



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 2012 OF 2000

KENINDIA ASSURANCE COMPANY LIMITED
PLAINTIFF

VERSUS

COMMERCIAL BANK OF AFRICA LIMITED 1ST
DEFENDANT

PETER KARIUKI T/S

LIBCO MERCHANT AUCTIONEERS 2ND
DEFENDANT

RULING

On 10.11.2000, the plaintiff Kenindia Assurance Company Limited instituted this suit against the two defendants for the followings orders:-

“(a) A Declaration that the execution proceedings instituted by the 1 st Defenda nt and the Warrant of Attachment obtained on the foot of the said proceedings in High Court Case No. 1347 of 1998 are invalid and null and void in law;

(b) A Declaration that the 2 nd Defendant’s purported proclamation and attachment of the Plaintiff’s move able assets are invalid and null and void in law;

(c) A Declaration that the 2 nd Defendant is not entitled to any fees at all on the foot of the said purported attachment and/or proclamation;

(d) A permanent injunction restraining the 1 st and 2nd Defendant s (whether by themselves, or by their servants or agents or otherwise howsoever), from demanding and/or enforcing payment of any fees to the 2 nd Defendant on the foot of the said attachment and/or proclamation.”

Simultaneously with the suit, the plaintiff lodged an application, under certificate of urgency pursuant to O. XXXIX, rules 1, 3 and 9 of the Civil Procedure Rules for an injunction in exactly the same terms as those sought in the suit.

The circumstances giving rise to this suit are that on 29.3.1998, the 1st defendant sued the plaintiff in H.C.C.C. No. 1347 of 1998 for the recovery of a certain sum of money secured by two guarantees executed by the plaintiff in favour of the 1st defendant. After the close of the pleadings in that suit, the 1st defendant applied for summary judgment under O. XXXV of the Civil Procedure Rules, which said application was allowed by Hon. Commissioner Ransley and judgment entered in favour of

1st defendant against the plaintiff in the sum of Shs.31,732,820/80 with costs and interest.

The 1st defendant's costs were subsequently taxed at Shs.495,000/= following which the 1st defendant made an application for execution by attachment and sale of the plaintiff's moveable assets. Thereafter, a warrant of attachment in respect of the plaintiff's moveable assets was issued by this court. Upon receipt of the warrant, the 2nd defendant to whom it was directed issued a proclamation of attachment of the moveable property of the plaintiff on 16.2.2000 but on 17.2.2000, the plaintiff paid the full decretal amount including costs and interest in the aggregate sum of Shs.37,008,005/= thus making the intended auctioning of the plaintiff's property unnecessary.

The dispute that followed between the parties hereto and which is the subject of these proceedings relates to the claim by the 2nd defendant for Shs.561,470/= as his fees for the attachment of the plaintiff's property. The plaintiff asserts that the 2nd defendant is not entitled to any fees whether in respect of the purported proclamation or attachment. In regard to that contention the plaintiff applied under Rule 55 of the Auctioneers Rules to the Deputy Registrar of this court to have the fees disallowed allegedly because the application for execution was fatally defective on account of the 1st defendant's failure to specify the particulars of the moveable assets sought to be attached as is mandated by O. 21 rule 7(2) of the Civil Procedure Rules as read with Form No. 5 in Appendix D of the same Rules. That application was heard and dismissed by the learned Deputy Registrar (Mrs. Lesiit).

The dismissal of the application to disallow the fees does not appear to have deterred the plaintiff. It promptly lodged an appeal to the High Court against the ruling of Mrs. Lesiit. The appeal was heard by Hon. Commissioner Ransley who dismissed it on 2.11.2000. Some 8 days thereafter, the plaintiff filed this suit in which he raises the same issues which it raised before the Deputy Registrar and also before Hon. Commissioner Ransley. The orders sought in the suit have been stated above.

The main issues that arise for determination are in my view as follows:-

- (a) Is the plaintiff entitled to bring a fresh suit to challenge entitlement to fees claimed in respect of an attachment carried out pursuant to a different suit; and
- (b) Does an injunction lie in the circumstances of this case?

Regarding the first issue, Mr. Amoko for the plaintiff submitted that the 2nd defendant is not entitled to any fees because the warrants of attachment and the proclamation giving rise to the claim for fees are null and void and of no effect. In his response to this point, Mr. Amollo for the two defendants stated that the plaintiff was barred by law from bringing a suit on the grounds it was arguing in this case. In support of that contention, Mr. Amollo referred to Section 34 of the Civil Procedure Act which provides:-

“S. 34 (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”

The issues raised in this suit and therefor in the instant application relate to the claim for fees by the 2nd defendant for the attachment and proclamation of the plaintiff's goods in execution of the decree issued in HCCC No. 1347 of 1998. The issues clearly arise between the parties to the said suit; they also relate to the execution of the decree in the same suit. In those circumstances, they are in my view, caught by the provisions of Section 34 of the Civil Procedure Act. Accordingly, I find that the plaintiff is not entitled to bring a separate suit on the same issues between the same parties. For those reasons, I agree with Mr. Amollo that this suit is incompetent.

Although what I have said above is sufficient to dispose of this matter, I think it is also necessary to go further and consider the second issue referred to above because in my view it demonstrates how misconceived the entire suit and the application is.

Besides other reliefs, all of which, it has to be observed, seek declarations relating to the execution proceedings referred to above, the plaintiff prays for a permanent injunction restraining the 1st and 2nd defendants from demanding or enforcing payment of any fees to the 2nd defendant in the form of the attachment and proclamations which the plaintiff claims were invalid. On the basis of that prayer and also on the strength of his averments in the plaint regarding the alleged invalidity of the attachment and proclamation, the plaintiff seeks an interlocutory injunction under O. XXXIX Rules 1, 3 and 9 of the Civil Procedure Rules in the same terms as the prayer for the permanent injunction aforesaid.

Rule 1 of O. 39 of the Civil Procedure Rules lays down the circumstances in which temporary injunctions may be granted. It states:-

“O.XXXIX r.1 Where in any suit it is proved by affidavit or otherwise: - (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree ; or (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction ...” (emphasis mine).

As was stated by Bosire, J. as he then was, in the case of Kiwayu Safari Village Ltd. V. Musiara Ltd. (HCCC No. 4759/89), O. XXXIX Rule 1 of the Civil Procedure Rules is intended to deal with situations where property in dispute is in danger of being wasted, damaged or alienated or in cases where the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in execution of any decree that may be passed against the defendant in the suit.

It hardly needs to be stated that a claim for fees for attachment whether or not the same is justified and a dispute arising therefrom cannot by any stretch of the imagination be regarded as a dispute about property; nor can it be said in such a circumstance that property is being threatened with wastage, damage or alienation. Quite clearly therefore O. XXXIX r. 1 of the Civil Procedure Rules does not apply in the circumstances of this suit. For the above reasons, I am satisfied that both the suit and the application are incompetent and consequently the injunction sought by the plaintiff cannot be granted. The application is dismissed with costs.

Dated at Nairobi this 16th day of February, 2001.

T. MBALUTO

JUDGE