



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA  
CIVIL CASE NO. 237 OF 1996

PHILIP NDOLO ..... PLAINTIFF

- Versus -

KENYA CROCODILE FARM ..... DEFENDANT

RULING

The Plaintiff's claims in this suit are against Kenya Crocodile Farm Limited described in the plaint as "a limited liability company duly incorporated in the Republic of Kenya under the Companies Act Cap 486 Laws of Kenya" (the company). The claims are based on the plaintiff's alleged shareholding in the company and also on an alleged contract of employment between him and the company.

By an application dated the 7th January 2004 and brought under Order 38 Rules 5, 6 and 12 of the Civil Procedure Rules the plaintiff has applied for attachment before judgment of "**cash deposits of Sh. 4,500,000/= and/or such other sums held by M/s Standard Chartered Bank (K) Limited, Treasury Square Mombasa in the Account of Kenya Crocodile Farm Limited, its servants, agents, Directors or assigns enough to satisfy the anticipated decree of sh.8,000,000/= pending delivery of judgment herein.**" In the alternative the plaintiff has also applied that the defendant do furnish security that may be sufficient to satisfy the anticipated decree of sh. 8,000,000/=. The application is based on the ground that the defendant company has sold the only property it owns in Kenya known as "Mamba Village" to one Hezron Awiti Bolo and that the directors of the company who are foreigners have "**relocated to Israel outside the jurisdiction of this court.**" The application is supported by the affidavit of the plaintiff sworn on 7th January 2004. In it the plaintiff deposed that in December 2003 he received confidential information from unnamed employees of Mamba Cultural Centre that the company had sold its premises and business assets to Hezron Owiti Bolo. Acting on that information, the plaintiff further deposed, he traced Mr. Bolo, whom he knew, who confirmed to him that indeed the company had sold its assets to him. According to the plaintiff Mr. Bolo informed him that he had paid the purchase price to the company out of which only sh. 4,500,000/= was deposited with Standard Bank pending finalisation of the purchase agreement. The plaintiff made private investigations but was unable to confirm the deposit as the bank cannot disclose information on accounts to third parties. He therefore wishes this court to order that the said deposit of sh. 4,500,000/= be attached before judgment.

In reply the said Hezron Awiti Bolo swore an affidavit in which he repudiated the plaintiffs claims and stated that he only bought shares in the company.

Mr. Munyithya for the plaintiff argued that the company having admitted the sale, whether of the shares or assets, the court should order the attachment. He further argued that the company as a going concern had been sold off and that the directors of the company are foreigners implying that they have or are about to leave the jurisdiction of the court.

Mr. Asige for the Respondent urged me to dismiss the application. He submitted that the application is

based on vague and unsubstantiated allegations. It is not quite clear under what paragraph of Order 38 Rule 5(1) the plaintiff's application is brought. In the supporting affidavit the plaintiff has averred that the company has sold all its assets in Kenya and that the directors of the company are foreigners who have relocated to Israel. He has not come out clearly on whether or not the company has sold its assets in Kenya and whether or not its directors have taken proceeds of sale to Israel. Whatever the position before making an order under Order 38 Rule 5 or 6 of the Civil Procedure Rules the applicant must satisfy the requirements of those provisions and in particular rule 5.

Order 38 Rule 5 provides that:-

**“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,

(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.”**

It is therefore clear that the Applicant has to satisfy the court by affidavit or otherwise that “the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him” is about to dispose of or remove his property from the local limits of the jurisdiction of the court. The court is not to grant the application lightly.

Commenting on similar provisions in the Indian Civil Procedure Rules *Sarkar's, The Law of Civil Procedure 8 th Edition at page 1406* stated:-

**“The jurisdiction is extraordinary and must be very sparingly exercised and with the uttermost caution, otherwise it would become the instrument of the greatest oppression. An order under Order 38, rules 5 and 6 is a grossly drastic one interfering with the fundamental rights of a person to have control over his property to deal with it in any manner he likes. Before such stringent order is passed, it is to be seen that the same is not made merely for the asking of it by the plaintiff. .... The court must insist upon strict proof of allegations in the petition for attachment before giving judgment.”**

At page 1407 the learned author continued to state that:-

**“vague or general allegations that the defendant is about to remove property are insufficient.”**

These views which I adopt in this ruling were echoed by the Court of Appeal in **Kanyoko t/a Amigos Bar Vs Nderu (1988) 2 KAR 126. In that case the Court stated:-**

**“If the result of this case teaches anything, it is that courts should be extremely slow in ordering attachment of the defendants property before judgment not only because it is hardly consistent with justice to exact “punishment” before the defendants liability to execution is established but 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.”**

Has the plaintiff satisfied the court that he is entitled to the orders sought? As I said earlier the plaintiff's claim is based on alleged confidential information received from unnamed employees of Mamba Cultural Centre. Needless to say that an averment based on information from unnamed people is

of no probative value. Mr. Bolo whom the plaintiff claimed confirmed to him that he had bought the assets of the company denied that and said that he only bought shares in the company and is now a director of the company. He did not say from whom he bought shares but it is obvious that it must have been from one of the previous shareholders.

There is absolutely no evidence that the company has or intends to sell its assets. There is no evidence that the company owns a property known as Mamba Farm or that it has sold it. No particulars of that property have been given. No particulars of the Account have been given. Interestingly the plaintiff seeks to attach the Accounts of the agents and or officers of the company. That cannot be granted without lifting the corporate veil.

The plaintiff says he has a claim for sh. 9.4 million which he implies should be protected by an order of attachment before judgment. Large and or valid as a claim might be is not the basis or criterion upon which an order should be granted under Order 38 Rules 5 or 6. Dealing with a similar situation in the said case of Kanyoko t/a Amigob Bar (supra) the court of Appeal said:-

**“The judge said he made the pre-judgment order to ensure that the Appellant would be able to honour the decree that may be passed against him. If that were the true criterion, then any party who files a suit would be entitled to an automatic order for attachment of the defendants property to ensure satisfaction of any decree.”**

In his application the plaintiff prays, first, for the attachment of the said deposit of Sh. 4,500,000/= and in the alternative for an order requiring the defendant to furnish security. That is reversing the provisions. My understanding of Order 38 Rules 5 and 6 is that the court must move step by step. The object of those provisions is not to attach the defendant’s properties but to require him, where the court is satisfied as already stated, to furnish security. Mulla, in his treatise on the Indian Code (13th Edition, page 1502) says of Order 38 Rule 5:-

**“The object of the rule, is to prevent the decree that may be passed from being infructuous. .... the order that is contemplated by this rule, is not an 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 into the question of its sufficiency before issuing a final order of attachment.”**

It is after the defendant has failed or refused to furnish security after he has been ordered to that the provisions of Order 38 Rule 6 are called in aid.

For these reasons I am not satisfied that the plaintiff has not made out a case for an order of attachment before judgment leave alone one requiring the defendant to furnish security. Consequently I dismiss his application with costs.

DATED this 5th day of February 2004.

**D.K. Maraga**

**Ag: JUDGE**