, or if resident has no means of satisfying any order as to costs which could be effectually made against him if he is unsuccessful, is required to give security for costs.

The exercise of discretion in such a matter is unfettered. However, like the exercise of any discretion, it must be done judicially. The onus is on the defendant to show, in accordance with the averments in the application, that the plaintiff is a man of no fixed abode, without tangible property in Kenya and whose immigration status are unknown.

I do not think the defendant has discharged this burden. Indeed the plaintiff has stated, without the defendant rebutting, that he has lived in Kenya since 1990. The plaintiff has further proved that since that period to present, he has had an Entry Permits, with the current one entitling him to remain in Kenya until 27th February, 2007.

He has further stated that he lives with his family permanently in Watamu in House No.26. His averments that he has now purchased machinery worth KShs.7m and that his household effect and motor vehicle are worth KShs.5m have similarly not been contraverted.

For these reasons, I decline to issue orders sought in the defendants' application. In the result amended chamber summons dated 3rd October, 2005 is dismissed with costs.

This is an old matter. It is ordered that it be listed for hearing on priority basis.

Dated and delivered this 14th day of July 2006 at Malindi

W. OUKO

J U D G E