

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 68 OF 2004

BAYUSUF GRAIN MILLERS.....PLAINTIFF

VERSUS

BREAD KENYA LIMITED.....DEFENDANT

RULING

This is an application by the plaintiff made under Order XXXVIII Rules 1, 5 and 12 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking the orders of this court for a warrant of attachment before judgment be issued against the defendant to attach the defendants movable assets including its motor vehicles. The plaintiff has further sought an order of this court to compel the defendant to furnish security to answer the plaintiff's claim. The application is based on the grounds that the plaintiff had obtained information that the defendant's proprietors and directors were about to abscond and leave the jurisdiction of the court. The plaintiff had further obtained information that the defendant was about to dispose of part or the whole of its assets to the detriment of the plaintiff's claim. The application is supported by the annexed affidavit of Nasser Bayusuf, a director of the plaintiff company. The application is opposed. The defendant has filed grounds of opposition to the application. A director of the defendant company, Chandrakant Shah has sworn a replying affidavit opposing the plaintiff's application.

At the hearing of the application Mr Ngure Learned Counsel for the plaintiff made submissions urging this court to allow the application. On his part, Mr Matiri, Learned Counsel for the defendant made vigorous submissions opposing the plaintiff's application. He urged this court to dismiss the application as no basis had been laid in law to enable this court grant the said application as prayed by the plaintiff. I have carefully considered the submissions made by the learned counsels. I have also read the pleadings filed by the parties to this application. The issue for determination is whether the plaintiff has established by affidavit evidence that indeed the directors of the defendant company intended to sell the assets of the defendant company and abscond from the jurisdiction of this court with a view to defeating the plaintiff's claim which is pending adjudication by this court.

What is the plaintiff required to establish under the provisions of Order XXXVIII of the Civil Procedure Rules? The plaintiff is required to prove that the defendant with the intent to delay the plaintiff or to avoid the process of the court or to obstruct or delay the execution of any decree that may be passed against him has either disposed off or removed from the local limits of the jurisdiction of the court his property or is about to abscond or leave the local jurisdiction of the court. In Savings & Loan Kenya Ltd versus Eustace Mwangi Mungai Nairobi HCCC No. 715 of 2001 (Milimani) (unreported), Ringera J (as he was then) stated at page 5 when a similar application for attachment before judgment was made;

“Be that as it may, I think that howsoever well grounded the plaintiff's apprehension might appear to be, it remains just that; well grounded apprehension. Without evidence that the defendant intends to do what is feared, the court cannot grant the order of pretrial attachment of the defendants property or ask him to furnish security. Is there any such evidence here? I fear not. There is no deposition of any positive fact tending to show that the defendant intends to dispose of his assets. Such positive facts might have included the fact that the defendant either negotiating the sale of his properties or entering into an agreement to sell the same.”

In Kuria Kanyoko t/a Amigos Bar and Restaurant –vs- Francis Kinuthia Nderu & Others (1988)2 KAR 126, the court of appeal in considering the circumstances when an order of attachment before judgment

can be made held at page 129 that

“On the material presented to the court, it cannot be gain said that the appellant deponed to facts which constitute more than plausible answer to the respondents plea for “attachment before judgment”. The burden of showing that the appellant has disposed of his properties or removed them from the courts jurisdiction or was about to abscond in either case with the object of defeating any decree that maybe passed against him, lay on the respondents. And it seems clear that on the state of the pleadings and in the view of the conflicting affidavits, that burden can only properly be discharged by testing the rival averments by evidence in the conventional way. The respondents averments only rested on information given to him by parties whom the court did not see or listen to.”

At page 130,

“Our Order 38 which sanctions this practice was borrowed from the Indian Code of Civil Procedure. The learned author, Mulla in his treatise on the Indian Code (13th Edn p. 1502), says, inter alia, of order 38 r. 5:- “The object of this rule is to prevent the decree that may be passed from being rendered infructuous... The order that is contemplated by this rule, is not unconditional one directing attachment of property, but one calling upon the defendant to furnish security or to show cause why security should not be furnished. Where the defendant offers to give security, the court should go into the question of its sufficiency before issuing a final order of attachment.”

What are the plaintiff’s grounds in support of its application for attachment before judgment? Nasser M. Bayusuf, a director of the plaintiff deponed that a director of the defendant, one Chandrakant Shah informed him that the defendants business was being sold as the directors and proprietors of the defendant company intended to relocate to the United Kingdom. An annexure marked “NMBI” was said to be the valuation of the assets of the defendant company which was being used as a basis to procure a buyer for the said assets of the defendant company. In his replying affidavit, Chandrakant Shah has denied that the defendant company intends to sell its assets. He however admitted that from time to time he has gone to the United Kingdom for business reasons and not for the purposes of permanently settling there.

Having considered the rival reasons given by the plaintiff and the defendant in support of their respective argument for and against the application, it is my considered opinion that the plaintiff has not discharged the burden placed on it to enable this court grant the application sought. The basis of the plaintiff’s application is an alleged conversation between its director Mr Nasser Bayusuf and a director of the defendant company, Mr Chandrakant Shah. Since the said alleged conversation took place, the plaintiff has not established that the defendant has taken a positive step to dispose of its assets. Neither has the plaintiff proved that the directors of the defendant company have gone out of the jurisdiction of this court with the intention of defeating the cause of justice. The evidence that the plaintiff has placed before this court is that of mere speculation. There is no evidence to support the plaintiff’s contention that the defendant company intends to dispose of its assets to defeat the cause of justice. The plaintiff has not discharged the onus of proof placed upon him.

This court is aware that for the order of an attachment before judgment to be issued, this court must be satisfied beyond per adventure that indeed the defendant intends to abscond from the jurisdiction of the court or dispose his assets with a view of defeating the cause of justice. The order of attachment before judgment is draconian and can only be issued in the clearest of the cases. In the instant case, the plaintiff has failed to establish that it is entitled to the said order sought. The application dated the 20th of July 2004 lacks merit.

The same is dismissed with costs to the defendants.

DATED at NAKURU this 13th day of May 2005.

L. KIMARU

JUDGE