REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Suit 220 of 2003

CHOICE TEA BROKERS LTD. ……..…… PLAINTIFF

- Versus -

JAMES THIGE NDEGWA

BENARD MUHINJA GICHUHI

LUCY WANGARI KIMANGA

BERLUC TEA TRADING CO. LTD. ….....… DEFENDANTS

RULING

The plaintiff in this case claims a sum of US $229,936.24 which it was allegedly defrauded by the first defendant, who was its employee, and deposited in the third defendant's account which was operated by the first and third defendants. By its chamber summons dated 11th September 2003 brought under Order 38 Rules 5, 6, 7 and 12 and Order 11 Rule 14 of the Civil Procedure Rules as well as section 3A of the Civil Procedure Act the plaintiff on the same day obtained an order of attachment before judgment of the first defendants immovable property situate at Shanzu and known as L.R. No. 10434 and the second defendants account No. 0150821002 held at Commercial Bank of Africa, Mama Ngina Street Nairobi until the final hearing and determination of this suit or until further orders of the court. The order also gave the defendants 30 days to furnish security for payment of the monies owed to the plaintiff. The first and second defendants now seek under section 3A of the Civil Procedure Act, Order 38 Rules 5, 8 and 10, Order 39 Rules 3 and 4 Order XLIVI (I suppose they meant Order XLIV) and Order 50 Rules 1 and 2 to have the order reviewed and or set aside. The application is based on the grounds that the plaintiff did not disclose to the court at the time of applying for that order that the first and second defendants were in prison following a conviction in a criminal case in which the plaintiff was the complainant, that the first and second defendants have never been served with that order and that they have been greatly prejudiced by that order.

Mr. Magolo for the two defendants argued that he chose to apply for review because the orders made under Order 38 Rule 5 are final. He also based the application under Order 39 Rules 3 and 4 I suppose because the order of attachment restrains the first defendant from transferring or otherwise interfering with the attached land. That provision is, however, inapplicable as the attachment before judgment was not granted under Order 39 of the Civil Procedure Rules.

Order 44 which provides for review of orders and decrees states the grounds upon which review can be sought. They are first, where the applicant has discovered new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced at the time when the decree was passed or order made, or secondly, where there is an apparent error of the face of the record, or thirdly, where the Applicant has any other sufficient reason entitling him to apply for a review. That provision presupposes that the Applicant participated in the proceeding leading to the passing of the decree or making of the order sought to be reviewed. That is not the case in this matter. The first and second defendants' main ground of application is that they have never been served with the order. In my view therefore the application should have sought to set aside that order under some other relevant provision. But not in review under Order 44.

Although the application seeks to set aside or review the order of attachment before judgment Mr. Magolo urged for a review which as I have said is untenable. Even if he had urged for setting aside the

application could not have succeeded for the simple reason that he relied on wrong provisions of the law. Order 50 Rule 12 could not have availed him as there is a world of difference between failing to cite the provision under which an application is brought and citing a wrong provision. For these reasons I find the application fatally incompetent.

I need to consider the merits of the application in event I am wrong in holding that it is incompetent. The Applicants argue that they were not served with the order and they were therefore denied the opportunity of being heard on the aspect of providing security. They are not saying that they could have provided security at that time or that they are ready to provide it now. They are not saying that the first defendant was at that time or now not intending to dispose of the attached piece of land. All they are saying is that they are prejudiced by the order and they would like to have it set aside because it was not served on them.

Whereas I agree that the Applicants should have been served with the order, however, failure to do so does not render it invalid in any way or provide a ground for setting it aside. The order has not passed any proprietory interest in the properties attached to the plaintiff. All it has done is to preserve the properties until the case is heard and determined. Given the large claim the plaintiff has lodged in this case and the alleged circumstances giving rise to it justice demands that the order should be maintained. The Applicants have now got to know about it and they can have it set aside upon providing security. I find no merit in this application and I accordingly dismiss it with costs.

DATED and delivered this 20th day of May 2005.

D.K. MARAGA

JUDGE