REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 294 of 2006

ATUL SHAH ……..…….1ST PLAINTIFF

ROBERT FOULER……..……..2ND PLAINTIFF

VERSUS

BHARAT DOSHI……1ST DEFENDANT

AASHIT SHAH ……...…….2ND DEFENDANT

RULING

The plaintiff filed the present action on the 5th of June 2006 and simultaneously filed a chamber summons dated the 2nd of June 2006. The chamber summons is brought under Order XXXVIII Rule 1 and 2 of the Civil Procedure Rules. The application seeks orders that the first defendant be arrested and brought to court and be called upon to show cause why he should not furnish security for his appearance during the trial of this suit. The other prayer is that the 1st defendant do deposit such money property or security as shall be sufficient to answer the claim against him in the sum of USD 1 million. There were two affidavits that supported that application the first one was by the 2nd plaintiff he confirmed that he had given authority to the 1st plaintiff to swear a verifying affidavit in support of the plaint. He confirmed his agreement with the contents of the plaint filed herein. He then stated on the 25th of May 2006 the defendants had called him and because of the financial problems he was experiencing they offered him kshs 500, 000 on account of any claim that he may have against them. He signed an acknowledgment for that sum but later realized that it contained a disclaimer. He confirmed that he later met with the defendants and on further discussion he leant that the first defendant had finalized plans to leave the country on the 8th of June 2006. He stated that that information was personally given to him by the 1st defendant. The 2nd affidavit was sworn by the 1st plaintiff. The 1st plaintiff stated that after discussions and negotiations in July 2004 he and his co plaintiff entered into an agreement with the defendants whereby the plaintiffs were to negotiate and secure an agency business with Kodak. The procurement of that business entailed various negotiations proposals and travel to Kodak offices in Dubai. The agreement provided that the defendants had to provide the capital base whereas the plaintiffs were to procure the agency. In so securing the plaintiffs were to relay on the expertise of the industry of the 2nd plaintiff. That agreement was concluded and reduced in writing whereby a joint venture company was to be formed and the plaintiffs were to have a 35% share holding and the defendant were to have 65% share holding. The plaintiffs after procuring the business stated that the defendants locked them out

from that business and failed to honour their part and also failed to disclose the entity under which they started to do the agency business. After much consultation through the year 2005 it became apparent to the plaintiffs that the defendants were not going to honour their word. The defendants were said to have approached the 1st plaintiff with an offer of Kenya shillings three million as a lump sum payment in consideration of the agreement. The 1st plaintiff stated that he had received information from the 2nd plaintiff as set out in the affidavit alluded to hearing before that the fist defendant had obtained an Australian visa and was due to leave the country on the 8th June 2006 with no intention of returning to the country. The 1st plaintiff therefore said if the 1st defendant was to so leave the country that it would be difficult or impossible to procure his attendance in court for this matter and that it would be difficult to enforce resultant judgment or decree in this matter. That application was first heard exparte on the 5th of June 2006 where the court ordered that a warrant of arrest do issue against the 1st defendant that the 1st defendant be brought before the court. On being arrested to show cause why he should not furnish security for his appearance. That the 1st defendant could be released if he was to pay USD 1 million or its equivalent to Kenya shillings at the prevailing exchange rate or to deposit the same in court until further orders of the court. It transpired that on 7th June 2006 the 2nd plaintiff filed an affidavit in court and stated therein that he wished to withdraw his claim in this matter against the defendants and further stated that he had information that the 1st defendant was not leaving the country permanently as he had stated before but that rather he was traveling out of the country on holiday. The 1st defendant came to court when the court made an order that in the interim he would provide a bank guarantee for USD1 million. The 1st defendant did provide and file in this court that guarantee issued by I &M Bank. When this matter came up before court on the 31st of October 2006 the 1st defendant was asked to show cause why security should not be required from him securing his appearance at the trial of this suit. By the time this matter came up for that notice to show cause the first defendant had filed a replying affidavit. He stated in that replying affidavit that he is a Kenyan citizen and a holder of a national identity card No. 10627099. He denied in that affidavit that he was a party to the agreement the subject of this suit. He drew the courts attention to the agreement annexed to the 1st plaintiffs affidavit which he stated would clearly show that he was not a signatory to the same. He stated that he later discovered that the plaintiffs had no authority or capacity from Kodak to offer the defendants any business prospects or contract. In support of this the 1st defendant annexed to this affidavit a letter written a letter by Kodak dated 19th June 2006. That letter clearly stated that the plaintiffs had no business relationship with Kodak. This letter also confirmed that the 1st plaintiff had also taken another prospective buyer of the Kodak business to the Dubai office and the 1st plaintiff was very active in promoting the interests of that buyer to Kodak. The 1st defendant also confirmed that he had learnt that the plaintiffs had contracted with other parties for the same business prospective that they had contracted with the defendants. The 1st defendant confirmed that he had no intentions of delaying the hearing of this matter that when the warrants of arrests were issued he had traveled to Dubai and other countries on holiday. He said that he had security in a form of a property that he co-owns with other people in Nairobi. He is also a director in two companies in Nairobi. He also annexed a letter written by the 2nd plaintiff which was undated which letter was addressed the plaintiffs advocates and which letter also instructed the said advocate to withdraw the suit on his behalf. In support of the 1st defendants submission and notice to show cause the 1st defendant advocates repeated the information in the replying affidavit. He additionally relied on the case of **Kuria Kanyoto t/a Amigos Bar and Restaurant v Francis Kinuthia Nderu, Helen Njeru Nderu** and **Andrew Kinuthia Nderu [1988] 2 KAR.** He relied on the holding of that case as follows:

"**The power to attach before judgment must not be exercised lightly and only upon clear proof of the mischief aimed at by Order 38, rule 5 namely that the defendant was about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him."**

The defendant also relied on the case of **Nextech Limited v Wanza Drapers Ltd & another.** This case the court faced with an application such as the one before court termed the arrest of a director as misplaced unwarranted harassment intimidation and embarrassment for no good cause because the applicant had failed to show any evidence in the supporting affidavit why the respondent should supply

security. The 1st plaintiff further swore a further affidavit dated the 30th of October 2006. He faulted the 1st defendant failure to attach all the pages of his passport particularly the page which showed that the 1st defendant had been given a visa to travel and remain in Australia permanently so long as he entered Australia by 7th of November 2006. 1st plaintiff said that failure to attach that page was concealment to the Honorable court with a view to misleading the court to misinterpret the facts. That in his association with defendant he had come to know that the second defendant had already purchased a house in Australia and had transferred all his family there with a view to him eventually immigrating to Australia indefinitely. That the purpose of the trip in June was to take his family to Australia and for him to return to the country with a view to winding up his affairs. The plaintiff also said that the security relied upon by the 1st defendant was heavily indebted to banks. Similarly that the companies where the 1st defendant is a shareholder were also heavily indebted. The plaintiffs counsel distinguished the cases relied upon by the 1st defendant by saying that they related to order XXXVIII Rule 5 of the Civil Procedure Rules whereas the plaintiffs hereof were relying on Rule 1 and 2. The defendant in support of the application relied on the case **Farrab Incorporated v Brian John Robson and other [1957] E.A**. He relied on the holding of that case:

"(i) **on an application for security for costs the summons need not be supported by an affidavit where the ground for requiring security is that of the plaintiff's residence abroad:**

ii in so far as the matter may be one of discretion this was a fit and proper case to order security for costs".

The defendant also relied on the case **Jiwaji v Saheb & another [1990] KLR** and in the following passages of the holding:-

"**1) The court can only order a defendant to furnish security where one or a combination of the grounds set out in order XXXVIII rule 1 of the Civil Procure Rules (cap 21 sub leg) are established.**

2) The wording of order XXXVIII rule 1 of the Civil Procedure Rules (cap 21 sub leg) does not permit the inclusion of grounds other than those set out in it when considering whether a defendant should furnish security.

3) **The court when considering an application under Order XXXVII rule 1 of the Civil Procedure Rules (cap 21 sub leg) should not all be concerned with the merits of the plaintiffs claim**."

I have considered the arguments presented before court the application and the affidavits in support of the opposition. The plaintiff has moved under order XXXVIII rule 1 and 2 of the Civil Procedure Rules. Rule 1 provides that at any stage of the suit where the court is satisfied by affidavits or otherwise that the defendant with an intend to delay the plaintiff or to delay the execution of a decree that may be passed against him has absconded and left the local limits of the court, is about to abscond or has disposed or removed form the local limits of the courts jurisdiction his property. The 1st plaintiff in making the application for the arrest of the 1st defendant relied on the information given by the 2nd plaintiff. Immediately after filing of that application about 2 days later the 2nd plaintiff swore an affidavit which contradicted the first affidavit where he stated that he was of the view that the 1st defendant was not leaving the jurisdiction of this court or this country permanently. It does seem that the 2nd plaintiff followed that with a letter written to the plaintiffs advocate and copies to both defendants where he against stated that he had no intention of continuing the prosecution of this case. That to some extend removed the basis of the plaintiffs application before court. It is only in the further affidavit sworn by the first plaintiff that the plaintiff alleged that the defendant had purchased a house in Australia. It however ought to be noted that paragraph 4 of that affidavit the 1st plaintiff seemed to have referred to the 2nd defendant when he said that the defendant had purchased a house in Australia. There was no basis laid before court where that information came from and there was no explanation why the first plaintiff was bringing that information to the court so late in the day that is October 2006 whereas the application was

filed in June 2006. I am of the view that the purpose of the rule upon which the plaintiffs have moved under is to secure the plaintiff against any attempt on the part of the defendant who may try to defeat the trial of the case or the execution of the decree obtained by the plaintiff. When one looks at order XXXVIII it is clear that the court ought to be satisfied from affidavits or otherwise that the defendant is likely to leave the jurisdiction of the court. That to my view means that either by affidavit or the pleadings the plaintiff ought to firstly show that the defendant is likely to leave the jurisdiction of the court and it is also important for the plaintiff to make out a prima facie case in order to satisfy the court that the orders sought can be granted. On a prima facie basis I find that the plaintiffs have not made out a case against the 1st defendants. The agreement relied upon by the plaintiffs although the body of it mentions the first defendant there is no signature made by the first defendant. But I think the greatest blow to the plaintiffs showing a prima facie case is the letter written by Kodak whereby Kodak disowned the plaintiff in respect of their authority to transact business on their behalf. I therefore find that a prima facie case is not made. I also find that there is no proper basis laid before court why the defendant should give security for his attendance of this case. The order of the court therefore is as follows:-

(1) That the Plaintiffs Chamber Summons dated 2nd June 2006 is hereby dismissed with costs to the 1st Defendant.

(2) That the requirement of provisions for security by the first Defendant is hereby discharged.

MARY KASANGO

JUDGE

Dated and delivered this 27th day November 2006.

MARY KASANGO

JUDGE