



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 273 OF 2004

NEXTECH LIMITEDPLAINTIFF

VERSUS

WANZA DRAPERS LTD & ANOTHERDEFENDANTS

RULING

This Ruling concerns an application brought by the plaintiff by way of a Chamber summons under Order XXXVIII, rules 1,2, and 3 thereof in which the plaintiff/applicant seeks orders inter alia that:-

- (1) Mr. Chavda, a director of Wanza Drapers Limited be arrested and brought to court to show cause why he should not furnish security for defending this suit.
- (2) In the alternative the property known as LR No. 209/1773 be attached pending the hearing and determination of this suit.

The application is dated 1 st September, 2004 and is premised on the grounds that: - Page 1

- (1) the respondents are likely to dispose the building standing on LR. No. 209/ 1773 which is the only known asset of the 1stdefendant, and if the suit succeeds execution will be defeated,
- (2) all the directors of the first defendant company have relocated to Australia and the remaining director Mr. Chavda is also about to leave;
- (3) the applicant will suffer irreparable loss and damage if the application is not allowed.

The application was also supported by the affidavit of one Eugene Victor Wandera sworn on 1.9.2004 and filed in court on the 2.9.2004. The deponent swears that he is the Managing Director of the plaintiff and is competent to swear the affidavit. This deponent swears that the Respondent is in the process of disposing LR No. 209/1773 the only known asset belonging to the Respondent i.e. Wanza Drapers Limited. The Managing Director also depones that if the premises are sold, any consequential order would be rendered null and void and the process of execution will be defeated.

The deponent also swears that he has established that the directors of the company are relocating to Australia and only one Director, one Mr. Chavda is still within Kenya, and he too was shortly due to leave the court's jurisdiction. The Managing Director swears that as a result of the break-in the operation of the applicant were paralysed and the compensation sought is likely to be substantial. He also swears that he has a good case with high chances of success, and will suffer irreparable loss and damage if the

respondent disposes the building, as it is its only known asset. He says that the respondent will not suffer any prejudice if they were restrained from disposing the building and the balance of convenience shifts In favour of granting an order of attachment. He further swears that it is in the interest of justice, fair and expedient that the property be attached.

Mr. Kwengu Counsel for the Plaintiff the Applicant followed the grounds and averments in the affidavit of the Plaintiff's Managing Director. He submitted that there is no denial that the property LR. No. 209/1773 has been sold or that the other directors have left the country and are therefore outside the jurisdiction of this court. The court should therefore reject the averments by Mr.

Affidavit sworn on 24.9.2004, and prayed for the grant of the orders sought.

Mr. Gachii Counsel for the respondents in his submissions relied upon the averments in the Replying Affidavit of I.M.L. Chavda, aforesaid, who admits that he is one of the directors of the 1st defendant, Wanza Drapers Limited (and not **Wanza Drapers Limited** as stated in the plaintiffs pleadings). The substance of this Replying Affidavit is this: -

- (a) That although the 1st defendant has been sued as a result of the break-in the plaintiff's premises the 1st defendant is not responsible for the damage or loss of the items which were stolen therein, as there was neither a contract that the 1st defendant would provide any security or insure the plaintiff's premises.
- (b) That if such theft occurred the same was a criminal act for which the 1st defendant was not liable for, and that it was the duty of the police to investigate, arrest and prosecute the culprits.
- (c) That the 1st defendant has a good defence with a high probability of success.
- (d) That the 1st defendant and has sold LR. No. 209/1773 and its directors have not relocated to Australia, and that the deponent has other business in Kenya, which would not allow him to leave Kenya.

This director further avers that the plaintiff's application has no merit and the prayers sought are merely to harass, intimidate or embarrass him for no good cause.

Counsel for the defendants submitted that enabling provisions relied upon for the application are inappropriate, there is no evidence of delay of suit, there is no avoidance of the process of court, the defendants have filed a memorandum of appearance, and a statement of defence. There is no obstruction, there is no prayer in the plaint for any of the prayers sought in the application, there is no monetary claim, and that no decree will arise from a declaration. The plaintiff was a tenant; it is not the Defendant's responsibility to compensate tenants for loss of stolen goods. There is no report to the Police of any theft. There is no contract of indemnity. He submitted that the suit was frivolous and had no chance of success. There was no evidence that the other directors of the 1st defendant had left the jurisdiction of the court.

In a short reply, Mr. Kwengu submitted that it was the landlord's responsibility to provide security and if the directors of the 1st defendant, were not relocating no reason had been given for the 1st defendant's sale of their only known immovable property. It was to avoid orders that the plaintiff will get against the 1st defendant.

The entire application is premised upon the provisions of Order XXXVIII rules 1,2,5 and 6 Section 3A of the Civil Procedure Act, the Judicature Act, and all enabling provisions of the law. Rules (5) and (6) of the said Order concern situations where a decree has been issued (rule 5) and where the defendants fails to show cause why he should not furnish the security required (rule 6), and also rule 2, where the defendant fails to show why he should not furnish security, the court may order deposit of money to be made into court. This leaves us with rule 1 which provides as follows: -

"Where at any stage of a suit, other than a suit of the

nature referred to in paragraphs (a) to (d) of section

12 of the Act, the court is satisfied by Affidavit or otherwise.

(a) The defendant with intent to delay the plaintiff, or delay the execution of any decree that may be passed against him

(i) has absconded or left the local limits of the jurisdiction of the court or;

(ii) is about to abscond or leave the local limits of the jurisdiction of the court, or (iii) has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof; or

(b) that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit the court may issue a warrant to arrest the defendant and

bring him before the court to show cause why he should not furnish security for his appearance;

PROVIDED that the defendant shall not be arrested if he

pays to an officer entrusted with the execution of the

warrant any sum specified in the warrant as sufficient to satisfy

the plaintiff's claim; and such sum shall be held in deposit by

the court until the suit is disposed of or until the further order of the court;"

As I understand this rule 1, the plaintiff must satisfy the court of the following: -

(1) intent by the defendant, to delay the plaintiff from prosecuting his suit;

(2) intent to avoid any process of court, or

(3) intent to obstruct or delay the execution of the decree that may be passed against him;

(a) has absconded and left the local limits of jurisdiction.

(b) is about to abscond or leave the local limits of jurisdiction.

(c) Has disposed or removed from the local limits of the jurisdiction his property,

(d) Is about to leave Kenya in circumstances affording reasonable probability that the plaintiff will be delayed in execution of the decree that may be passed against him, (the defendant);

If the above conditions are fulfilled to the satisfaction of the court, the court will issue the necessary arrest warrants. If the conditions are not satisfied, the court will obviously not issue an order either of arrest of the defendant or attachment of the defendant's property or any part thereof.

Counsel for the plaintiff's told the court that it took sometime to serve the 1st defendant's director. Be it as it may. The suit herein was filed on 28.5.2004. A Memorandum of Appearance was filed on 25.6.2004 on behalf of the Defendants, by the firms of Eboso and Wandago, and Murungi & co. Advocates respectively. Statements of defence were filed on 9.7.2004 and 14.7.2004 on behalf of the 1st and 2nd Defendants respectively. The Plaintiff's Chamber Summons the subject of this ruling was filed on

20.7.2004, under a Certificate of Urgency. A party may be said to delay the prosecution of a suit if-----.

- (a) seeks extension of time to file his defence,
- (b) seeks further and better particulars, even if he is in possession of or has access to those facts;
- (c) seeks undeserved amendments of pleadings.
- (d) Files motions or cross motions and applications.
- (e) Refuses to attend court or invitation for discovery of documents,
- (f) Applies for unnecessary adjournments.
- (g) Files frivolous or vexatious applications;
- (h) Or otherwise abuses the process of court. This list is not exhaustive.

These may all be said to be intent to delay or obstruct the plaintiff's prosecution of the plaintiff's case or execution of any decree issued there-under. As to leaving the court's jurisdiction, or leaving permanently the courts jurisdiction, there is nothing in the suit to warrant the arrest of the 1st defendant's directors or any of them. The plaint does not claim any monetary decree, it merely seeks a declaratory order that the defendants are liable for the plaintiff's loss and they should accordingly compensate the plaintiff. A declaratory order does not confer upon the plaintiff a right to any monetary value, and for this reason alone I would declare the plaintiffs application as both bankrupt and incompetent. It has no foundation in the suit, and a party shall not found in an interlocutory application, a new cause of action, which he has not first pleaded in his statement of claim or plaint. It is little law that parties are bound by their pleadings, and may only depart from them by amendment if leave is given by the court.

In this application, it would be a misplaced discretion, and indeed, an unwarranted act of harassment, intimidation and embarrassment for no good cause to order for the arrest of the 1st Defendant's directors or anyone of them. No evidence was contained in the supporting affidavit of the 1st Plaintiff's Managing Director, Mr. Eugene Victor Wandera, that the 1st Defendant's directors except Chavda had left the court's jurisdiction, mere averments are not proof of such allegations.

In all the plaintiff's application must fail, and it IS dismissed with costs.

DeliveredanddatedatNairobithis14 th day of October, 2004.

ANYARA EMUKULE AG.

JUDGE