



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO 274 OF 2002

SOUTHERN CREDIT BANKING CORP. LTD PLAINTIFF

VERSUS

UNIVERSAL MOTORS LIMITED 1ST DEFENDANT

TARLOCHAN SINGH DHANJAL 2ND DEFENDANT

SUKHDEN KAUR DHANJAL 3RD DEFENDANT

JATINDER SINGH DHANJAL 4TH DEFENDANT

RULING

The Plaintiff filed this suit on 5th March, 2002 to recover Kshs.8,782,499.75/= from the defendants together with interest at 34% per annum and a further compounded penal rate of 4% per month from 1st October, 2001 till payment in full. This sum was claimed on account of an overdraft and other financial facility which the Plaintiff granted the 1st defendant who is the principal debtor. The financial accommodation which the 1st defendant was granted was to the tune of Kshs.11,864,650/=. The 2nd, 3rd and 4th defendants provided guarantee of payment. The facility was granted by a letter of offer dated 9th October, 1997.

On 27th February, 2003, the Plaintiff filed an application by way of summons in chambers, seeking the following orders:-

(a) That pending the determination of this application, the 2 nd defendant do personally attend court to surrender his passport to the court as security for his future attendance sho uld the orders sought in the application be granted

3. (a) That the Honourable court be pleased to order the 2 nd and 3 rd defendants to show cause why they should not furnish security jointly and severally for their respective appearance

(b) That in default of such cause being shown the 2 nd and 3 rd defendants do furnish security sufficient to secure the Plaintiff's claim and costs herein.

In the alternative, the Plaintiff sought an order to compel the defendants jointly and severally, to give security for the whole of the Plaintiffs claim with respect to costs and the entire claim, and that such security be by payment of money sufficient to cover the Plaintiffs claim. The application is supported by the annexed affidavit of the Plaintiff's debt recovery manager in which it is deponed that, with an intent to

delay or obstruct any decree that may be obtained against the 2nd and 3rd defendants in future, and further defeat the 2nd and 3rd defendant's creditors, the 2nd and 3rd defendants have emigrated to the United Kingdom and that prior to the said emigration, the 2nd defendant disposed off his immovable property.

It is further deponed that the 1st defendant transferred its business to Mr Sanjeet Singh Dhanjal trading as Crossbow Motors with effect from 2nd January, 2001. This information is contained in gazette notice number 1411 dated 2nd March, 2001 [annexure "AM 5 (b)"] and on 16th February, 2002, the 1st defendant was placed under voluntary winding up (see annexure AM 5 (a)). The applicant believes that the transfer of the 1st defendant's business, followed in quick succession by the voluntary winding up of the 1st defendant was undertaken with intent to avoid court process, obstruct or delay execution of a decree issued in the future in favour of the Plaintiff against the 1st defendant. All this was done before the filing of this suit.

When the application came for hearing on 7th April, 2003, the second prayer in the application was abandoned as counsel for the applicant informed court that the 2nd and 3rd defendants were in Kenya and that he had also seen their passports. They were present during the hearing of the application, pursuant to an order made by the court, Osiemo J. on 24th March, 2003.

The application is brought under the provisions of Order XXXVIII Rules 1 (a) (i), (iii), 2 and 12 of the Civil Procedure Rules and Sections 3A and 63 of the Civil Procedure Act, (Cap 21 Laws of Kenya). Rule 1 of Order XXXVIII provides that:-

"Rule 1. Where at any stage of a suit the court is satisfied by affidavit or otherwise

(a) that the defendant with intent to delay the Plaintiff, or to avoid any process of the court, or to obstruct or delay any decree that may be passed against him _____

(i) _____

(ii) _____

(iii) has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof

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. As the court, Osiemo J ordered that the defendants attend court during the hearing of the application and as they were present during the hearing of the said application, I take into account the fact that it has not been shown that the defendants have left the jurisdiction of the court or that they are about to do so and the prayer requiring that they surrender their passports having been abandoned, the question of their furnishing security for their appearance, contained in prayer number 3 of the application cannot in the circumstances stand. I shall therefore determine the alternative prayers in the said application, and that is that the defendants be ordered to give security for the whole of the Plaintiff's claim with costs for the reason that:-

1. The defendants with intent to delay, defeat or obstruct the execution of the Plaintiff's decree that may be possibly obtained, have sold and transferred the 1st defendant's business and thereafter placed the 1st defendant in voluntary liquidation

2. The actions complained of above were aimed at, avoiding and/or defeating the creditors and court process and any future decree in favour of the Plaintiff

3. The second defendant has sold off his immovable assets with intent to defeat creditors, obstruct justice and delay the trial of the Plaintiff's claim.

The defendant's concede that the only asset which their family had, a piece of land known as LR 2/332 was sold. The explanation for the sale is that it was to raise funds for the treatment and medical expenses of the 2nd defendant in the United Kingdom, which treatment he received and returned to Kenya on completion of the same. It is not denied that the 1st defendant commenced voluntary winding up proceedings but as it is not party to the present application, the issue of the 1st defendant commencing voluntary winding up proceedings to defraud or avoid creditors will obviously be dealt with in the matter of the voluntary winding up proceedings of the 1st defendant.

The allegation that the 2nd defendant sold off his immovable assets to obstruct justice and delay the trial of the Plaintiff's claim cannot be true. This is because, the sale of the land was on 30th January, 2001, according to the West Minister report dated 7th August, 2001. This suit was filed on 5th March, 2002, over one year later. At the time of the sale of the said land, there was no case pending against the defendants and I see no evidence that the Plaintiff had notified the defendants that a suit would be filed against them. The sale could not have been aimed at delaying a suit which had not been filed. There is no further evidence to show that the defendants have sold any other property or that they have some property which they are about to sell to defeat a decree that may be passed in favour of the Plaintiff herein. The defendants have explained why the land of the 2nd defendant was sold i.e to meet the treatment expenses of the 2nd defendant abroad. This has not been disputed by the applicant. The report by West Minister Commercial traders to the effect that the 2nd and 3rd defendants were resident in the United Kingdom is not true. The passport of the 2nd defendant (annexure "JSG 1" shows that the last time he travelled to the United Kingdom was in the year 2001 and he returned on 16th August, 2001 even before this suit was filed. As for the 3rd defendant she too travelled to the United Kingdom in the year 2001 and was back in August 2001, again, before the suit was filed.

As I have said elsewhere in this ruling, the reason why the 2nd defendant's land was sold, as given by the defendants, has not been disputed. The 2nd and 3rd defendants, must have travelled to the United Kingdom for the treatment of the 2nd defendant, and the fact that they have been in the country since August 2001, before this suit was filed, is evidence that they did not have the intention to settle in the United Kingdom. If the reason for their travel was to avoid any suit that may be filed against them, then I do not think that they would have returned.

The Plaintiff has not made out a case to warrant calling upon the 2nd and 3rd defendants to furnish security for the whole or part of the Plaintiff's claim and I find no merit in the Plaintiff's application dated 27th February, 2003. The same is dismissed with costs to the 2nd and 3rd defendants.

Delivered at Nairobi this 8th day of May, 2003.

S. C. ONDEYO

JUDGE

8.5.2003

I certify that this is

a true copy of the original

DEPUTY REGISTRAR