REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI MILIMANI LAW COURTS

CIVIL CASE 2022 OF 1996

SAI SPORTS LIMITED …….....……PLAINTIFF

VERSUS

NARINDER SINGH ROOPRA……..... 1ST DEFENDANT

SURINDER SINGH ROOPRA…….…….....……..2ND DEFENDANT

KULWANT SINGH ROOPRA…….....……..3RD DEFENDANT

SATNAM SINGH ROOPRA …….....….4TH DEFENDANT

(All trading as Motorways Construction)

RULING

On 3.11.2004 was urged before me an application dated 5.8.2004 brought by way of a Chamber Summons under Order XXXVIII rule 5 (1) (3) and Rule 12 of the Civil Procedure Rules and Section 63 (b) and (e) and Section 3A of the Civil Procedure Act, (Cap 21, Laws of Kenya) and Section 401 of the Companies Act (Cap 486, Laws of Kenya) in which the defendants seek the following orders: -

(1) That the Plaintiff do furnish security for a sum not exceeding Kshs.33,380,290.00 and/or any other reasonable sum as this Court may deem fit pending the finalisation of the suit.

(2) That the proceedings herein be stayed until deposit of sufficient security to be given by the Plaintiff.

(3) That the Plaintiff do disclose to the Court its business and assets.

(4) In the alternative, that the Plaintiff discloses its assets within Kenya the same to be conditionally attached until the determination of this suit.

(5) That the Plaintiff do show cause why all sums of money due to it from business and any assets should not be attached by the Court pending judgement of the Court.

(6) The costs of the application be provided for.

The application is supported by the Affidavit of one **Narinder Singh Roopra,** the 1st defendant, sworn on 5.08.2004 and who depones that he is a Partner in the firm of Motorways Construction, he is conversant with the facts in the matter, and that he is duly authorised to swear the Supporting Affidavit on behalf of Motorways Construction (he means I think the partners of that firm), and also on his own

behalf. The application is also based upon the grounds that: -

(a) the Plaintiff's claim herein is a sham with no prospects of success,

(b) the Plaintiff's claim has not been brought in good faith,

(c) the Plaintiff's company is not a going concern, does not carry out any other business and is merely a shell company with no assets,

(d) the Plaintiff's company has filed no Profits and Loss Account and Balance Sheet at the Companies Registry to enable the Court to determine the true trading position as regards the Assets and Liabilities of the Plaintiff's company,

(e) the directors of the company are impecunious and cannot indemnify the defendant's against the huge costs already incurred in this matter,

(f) in the likely event that the Plaintiff's claim herein is dismissed, the Defendants will suffer huge losses since it will have difficulty in realising the costs already incurred and likely to be incurred in defending this matter,

(g) the Plaintiff's claim is substantial and likely to attract costs in favour of the Defendants who have a good and meritorious Defence and Counter-Claim herein,

(h) the Plaintiff has no fixed or known moveable assets within the Court's jurisdiction,

(i) there is in fact no other known assets of the Plaintiff save LR. No. 12596/22 which belonged to the Plaintiff and which it has disposed off to avoid depositing any security which this Court may order, which is clearly an abuse of the Court process,

(j) the Plaintiff is also in the process of again disposing off the said suit property to another party to remove the only known asset out of the Court's jurisdiction with a manifest intention to defeat the ends of justice,

(k) the Plaintiff has perpetually been in the habit of arranging for loans and thereafter arranging for taking over the existing loan with new and substantial liabilities and that this alone proves that the Plaintiff will not be in a position to pay for the reasonable security sought by the Defendants.

(l) there is a real risk and likelihood that in the event that the Defendants are awarded any judgement, the Plaintiff will not be in a position to satisfy any such decree or judgement and the Defendant's costs.

The Affidavit of Narinder Singh Roopra is in like vein but more specific as to the disposal of the suit property LR. No. 12596/22. This deponent swears that the said property had been sold, and the seller thereof was also in the process of selling the property. The exhibit NSR "J" is a copy of the Amended Plaint, the Amended Joint Defence and Amended Reply to Amended Defence and Defence to Amended Counter-Claim to the Defendants Counter-Claim of Kshs.33,380,290.00/=. On the basis of these pleadings, this deponent is advised that the Plaintiff's claim herein is a sham with no prospects of success, and that the suit has not been brought in good faith.

This deponent further avers on advice from his counsel, Mr. Billing that the sale of the Plaintiff's only immovable property, LR. No. 12596/22, (the property) has been done in order to avoid depositing any security the Court may order, and that this was an abuse of the Court process, as the Plaintiff has no other known assets and will not be able to meet the Defendant's Counter-Claim herein.

Of particular interest to this Ruling is the averment in paragraph 8 (a) of the Supporting Affidavit aforesaid where the deponents say that **"(a) Plaintiff's company is not a going concern, does not carry out any other business and merely a shell company with no assets, and,** (b) **that the Plaintiff has**

filed no Profits and Loss Accounts and Balance Sheet at the Companies Registry to enable the Court to determine the true trading position as regards Assets and Liabilities of the Plaintiff's company."

Annextures SNR (3) show the transfer of the suit property (Entry NO. LR. No. 55674/14) by the Plaintiff to the Purchaser, **Sai Sports Wear and Uniforms Ltd.,** and the subsequent instructions by Sai Sports Wear and Uniforms Ltd. to Tysons Ltd., a well known Estate Agent company to sell the property. The letter of instruction to sell the property is dated 12.05.2004 and is signed by one Mrs. Kamal Rahimtulla. One can therefore conclude that the property is no longer owned by Plaintiff and I will comment on the motive(s) (if any) herein below.

Mr. Billing, Counsel for the Defendant followed the above captioned grounds of the application, and the Supporting Affidavit of one of the Partners Narinder Singh Roopra, and cited no less than 6 authorities to which I shall refer in the subsequent consideration of the merits of the Defendant's application.

The application was opposed by the Plaintiff through the Replying Affidavit of Mohammed Japperali Rahimtulla sworn and filed on 29.10.2004. Mr. Regeru who appeared with Miss Oriri on behalf of the Plaintiff relied upon the averments in the said Affidavit and I shall refer to them in the course of my decision in this application, and I do not therefore propose to reproduce the contents thereof hereunder. It will however suffice to say that the Defendant has unsuccessfully attempted by various similar applications not merely to delay but in my view subvert the course of justice by the abuse of the process of Court. In accordance with the averments set out in paragraph 3 of the Replying Affidavit aforesaid, the Defendants filed on 28.05.2002 an application for security in the sum of Kshs.33,380,290/=, and withdrew it on 10.07.2002. Mbaluto J., resisted a similar application filed on 16.02.2003, and was able to commence hearing of the suit on 20.03.2003, but on 26.03.2003, the defendants filed an application for stay of proceedings pending the hearing of his application. The application was unsuccessful, and the case was fixed for continuous hearing on 29.05.2003, 12.06.2003 and 12.06.2003. The Defendants' application was dismissed by Lady Justice Kasango on 28.07.2004, although there is a Notice of Appeal dated 29.07.2004 but filed on 30.07.2004.

The current application is expressed to be brought under the provisions of order XXXVIII rule 5 (1) (3) and 12 of the Civil Procedure Rules, Sections 63 (b) and (e) and Section 3A of the Civil Procedure Act (Cap 21, Laws of Kenya). I will now proceed to set out and consider each of the provisions lest I condemn the Defendant without granting him a fair hearing and therefore determination of his application.

Order XXXVIII is entitled **"Arrest and Attachment Before Judgement"** and rules 5 (1) and (3), and 12 provide 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 jurisdiction 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;

(3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified;"

Rule 12 of order XXXVIII merely provides that applications under the order other than under order 3 (1) (discharge of security) shall be brought by way of Summons in Chambers.

Section 63(b) provides that in order to prevent the ends of justice from being defeated, the Court may **"direct the defendant to furnish security to produce any property belonging to him and place the same at the disposal of the Court or order the attachment of any property."** Section 63 (e) empowers the Court to make any other interlocutory orders as may appear to the Court to be just and convenient.

I hold that Section 3A of the Civil Procedure Act merely codifies the Court's inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

The Defendants/Applicants also sought succour in Section 401 of the Companies Act, [Chapter 486, Laws of Kenya] which reads -

"Section 401. Where a limited company is Plaintiff in any suit or other legal proceedings any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the Defendant if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given."

I will now consider each of the said applicable provisions under which the application is brought. Rule 5 (1) (a) and (b) of Order XXXVIII requires the applicant to show that the applicant is about to dispose of the whole or any part of his property or to remove it from the local limits of jurisdiction, and that the purpose or intent of doing so is to **obstruct or delay the execution of any decree passed against the defendant.** If the applicant shows those requirements are present, the Court may direct the defendant to provide security within a time to be fixed by the Court or order the Defendant to show cause why he should not furnish such security, or the Court may also order the conditional attachment of the property or a portion of it.

Similarly under Section 401 of the Companies Act, the Plaintiff must show by credible testimony that the Plaintiff (company) will be unable to pay the costs of the Defendant if successful in his defence before an order for security of costs, and stay of proceedings may be granted.

So what is the credible testimony that the Plaintiff/Defendant is about to dispose of its property? Where is the credible testimony that the Plaintiff with intent to obstruct and delay the trial of the Applicant's Counter-Claim has disposed or is about to dispose of his property or about to remove it from the local limits of jurisdiction?

Before answering these questions, the first point to observe is that the applicant is by virtue of the Counter-Claim dated and filed on 15.05.2001 a Plaintiff pursuant to the provision of order VIII rule 2 under which the Defendant's Counter-Claim for Kshs.33,380,290/= becomes a cross-suit. The defendant is therefore perfectly in order to bring the application the subject of this Ruling. Secondly and having said so whether there is any merit in terms of the issues raised in the immediately preceding paragraph in the Defendant's application?

The Defendant's claim in the Supporting Affidavit of Narinder Singh Roopra, the first defendant, which he swore on his own behalf and on behalf of the other three Defendants is that he knows the Plaintiff's business very well, he had done business with the Plaintiff and so far as his knowledge of the Plaintiff shows the Plaintiff had sold his only known assets (LR. No.12596/22) and that property is also in the process of being sold by the purchaser, he depones that the Plaintiff is no longer a going concern, its directors are impecunious, that the Plaintiff's defence to the Defendant's Counter-Claim is but a sham and that for these reasons, the Plaintiff should be ordered by the Court to provide security in the amount of the

Defendant's Counter-Claim, and that the suit be stayed until such security is furnished.

In answer to these contentions, the Plaintiff, through its director, **Mohammed Jafferalli Rahimtulla** in his Replying Affidavit sworn and filed on 29.10.2004 stated on oath in paragraph 5 (d), 6 (a) and (b) 8 and 9 thereof in as far as I am able to paraphrase as follows: -

(5)(d) The sale of the property (LR 12596/22), was a business decision to enable the Plaintiff to reduce its overhead costs and raise further working capital by *inter alia* reverting to operating its business from rented premises. The costs of running the business in the property would not be justified due to the loss of the Licensing and Distributorship Agreement between the Plaintiff and Diadora SPA, the sole purpose for which the property was constructed. The loss of the said Licensing and Distributorship Agreement which in turn led to the appointment of the Receivers and Managers over the Plaintiff's business was solely attributable to the Defendant's breaches and failure to complete the project within the agreed time ….. The Plaintiff has worked hard to pay the banks that financed the construction and completion of the property to enable it to regain control over its business. Following the receivership over the business and assets of the Plaintiff, the Plaintiff had to take business decisions that would facilitate the faster growth of its business.

6 (a) …..The Defendant alleges that the Plaintiff is not a going concern but on the contrary annexes to the Affidavit of Narinder Singh Roopra, the Plaintiff's up to date Annual Return, showing that the Plaintiff is a going concern carrying on the business of manufacturing and selling sports wear and equipment which is still located in the property.

(b) …..On advice from his legal advisors -" there is no known statutory obligation and/or requirement that the Plaintiff ought to file its Profit and Loss Account or Balance Sheet with the Registrar of Companies. The Plaintiff has duly complied with the statutory requirements to file its Returns which are annexed to the (Defendant's) Application;

and Paragraph 8 -

"….. no evidence whatsoever has been placed before the Court in support of the allegation that the directors of the Plaintiff are impecunious. We have not at any time been declared bankrupt, and

9 (a) the deponent is seeking to rehash the Defendants' application for security for costs which was heard on merits and dismissed by Lady Justice Kasango.

(b) the Plaintiff is well able to pay its liabilities as and when the same arise including the unlikelyhood of costs being granted to the Defendants."

From the foregoing expose of both the prayers sought in the application, the Supporting Affidavit of the First Defendant, Narinder Singh Roopra, there is no scintilla of credible testimony that the Plaintiff sold its only immovable property with the intention of obstructing or delaying the adjudication of the suit, or that there is no asset to meet any decree for costs in the event the Defendants were successful in their suit against the Plaintiff on their Counter-Claim. There is certainly no evidence to suggest that the Plaintiff has removed any of its property or part thereof out of the Court's jurisdiction. There is equally no credible testimony to believe that the Plaintiff will be unable to pay the costs of the Defendant if successful in his defence to require the grant of security to secure those costs (if any). There is certainly no evidence (let alone credible evidence) that the Plaintiff's directors are impecunious! Purely therefore, and upon the statutory requirements of the Civil Procedure Rules, the Defendant's application has no legs on which to stand. So what is the purpose of this application? The answer is provided in paragraph 9 (a) above of the Replying Affidavit of Mohammed Jafferali Rahimtulla.

The current application although brought under separate provisions of the Civil Procedure, namely order XXXVIII - **"Arrest and Attachment Before Judgement"** is essentially to regurgitate the same issues dismissed by Lady Justice Kasango in her Ruling of namely security for the Defendants Counter- Claim in the sum of Kshs.33,390,290/= against the Plaintiff's large and therefore superior claim of

Kshs.77,235,850.65 which claim the Plaintiff has sought to prosecute without success due to the Defendant's determined but totally unjustified antics, to use every available provision in the letter of the law of Civil Procedure Rules, to delay that process, and quite shamelessly so. Indeed there is an old adage that every aggrieved person shall have his day in Court, and must therefore be heard, the use of the process of the law and its judicial precedent in this manner is unacceptable and it is a practice which the Court must firmly and jealously guard against.

I think that this is the way the Lord President, Sir Charles Newbold thought and perhaps felt in the case of **MERU FARMERS COOPERATIVE UNION -VS- SULEIMAN (NO. 2) [1966] EA** 442 and 443 when he said -

"**The Court should always be extremely anxious to ensure that due administration of justice does not cause unnecessary expenses if any course of action which either litigant chooses to adopt would result in unnecessary expenses, the Court shall be zealous to ensure that that course of action is not open. A Court should above all, be most careful to ensure that it should not itself be used as a tool to incur unnecessary expense where it is satisfied that such expense is unnecessary**."

Commenting on that passage in the case of **KURIA KANYORO t/a AMIGOS BAR & RESTAURANT -VS- FRANCIS KINUTHIA NDERU [1985] 2 K.L.R. 126** at page 133 Apaloo J.A. (as he then was) said -

"There is elementary wisdom in these observations. Had the respondent prayed in aid the equitable remedy of interim injunction to restrain the applicant from either absconding or disposing of his assets, assuming these were believed to be the case, the cost of either party would have been within the limits permissible by reason and common sense.

If the result of this case teaches anything, it is that the Courts should be essentially slow in considering attachment of a defendant's property before judgement, not only because it is hardly consistent with justice to exact "punishment" before the Defendant's liability to execution is established, and also because in view 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 possibly years."

Mulla's Code of Civil Procedure 14th Edition Vol./ III paragraphs 2166 - 2132 says that in an application for **arrest before judgment**, the Court must be satisfied that the suit, or as in this case, the Counter-Claim must be *bona fide*. In my view, whether the Counter-Claim is *bona fide* or not must await the determination of the trial judge.

The same commentators in Mulla aforesaid say that the main object of the rule for attachment before judgement is to enable the Plaintiff to realize the amount of the decree if ever is eventually passed, from the Defendant's property. The object of the rule is to prevent the decree that may be passed from being rendered infractuous, and that the order contemplated is not an unconditional one directing attachment of property, but one calling upon the Defendant to furnish the security or to show cause why security should not be furnished. Similarly vague allegations are insufficient. The power to attach is not to be exercised lightly and without proof of the mischief aimed at. The mere fact that the Plaintiff mortgaged or disposed of his property is not sufficient ground for ordering attachment. Likewise, the fact that he had left the place or was thinking of alienating properties would not be sufficient to order attachment unless it is further established that that was with **intent** to defeat or delay execution of the decree. Nor is it relevant to consider whether the Plaintiff has a just claim or whether his apprehensions are reasonable or justified.

In **LALCHAND MULCHAND -VS- BOILEOU [1906 - 1908] 2 K.L.R 25 - 26** Barth J. held likewise that the Plaintiff must allege **intent** to avoid or delay the Plaintiff in prosecuting his suit.

In **POTGIETER -VS- STUMBERG & ANOTHER [1967] EA 609 - 613** the affidavits alleged broadly that the applicant had sold the immovable property of the farm and the main part of the livestock, and alleged that **'the only hope"** the appellant could have of evading the respondents' just claims was **"in leaving the country as soon possible"** the judge's order for arrest of the Defendant was reversed by the

Court of Appeal which held *inter alia* that there was no evidence before the judge who made the order to enable him to say that the Defendant was about to leave Kenya at all, let alone in the circumstances set out in order 38 rule 1 (b) of the Civil Procedure Rules 1948 (Identical to Order XXXVIII rule 1 (b)).

In **JOHN KIPKEMBOI SUM -VS- LAVINGTON SECURITY GUARDS LIMITED (CIVIL APPEAL NO. 124 OF 1998)** the Court reiterated its decision in KURIA KANYORO t/a AMIGOS BAR & RESTAURANT -VS- FRANCIS KINUTHIA NDERU & OTHERS (supra) "**that the power to attach before judgment must not be exercised lightly and only upon clear proof of the mischief aimed at by orders 38 rule 5 of the Civil Procedure Rules, namely, that the Defendant is 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 ….."

Ringera J. (as he then was) held likewise in **SAVINGS & LOANS KENYA LIMITED -VS- EUSTAS MWANGI MUNGAI** (Milimani Commercial Courts HCCC No. 715 of 2001), the furnishing of security and pre-trial attachment may not be ordered on the

Plaintiff's or the Defendant's apprehension however seemingly well-founded that the defendant intends to dispose of his property to delay or defeat the execution of a decree. It is necessary to prove that the Defendant intends to dispose of his property.

Similarly in **JOELLEN LAMOTTE -VS- ANDREW FRACKLIN** (Milimani Commercial Courts HCCC No. 1176 of 1996) Mwera J. held that the Plaintiff must show that the Defendant "**has the intention to obstruct or delay execution of the decree that may be passed against him.…. The intention must be demonstrated by the Plaintiff. The Plaintiff must also show that the Defendant is about to remove the same from the local limits of jurisdiction. If he fails to do so, then he does not get orders under Order 38 rule 5 of Civil Procedure Rules."**

Finally, I wish to commend Mr. Billing Counsel for the Defendants for his industry and research in the matter of the application. He cited not less than fifteen (15) statutory as well as judicial authorities in support of the Defendant's application herein. These authorities are no doubt correct and applicable in their correct contexts in applications where their principles are sought to be applied. I have already referred to some of them but shall refer to

SIR LINDSAY PARKINSON & CO. LTD -VS- TRIPLAN LTD. [1973] 2 ALL ER 273 in the context of Section 447 of the Companies Act 1948 of England (similar to Section 401 of at Companies Act Cap 486 (Laws of Kenya) regarding the Court's discretion in these matters. Dismissing an appeal for security for costs under section 447 of the Companies Act to 1948 (aforesaid) the English Court held *inter alia* that -

(i) When it was shown that there was reason to believe that a Plaintiff company would be unable to pay the Defendant's costs if the Defendant was successful the Court had a discretion under section 447 of the 1948 Act whether or not to order security for costs to be given.

(ii) Per Lord Denming M. R., and Lawson L. J., the Court's discretion should be exercised considering all the circumstances of the case; in considering the circumstances the Court could take into account a payment into account by the Defendant, or an open offer, or tendering to show that there was substance in the Plaintiff's Company's claim and that it was bona fide, accordingly the judge was entitled, taking into account Parkinson's offer and the lateness of the application for security to refuse an order."

In conclusion, and for the record, there is no provision or acquirement in the Companies Act (Cap 486 Laws of Kenya) for a private limited liability company to file its financial statement with the Registrar of

Companies. They are required to show their indebtedness such as debentures or other encumbrances (Section 96 Part IV Registration of charges with the Registrar). Under Section 128 (4) it is only a public liability company which need attach a copy of its balance sheet, the directors and auditors report to its Annual Returns. The Defendants attack on the Plaintiff's Annual Returns filed under Section 125 of the Companies Act is therefore without foundation.

In the result therefore, taking every circumstance of this case, up to the application, the subject of this Ruling, firstly on merits this application has no basis. It is brought to delay the fair trial of the Suit itself. From the antecedent conduct of the Defendants, this application is but another futile attempt to delay and derail the early trial of the suit, and is, as clearly stated in the earlier passages of this Ruling, a calculated and determined effort to ensure that that motive is achieved. I think that the application is brought in bad faith and granting it would neither enhance the cause of justice as is envisaged under Section 63 (e) and Section 3A of the Civil Procedure Act. The applicant has clearly not satisfied the requirements for grant of any of the orders sought under Order XXXVIII rule 5 and none shall be granted under Section 63 (b) of the Civil Procedure Act.

Indeed the dictates of justice and not the Defendants convenience compel that the Defendants application dated and filed on 5.08.2004 be and is therefore dismissed with costs.

The same interests of justice further dictate that this suit be fixed for hearing on a priority basis.

Dated and delivered at Nairobi this 4th day of February 2005.

M. J. ANYARA EMUKULE

JUDGE