



REPUBLIC OF KENYA

IN THE HIGH COURT KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
CIVIL CASE NO. 219 OF 2005

PHILIPPE CARETTE.....PLAINTIFF

VERSUS

INTERNATIONAL CO-OPERATION FOR INTEGRATED

RURAL DEVELOPMENT (CIDRI).....DEFENDANT

RULING

The plaintiff has moved this court by way of chamber summons dated 25th April 2005, which is brought under Order 38 Rule 5 of the Civil Procedure Rules. The application prays for firstly, pending hearing of the application inter partes the freezing of the defendants 7 bank accounts; secondly, pending the hearing of the suit that the defendant be ordered to furnish or deposit as security the sum of kshs 9, 672, 930/- in court.

The plaintiff states that he was from April 2002 to March 2004 an employee of the defendant as the organizations overseas programmes director. That the contract of employment provided that the plaintiffs salary was 3, 000 Canadian dollar per month and oversee allowance of 1, 500 Canadian dollar per month.

He alleges that during his period of employment by the defendant in Kenya, he often went without a salary and allowances and on the persuasion of the defendant's country representative, he gave loans to the defendant which was from his life savings and proceeds of the sale of his house in Canada. The plaintiff deponed that in the year 2002 he gave a loan to the defendant for a total of kshs 2, 879, 775; in 2003 a total of shs 925, 155; in 2004 the defendant owed him air fair for him and 3 members of his family for the value of kshs 423, 000/- and salary arrears of 83, 875 U.S. dollars.

The plaintiff deponed that he had knowledge that the defendant had in its accounts US dollars 70, 000 which could partially pay his debt. He then said that, "*I am certain that the defendant through the resent representative Patrick Konieczniak and the other signatories to the bank account for which I am not will move the money beyond the reach of the court execution process unless the order freezing any withdrawal from the accounts is given immediately pending further resolution of this application.*" Although it seems the plaintiff sought the freezing of the accounts pending the hearing of the application, as seen from the prayers of the application; the plaintiff did depone in the affidavit that he sought the freezing until the hearing of the claim.

The arguments before me were such that the plaintiff's counsel was seeking the freezing of accounts and in the alternative an order for security. Mr. Namanda, learned counsel for the plaintiff in support of the application said that the plaintiff's claim is real and not imaginary and the balance of convenience favoured the granting of the orders as prayed, to ensure the plaintiff is protected. Counsel referred to annexure 'PC' pages 1 to 18, which were alleged to be loan acknowledgment, and said that they clearly

showed that the defendant is relying on funds from its donor and if the donor funds are not forthcoming the defendant may have to close its organisation in Kenya to the detriment of the plaintiff.

Mr. Namada, learned counsel for the defendant opposed the application. He said that for the plaintiff to succeed it was necessary for the plaintiff to show that there was a suit in progress and the defendant with the intent of delaying or obstructing the execution of the decree was about to dispose its property or remove it from the jurisdictions of the court. He said the plaintiff had failed to address these issues but instead concentrated on the defendant's lack and yet that was not a reason for granting orders as sought.

Defence counsel further argued that the plaintiff had failed to serve the defendant with the summons as required by Order 4 rule 3 (5) of the Civil Procedure Rules. The plaintiff in opposition to this argument replied that the plaintiff had complied with the rules and had filed the summons together with the plaint as required.

The defendant counsel drew the court's attention to an annexure to the replying affidavit, namely the certificate of Registration of the defendant under section 10 of the non-Governmental organization coordination Act. The certificate showed the date of registration to be 17th April 2003. In this regard counsel said that the contract of employment, the basis of the plaintiff's claim for salaries was entered into before the defendant was registered; similarly the loan acknowledgments were dated on dates that were prior to the registration of the defendant. This counsel said proved that the defendant was not liable for the plaintiff's claim.

Defence counsel also referred to page 16 of an annexure 'PC5' of the plaintiff's affidavit, which states; **“the present contract will govern and interpret in accordance with the laws of Quebec.”** Counsel said that it is not clear whether under the Quebec Law there is provision of order 38 rule

5.

The loan acknowledgment, according to the defendant's counsel breached the stamp Duty Act, that section 5 and 19 of that Act make it clear that the loan acknowledgments are not admissible in evidence. For the purpose of an application for provision for security the applicant is required to satisfy by affidavit or otherwise, that the defendant, with intent to obstruct or delay execution of a 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.

One argument raised by the defendant that greatly dents the plaintiff's application is the revelation that the defendant was only registered on 11th April 2003. I do not accept that the local registration of the defendant has no legal basis or that despite it there was no separating the defendant with the Canadian organization with the same name. I accept the defendant's counsel's argument that the defendant is registered in Kenya with the power to sue and to be sued. Consequently contracts and undertakings signed or issued before the registration of the defendant, it is arguable whether they are binding on the defendant.

It is material to note that page 10 of plaintiff's annexure "PC5" states under part 1; "Cidri, a non profit making organization is incorporated by virtue of Canadian Laws, having its social head office at the 884 Jean Plouf, Bouchaville, Quebec Canada." This statement is to be found at the beginning of the plaintiff contract of employment and would seem to suggest that the plaintiff was officered employment by Cidri, incorporated under the Canadian Law; that would seem to suggest that the plaintiff's employer is not the defendant.

The issue about summons raised by the defendant is rejected because order 4 rule 3 (5) requires the plaintiff to present summons at the time of filing the plaint. Once the plaintiff does that the responsibility of signing the same is placed upon the judge or an officer appointed by the judge. I do accept the defendant's argument that the loan acknowledgment documents, relied upon by the plaintiff fall foul of the stamp Duty Act. They obviously are within the definition of a document which is liable to pay stamp

duty and failure to so pay means that they cannot be received in evidence.

Having considered the arguments of counsel the evidence presented before me the plaintiff's application is not merited; particularly considering the burden on the plaintiff under Order 38 rule 5. I find that it has not been satisfied. The object of that order is to secure the plaintiff against any attempt on the part of the defendant to defeat execution of any decree that may be passed. The plaintiff has not shown the defendant is about to dispose his property or is about to remove it from the jurisdiction of the court.

Accordingly the order of the court is: - ·

- That the plaintiff's application dated 25th April 2005 is dismissed with costs to the defendant.

Dated and delivered at Nairobi this 17th May 2005.

MARY KASANGO

JUDGE