



**Ruzaik & another v Patel & another (Commercial Case E235 of 2024)  
[2025] KEHC 809 (KLR) (Commercial and Tax) (4 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 809 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E235 OF 2024  
JWW MONG'ARE, J  
FEBRUARY 4, 2025**

**BETWEEN**

**ARJUN RUZAIK & SUNITA RUZAIK ..... PLAINTIFF**

**AND**

**SUNDIP JAGDISHROY PATEL & HINA RAMBHAI PATEL ..... DEFENDANT**

**RULING**

**Introduction and Background:-**

1. The Plaintiffs filed this suit through a plaint dated 30<sup>th</sup> April 2024 claiming that they advanced the Defendants money on various dates between 2<sup>nd</sup> May 2013 and 14<sup>th</sup> April 2014 which loans were secured by executed blank cheque leaves and logbooks of various motor vehicles upon the understanding that the Plaintiffs would realize the securities in the event of default, at the Plaintiffs' sole discretion. That it was an express term of the lending contract that in case the Defendants fail to refund the said monies on the due dates, interest would accrue in the manner heretofore stated.
2. The Plaintiffs aver that in 2019 when they tried to realize the security by taking possession of and selling the said motor vehicles, they discovered, "to their horror", that the alleged motor vehicles were all insurance salvages and accident write-offs not worth anything more than the paper of the logbooks. They state that the act of giving false and due logbooks to the Plaintiffs was an act of fraud on the part of the Defendants and is actionable both under criminal and civil law. As such, the Plaintiffs seek inter alia USD 734,473 and interest at 12% from 31<sup>st</sup> December 2013. Contemporaneously with the plaint, the Plaintiffs have also filed the Notice of Motion dated 30<sup>th</sup> April 2024 under sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) and Order 39 Rule 5 of the Civil Procedure Rules, 2010 principally seeking for an order of attachment of the Defendants' properties and security in the sum of Kshs. 105,000,000.00/= pending the hearing and determination of this suit.



3. The application is supported by the grounds on its face and the supporting affidavit sworn by ARJUN RUZAIK on 30<sup>th</sup> April 2024. In response, the Defendants have filed the replying affidavit sworn on 21<sup>st</sup> May 2024 by SUNDIP JAGDISHROY PATEL. They have also filed a Notice of Motion dated 21<sup>st</sup> May 2024 seeking to strike out the suit for being time barred under section 4 of the *Limitation of Actions Act* (Chapter 22 of the Laws of Kenya). This application has been responded to by the Plaintiffs through Grounds of Opposition dated 1<sup>st</sup> July 2024. The applications were disposed by way of written and oral submissions by the parties' counsel which I have considered and together with the pleadings, I will make relevant references to in my analysis and determination below.

#### **Analysis and Determination:-**

4. Going through the applications, the responses and submissions, I propose to first deal with the Defendants' application that this suit is time barred. The Defendants state that this suit is an action for an alleged breach of contract for alleged actions that took place between 2013 and 2016. In their reply, the Plaintiffs state that the suit is not time barred as it is founded on fraud perpetrated by the Defendants, and which only came to light in the beginning of 2019 and that time started running upon discovery of the said fraud. The Plaintiffs rely on section 26 of the *Limitation of Actions Act* which provides as follows:-

26. Extension of limitation period in case of fraud or mistake

Where, in the case of an action for which a period of limitation is prescribed, either—

- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or
- (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:....
5. As stated in the introductory part, the Plaintiffs' suit is indeed founded on fraud allegedly committed by the Defendants as the security offered by them, specifically the logbooks, were not valid and that they constituted a fraud upon the Plaintiffs. The Plaintiffs have annexed WhatsApp communication between the parties and I note that in one of them, that of 15<sup>th</sup> November 2019, the Plaintiffs' deponent raises issue with one of the logbooks and states that the police have a concern with it. This lends credence to the Plaintiffs' position that this was when the alleged fraud was discovered and as such, I am inclined to accept the same as well. Thus, I find that time started running as from 2019 when the alleged fraud was discovered and when the Plaintiffs were attempting to realize the claimed debt and since the Plaintiffs filed the suit in 2024, it is my finding that the suit is within time. The Defendants' application dated 21<sup>st</sup> May 2024 is therefore not merited and the same is dismissed.
6. Turning to the Plaintiffs' application for attachment and security, the Plaintiffs have invoked Order 39 Rule 5 of the of the Rules which provides as follows:-

5.

- (1) Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him—

- (a) is about to dispose of the whole or any part of his property;



(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

7. The question then is whether he has made out a case to warrant grant of the application for attachment before judgment. Several decisions of our superior courts have laid down the principles to be followed when considering such an application. In *Kuria Kanyoko t/a Amigos Bar and Restaurant vs. Francis Kinuthia Nderu, Helen Njeru Nderu and Andrew Kinuthia Nderu* [1988] 2 KAR 1287-1334 the Court of Appeal stated as follows:-

The power to attach before judgement 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 with intent to obstruct or delay any decree that may be passed against him.

8. In *Shivam Enterprises Limited v Vijaykumar Tulsidas Patel T/A Hytech Investments* [2006] KEHC 257, Kasango J., amplified the requirements of proof under the subject rule and observed as follows:-

That a party would need to meet that high standard of proof before a party is ordered to supply security for the amount claimed. The jurisdiction that the Plaintiff invoked has to be appropriately exercised to ensure that a party meets the aforesaid high standards. It ought to always be remembered that the purpose of that jurisdiction is to secure the Plaintiff against the Defendants act aimed at defeating judgment that may be entered. It is however not the intention of that jurisdiction to harass or to punish the Defendant before judgment is entered against him.

9. It is clear from the decisions above that the threshold for granting the orders sought by the Plaintiffs is high and the court should grant the orders sparingly. The burden rests on the Plaintiffs to establish that the Defendants are about to dispose of the whole or any part of his property or they are about to remove the whole or any part of his property from the local limits of the jurisdiction of the court. The Plaintiffs, in their deposition have stated that the Defendants have abruptly shut down their business which is a clear indication that they are intent on hiding their assets with a view of defeating the Plaintiffs' claim. Further, that the Defendants have absconded from their residences and have failed to disclose their whereabouts. However, I note that the Plaintiffs have not set out any evidence to support these averments and which show, or from which the court can conclude, that the Defendants are about to dispose of their property or that they are about to remove it from this jurisdiction. My reading of the Plaintiffs' deposition is that they are merely apprehensive and fear or apprehension without a factual or evidential basis is insufficient support for an application under Order 39 rule 5 of the Civil Procedure Rules (see *Patrick Sagwa Kisia t/a Steg Consultants v Kay Construction Company Limited* [2020] KEHC 1279 (KLR)). In any event, the Defendants have deponed that they are reside and work for gain in Nairobi and that they are not a flight risk, a position that has not been rebutted by the Plaintiffs.



10. Therefore, I am in the agreement with the Defendants that the Plaintiffs' application does not meet the legal threshold for an application under Order 39 Rule 5 and the same is dismissed.

**Conclusion and Disposition:-**

11. In the upshot, I find that both applications dated 30<sup>th</sup> April 2024 and 21<sup>st</sup> May 2024 have no merit and the same are dismissed but with no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 4<sup>TH</sup> DAY OF FEBRUARY 2025**

**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

Mr. Mutuku for the Plaintiff/Applicant.

Mr. Carey Francis for the Defendant/Respondent.

Godfrey - Court Assistant

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