

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL DIVISION – MILIMANI
CIVIL CASE NO. 511 OF 2004**

AKIBA BANK LIMITED ::: PLAINTIFF

VERSUS

AMINA GHAFUR HAJI::: 1st DEFENDANT

ABDUL GHAFUR HAJI ::: 2ND DEFENDANT

ABDUL RAHIM ISMAIL (also known as Abdul Rahim

Noormohamed Ismail)::: 3RD DEFENDANT

RULING

The Plaintiff has filed this suit against the Defendants claiming a sum of Kshs 41,192,727.17 together with interest. The claim arises from sums advanced to a company called Target Carriers Ltd in receivership on the guarantee of the Defendants. The Plaintiff avers that the said company defaulted in the repayment of the said sums resulting in demands for repayment directed against the Defendants who have also not paid the said sums. Hence this suit.

The Defendants have filed a joint defence in which they deny liability to the Plaintiff. The Defendants have further pleaded that the Plaintiff has not accounted for sums recovered out of the receivership of the said company which borrowed the said sums. They have also pleaded that the suit and the alleged guarantee are a nullity as at all material times there was and still is a Receiving Order issued against the 2nd Defendant.

On 18th February, 2005, the Plaintiff lodged an application by way of Chamber Summons under Sections 3A and 63 (a) and (b) of the Civil Procedure Act and Order XXXVIII Rules 1 (a) and (b) and 2 of the Civil Procedure Rules seeking orders that warrants of arrest be issued against the Defendants to be brought before the Court to show cause why they should not furnish security for their appearance and that the Defendants do furnish security and place at the disposal of the Court the sum claimed in the plaint or furnish other property sufficient to answer the Plaintiff's claim.

The application is supported by an affidavit sworn by one Fred Ngari a Legal Officer of the Plaintiffs. There is also a further affidavit sworn by one Paul Musyimi an investigator trading under the name and style of KCB investigators. The application is opposed.

The application was canvassed before me on 15.4.2005 by Mr. Khyayega Learned Counsel for the Plaintiff and Mr. Obiero Learned Counsel for the Defendant. The gist of the Plaintiff's case is that its efforts to recover the sums claimed from the borrower have been unsuccessful and the Defendants although they are citizens of Kenya are planning to relocate from the country and that some of them have in fact already left the country for Dubai where they intend to relocate to. In the Plaintiff's view unless the Defendants are ordered to furnish adequate security for their appearance or furnish security in answer to the Plaintiff's claim execution of any decree that may be passed against the Defendants may be delayed and/or rendered nugatory.

The Defendant's answer to the Plaintiff's case is that the material placed before the Court by the Plaintiff disentitles the Plaintiff to the reliefs sought in the application. Specific reference was made to the further affidavit of Paul Musyimi aforesaid in which it is deponed that the Defendants are in the country

and are trying to sell four (4) trucks which they imported from the United Kingdom. It is further deponed that the Defendants own motor vehicles and a house in Nyali Estate of Mombasa.

I have now considered the rival positions taken by both parties. I have also considered the pleadings, the application, the affidavits and the authorities cited. Having done so I take the following view of the matter. The Plaintiff's application is predicated on the primary ground that the Defendants are planning to relocate from the country and further that indeed some of them have already left the country for Dubai where they intend to relocate to. Yet the further affidavit of Paul Musyimi completely destroys the basis of the Plaintiff's application. The said Paul Musyimi has categorically deponed that the defendants and I believe recently imported four (4) trucks from the United Kingdom and the Defendants intended to sell the said trucks. The same Paul Musyimi has stated on oath that the Defendants own motor vehicles and a house in Nyali estate of Mombasa and are indeed in the country. The affidavit evidence of Paul Musyimi suggests that the Defendants are in the country and their actions further suggest that they may be in business. There is no suggestion that the Defendants with intent to obstruct or delay the execution of any decree that may be passed against them are either about to dispose of the whole or part of their property or are about to remove their property from the jurisdiction of the Court. Paul Musyimi has not deponed that the Defendants plan to relocate from the country. The substratum of the Plaintiff's application has been removed.

I hold the view that it is not the function of the Court to make life easy for a Plaintiff or indeed any party without clear evidence.

In the premises the Plaintiff's application is dismissed with costs to the Defendants.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MAY 2005.

F. AZANGALALA

JUDGE

Read in the presence of:-