



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI

CIVIL CASE NO.597 OF 2002

DAVID CHABEDA.....1ST PLAINTIFF

TRUPHENA CHABEDA.....2ND PLAINTIFF

VERSUS

DR. FRANCIS INGANJI.....DEFENDANT

R U L I N G

The Plaintiffs herein seek by Chamber Summons dated 17th September, 2004 the following orders against the Defendant:-

- (i) that the Defendant do within 7 days furnish security in such sum as may be sufficient to satisfy decree herein that may be passed against him;**
- (ii) that the Defendant's property sufficient to satisfy such decree be attached;**
- (iii) that the Defendant's former employer, the African Union, be restrained from paying out to him his terminal benefits or any other monies accruing to him till further orders of the court; and**
- (iv) that the Defendant be barred from leaving the jurisdiction of the court by depositing his passport in court until he furnishes the security sought.**

The application is essentially brought under Section 63(a), (b) & (e) of the Civil Procedure Act, Cap.21 (the Act) and Order 38, rules 1, 2 and 5 of the Civil Procedure Rules (the Rules). So, in essence, the Plaintiffs are seeking the arrest of the Defendant and attachment of his property before judgment. There is pending before court an application by Notice of Motion dated 18th March, 2004 for an order under Section 36 of the Arbitration Act, Cap.49 to recognise an arbitral award dated 6th November, 2003 and to enter judgment in accordance therewith.

The Defendant has already given notice of preliminary objection to that application on a point of law. The Defendant's counsel was served with the application at hand on Friday 17th September, 2004. So he did not have sufficient time to file papers in opposition to the application. But I agreed to hear the application on 21st September, 2004 on account of its urgency. The Defendant's counsel addressed the court in opposition to the application.

The Plaintiffs' present application is brought upon the grounds that the arbitral award is in their favour for the sum of Kshs.1,590,000/00 against the Defendant; that the Defendant has neglected to remit the

said sum in full and has instead resorted to dilatory tactics; that there is no good reason why he has not made good the award; that he has left his employment with the African Union office in Nairobi and is in the process of settling in Ethiopia; and that he has now obtained employment in Addis Ababa, Ethiopia and has infact left the country for purposes of “evacuating” his family to Ethiopia.

I have read the affidavit sworn in support of the application. I have also considered the submissions of the learned counsels appearing. In order to succeed the Plaintiffs must satisfy the court that the Defendant has left his employment in Nairobi and is about to leave the country for Ethiopia with intent to delay the Plaintiffs or to avoid any process of the court or to obstruct or delay the execution of any decree that may be passed against him. There is no evidence of such intent. On the contrary, the letter dated 29th April, 2004 addressed to Plaintiffs’ advocates by the Defendant and annexed to the supporting affidavit shows that the Defendant has already paid Kshs.200,000/00 towards the arbitration sum awarded to the Plaintiffs. The allegations that the Defendant has left his employment in Nairobi and is in the process of relocating to Ethiopia are themselves not based upon any tangible evidence but upon hearsay. The Plaintiffs could for instance have asked the Defendant’s employer in Nairobi to confirm in writing that he is no longer in their employment.

In the case of **KURIA KANYORO (t/a AMIGOS BAR) -VS- FRANCIS KINUTHIA NDERU & OTHERS (1998) 2 KAR 126** the Court of Appeal held as follows-

“4. The power to attach before judgment must not be exercised lightly and only upon clear proof of the mischief aimed at by Order 38, rule 5, namely that the Defendant was about to dispose of his property or to remove it from the jurisdiction (of the court) with intent to obstruct or delay any decree that may be passed against him.”

To my mind the same caution applies in equal measure in respect to the power to arrest before judgment. In the present case no case has been made out by the Plaintiffs for invoking the very drastic power of the court under Section 63 of the Act and Order 38 of the Rules. The application must fail. It is hereby dismissed with costs to the Defendant.

Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2004.

H. P. G. WAWERU

JUDGE