

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 501 of 2006

SHIVAM ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

VIJAYKUMAR TULSIDAS PATEL T/A HYTECH INVESTMENTS....DEFENDANT

RULING

The Plaintiff has brought a Chamber Summons dated 1st December 2006. That chamber summons is brought under Order XXXVIII rule 1 and 2 of the Civil Procedure Rules. The Plaintiff seeks an order that this court will order the arrest of the Defendant for the purpose to show cause why he should not furnish security for the amount claimed in the plaint for his appearance pending hearing and determination of this suit. The affidavit in support of that application is sworn by the Managing Director of the Plaintiff. He deponed that the defendant on different dates between April and August 2006 obtained various goods from the Plaintiff incurring a debt of kshs 24, 895, 840. 40/-. The Defendant had refused or neglected to pay the Plaintiff the said debt. The defendant had on several occasions issued cheques to the Plaintiff which cheques had been returned unpaid. The Plaintiffs Managing Director deponed that he truly believes that the said cheques were issued as a decoy since the Defendant did not intend to pay the debt but intended to leave the country without making payment. On demand being made to the Defendant to pay the debt the Defendant had categorically told the deponent that he had no intentions of paying the said amount. The Defendant had threatened the Managing Director of the plaintiff by saying that he was in the process of transferring his money to foreign accounts particularly in India with a view to avoiding execution of any decree that the court might issue in this matter. The deponent further stated in his affidavit that he had discovered that the Defendant family had left Kenya for India in circumstances that afforded reasonable probability that the defendant was intending to relocate to India. The deponent said that he believed that the Defendant was about to leave Kenya. The deponent finally stated that if indeed the Defendant does transfer his assets as he had said before, to a foreign country without providing security for the amount claimed in this matter that it was likely the plaintiff would not be able to execute any decree it obtains in this matter.

That application was opposed. The Defendant in his replying affidavit stated that the Managing Director of the Plaintiff had made several false allegations regarding the amount due from the Defendant. That as at August 2006 the amount that the Defendant owed to the Plaintiff was kshs 8, 178, 463. 10/-. The Defendant annexed a statement showing that amount. That between January and June 2006 the Defendant had supplied the Plaintiff with goods valued at kshs 5, 504, 860/- . Again the Defendant attached a statement to that effect. Further that in the month of September 2006 the Defendant sold his motor vehicle Registration No. KAM 529E to the Plaintiff for the amount of kshs 420, 000/- which amount the Plaintiff had not paid to the Defendant to date. That the Plaintiff and the Defendant agreed that the aggregate amount owed by the Plaintiff to the Defendant be offset against the debt of kshs 8, 178, 463.10/-. That as a consequence of that offsetting the amount that the defendant owes to the Plaintiff is kshs 2, 253, 6093. 10/-. This amount the Defendant stated in his affidavit that he intends to pay the Defendant by installments. In response to the statement of account annexed to the Plaintiff application and in respect of the cheques also annexed thereto the Defendant stated that they were obtained by the Plaintiff on the understanding that they would assist the Plaintiff to obtain a loan from the bank. That they were not intended to represent the debt owed by the Defendant to the Plaintiff. The Defendant denied that he had indicated to the Plaintiff's Managing Director that he did not intend to pay the alleged debt. He said that he had business interests in the country and that even after the filing of this case he had

continued to transact business with the Plaintiff. To prove this the defendant annexed copies of cash receipts issued by the Plaintiff. The Defendants said he had continued to do business with other entities in the country and to prove this he annexed statements showing the names of the entities and the amount of their transaction. The Defendant was of the view that the Plaintiff's application is intended to harass him because of his association with the Plaintiff's business competitors. The Defendant further stated that his family had traveled to India for holidays but were to return to the country in the month of February 2007.

I have considered the application, the affidavit in support and the Defendant's replying affidavit. The Plaintiff's application is brought under Rule 1 and 2 of Order XXXVIII. What the Plaintiff says by that application is that the defendant is about to leave Kenya under circumstances affording reasonable probability that the Plaintiff may thereby be obstructed or delayed in the execution of a decree that might be passed in this matter. The Plaintiff did not respond to the Defendant's averments that the debt owed to it was far less than claimed in the plaint. Further the Plaintiff did not also respond to the defendant's allegation that the present application is intended to harass the Defendant for transacting business with the Plaintiffs competitors. It is pertinent to note that the cheques, that the plaintiff relied upon in his argument, that they were intended to be a decoy as the Defendant arranged to leave the jurisdiction of this court that the same were issued between the month of March and August 2006. If indeed they were intended to be a decoy upto the date when this suit was filed that is, September 2006 the Defendant is still in the country. One would have expected that the cheques would have been issued for a period when the Defendant would have been out of the country, if indeed the intention was to use those cheques as a decoy. Much more than that, the court having examined those cheques noted that the same were not presented to the bank for payment. The court finds itself to be in agreement with the Defendants submissions that security cannot be ordered due to the Plaintiffs apprehension no matter how well founded that apprehension may be. The Airline ticket that the Plaintiff relied upon as evidence of travel of the Defendants family members was not legible. The court could not be able to make out to whom the ticket was made out to or the period of travel. That ticket, together with the averments of the Plaintiff Managing Director do not suffice for the court to be moved to grant the orders that are sought by the plaintiff. It ought to be noted that a party seeking the arrest of another before proving its case by evidence ought to meet the high standards of proof of the other party's intention to avoid the execution of the decree. That a party would need to meet that high standard of proof before a party is ordered to supply security for the amount claimed. The jurisdiction that the Plaintiff invoked has to be appropriately excised to ensure that a party meets the aforestated high standards. It ought to always be remembered that the purpose of that jurisdiction is to secure the Plaintiff against the Defendants acts aimed at defeating judgment that may be entered. It is however not the intention of that jurisdiction to harass or to punish the Defendant before judgment is entered against him. It is worthy to quote from 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.**

“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. In an application under Order 38 rule 5, the onus of showing a plausible case for resisting the application can only shift to the Defendant once the Plaintiff fully satisfied the requirements under the order.....”

I find that the Plaintiff by the evidence presented before this court has failed to satisfy the high standards required to be met before the court can invoke the powers sought by the plaintiff. The end result therefore is that the Plaintiff's Chamber Summons dated 1st December 2006 is dismissed with costs to the Defendant. Orders accordingly.

MARY KASANGO

JUDGE

Dated and delivered at Nairobi this 21st day of December 2006.

MARY KASANGO

JUDGE