



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
MILIMANI COMMERCIAL COURT
CIVIL SUIT NO. 581 OF 2004**

мбаки агрїк инпутс лїмітедPLAINTIFF

VERSUS

EQUIP AGENCIES LIMITEDDEFENDANT

RULING

The plaintiff's application dated 29th October 2004 is brought under Order XXXVIII Rules 1,2,4,5 and 6 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act.

The Plaintiff seeks the following orders: -

- The Honourable court do issue warrants of attachment of the defendants movable and immovable property and in particular vehicles, machines, hardware, chemicals and the goods of trade and in stock in the defendants godowns/shops or premises before judgment in this suit.

Alternatively

The Honourable court be pleased to issue a warrant to arrest the defendant's directors and bring them to court to show cause why they should not furnish security for their appearance and for the sum claimed in the plaint.

- Any other relief the court may deem just to grant for the interest of Justice.

The plaintiff's argument is that the plaintiff who deals with Agro Chemicals, seeds, animal health products, general hardware, consultancy, supplied the defendant with goods worth kshs 11, 250, 000. The defendant acknowledged receipt of those goods on a delivery note and issued a cheque in favour of the plaintiff for kshs 11, 250, 000/- dated 30th June 2003. The defendant instructed the Plaintiff not to bank the said cheque and instead issued the plaintiff with a replacement cheque for similar amounts dated 15th April 2004, which on being presented to the bank was dishonoured. As a result of that non-payment of that cheque the plaintiff and its counsel made demand to the defendant who responded by seeking indulgence from the plaintiff to be allowed a further period to repay the debt.

The deponent of the affidavit in support of the application, Daniel P Marangu, who described himself as a director of the Plaintiff deponed that he had been monitoring the defendant and in so doing discovered the defendant moved away all their vehicles and machines from Mombasa road, where they operate, to another company based on Dar-essalaam Road called Inter-Tractor Company which company deals in spare parts. He further said that that movement of property was done hurriedly since the filing of this suit and he believes it was attempt to delay or obstruct execution of any decree that the plaintiff may obtain in this suit. The deponent then stated that the plaintiff required protection from the court since he

did not know of any other property owned by the defendant apart from the property that was moved as aforesaid.

The defendant did not file a replying affidavit or grounds of opposition and it therefore can be taken that the defendant does not dispute the facts as contained in the supporting affidavit. The defence counsel chose to argue the preliminary objection that had been filed after being given leave by the court to respond only on points of law.

The defence counsel submitted that the plaintiff's application is not maintainable because the plaintiff had failed to show that the defendant has left or was leaving the local limits of this jurisdiction; had failed to prove disposal of property by the defendant, in other words counsel argued that the plaintiff had not placed material to satisfy the requirement of Order 38. He further said that the fact the defendant's property had been moved to Inter-Tractor Company was not evidence of sale.

The defendant's counsel submitted that the plaintiff was seeking trial by affidavit evidence and that he said ought not to be allowed particularly since the defendant had not filed a defence.

Defence counsel also attacked the plaintiff's application in that it was defective for failing to comply with order 50 rule 15 of the Civil Procedure Rules. This rule states: -

“(2) Every motion and summons shall bear at the foot the words -

“If any party served does not appear at the time and place above - mentioned such order will be made and proceedings taken as the court may think just and expedient.”

Counsel argued that this rule was in mandatory terms and the failure to follow it cannot be cured by Order 50 Rule 12 because this rule deals with omissions to state rule. He also was of the view that Section 3A of the Civil Procedure Act cannot help.

As I begin to consider my ruling I am clear in my mind that the object of Order 38 is to secure the plaintiff against any attempts on the part of the defendant to defeat execution of a decree that might be passed against him.

The court has to be satisfied on two points. One, that the plaintiff has a cause of action which is prima facie unimpeachable, and two, the court should have reason to believe that unless jurisdiction is exercised there is a real danger that the defendant will remove himself from the ambits of the powers of the court.

As stated earlier in this ruling the defendant did not file any papers in opposition to the plaintiff's claim and that evidence has to be accepted as it is. The plaintiff to my mind and to my satisfaction has shown that it has a bona fide case against the defendant. The plaintiff exhibited documents evidencing the delivery of goods, the subject of this suit, then exhibited two cheques for KShs 11, 250, 000 issued by the defendant, which cheques were said to have been dishonoured and finally the plaintiff exhibited its demands and its counsel's demand to the defendant which demands were responded to by the defendant who acknowledged the debt and sought indulgence to pay.

I do not accept defence counsel's argument that the plaintiff had failed to show material that falls within the ambits of Order 38. Order 38 rule 1 (iii) provides that attachment before judgment or provision of security which can be ordered when the defendant has disposed his property.

The defendant admitted that it has moved its property to another company called Inter-Tractor since it did not contradict the Plaintiff's director's averments. I am satisfied that is sufficient evidence of disposal of property and it is pertinent to note that this disposal took place after summons were served upon the defendant.

Order 38 rule 2 states that where a defendant fails to show cause as required under Order 38 rule 1, the court can order the defendant to deposit money or other property sufficient to answer to the claim. Since

the object of Order 38, that is attachment before judgment, is to prevent a decree when passed from becoming in fructus. I am minded to order that the defendant do deposit security.

The defendant's other objection to the plaintiff's application is in regard to the plaintiff's failure to comply with order 50 rule 15.

In considering this rule I need to ask myself, what is the mischief that was directed towards it. The rule as it clearly states directs a warning to any party served with an application and fails to attend court at the time and place indicated ran in the danger of having orders issued against him. If that is the mischief then at most what the court would do is to refuse to grant orders as prayed when the respondent fails to attend the hearing of an application, which does not comply with order 50 rule 15. In other words the court will refuse to proceed exparte even if service on the respondent is proven, when that order is not displayed in the application. I do not therefore accept defence counsel's argument that lack of compliance with that rule automatically renders an application defective. Even if I am wrong I am of the view that the same can be cured by Order 6 rule 12.

The orders of this court are as follows: -

(a) That the defendant is hereby ordered to furnish within 30 days from this date hereof a banker's guarantee to pay the plaintiff kshs 11, 250, 000. The said guarantee is to be furnished to the plaintiff's counsel.

(b) In default of (a) above the plaintiff is hereby granted leave to carry out an attachment of the defendant's goods to the value of kshs 11, 250, 000 and, on attachment the goods shall be kept in storage to await the conclusion of this suit.

(c) The Plaintiff is awarded the costs of the application dated 29th October 2004.

Dated and delivered this 24th day of November 2004.

MARY KASANGO

AG JUDGE