



Gadano General Trading Company Ltd v Alcon Holdings Limited (Civil Suit E167 of 2023) [2024] KEHC 7475 (KLR) (Civ) (20 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7475 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL SUIT E167 OF 2023**

JN MULWA, J

JUNE 20, 2024

BETWEEN

GADANO GENERAL TRADING COMPANY LTD PLAINTIFF

AND

ALCON HOLDINGS LIMITED DEFENDANT

RULING

1. Before the court is an Application dated 28/09/2023 filed simultaneously with an even date.
2. A perusal of the plaint shows the cause of action as a land dispute over the use of a property known as LR No. 12467 wherein the plaintiff is the Lessee and the defendant the Lessor by a lease agreement dated 11/11/2022 for a period of 5 years which was to expire on 31/12/2027 with a default clause, at paragraph 7 that: -

“Either party may terminate the lease Agreement by giving six (6) months written notice of such reasonable period as may be agreed in writing. The lessee to recover the cost of constructions in the event of a sale before expiry”.

3. By an Application dated 28/09/2023, the Plaintiff as lessee of the subject property sought orders:
 1. That this application be certified as urgent and fit to be heard forthwith, and the same be heard ex-pert and in priority to any other matter herein.
 2. That this Honorable Court do direct conditional attachment of such property of the Defendant/Respondent as shall be sufficient to satisfy a decree of the sum of Kenya shilling Thirty-Eight Million Nine Hundred and Seventeen Thousand (Kshs. 38,917,000/=).



3. That in the alternative the Defendant/Respondent be ordered to furnish security equivalent to the sum of Kenya shillings Thirty-Eight Million Nine Hundred and Seventeen Thousand (Kshs. 38,917,000/=) to satisfy any decree that may be passed against it.
4. That cost of this Application will be borne by the Plaintiff.
4. It is grounded on a Supporting Affidavit of Mohamed Ahmed Dahir sworn on an even date and grounds stated at its face.
Briefly, the plaintiff invokes the termination clause and seeks refund of Kshs. 38, 917,000/= being cost of the back filling of the land as a necessary measure for exploiting the property's economic potential as intended in the Lease Agreement on grounds that before expiry of the lease, the property was sold through a private treaty and the view registered proprietors assumed ownership and control of the property.
5. Refusal by the Defendant to compensate the Plaintiff of the above sum is the subject of the suit filed herein, and the application under review.
6. It is further postponed that the property having been sold the Defendants have no other business in Kenya and its Directors mostly reside in the United Kingdom, that there is fear and great risk that should the Plaintiff's claim succeed, it would be difficult to recover the money hence the orders sought in the Application.
7. In response to the Application the Defendant/Respondent filed a statement of defense dated 28/11/2023 denying being indebted to the Plaintiff.
8. Additionally, by a Replying Affidavit sworn by one Jaspriya Kaur Hanspal, who describes himself as the Administrator of the Estate of Davinder Singh Hanspal who currently holds majority shares in Alcon Holding Ltd, the Defendant, and annexed thereto a CR-12 and copy of grant of Probate with Written will for the Estate marked JKH – I and JKH – respectively.
9. The deponent acknowledges both the lease agreement and posits that the subject property was charged to Kenya Commercial Bank which encumbrance is evidenced in the encumbrance section of the lease agreement and further that the Plaintiff/Applicant never sought consent of the charger to make the constructions or improvements in the said property, stating that if any, the improvements were purely for the convenience and benefit of the plaintiff.
10. The deponent therefore disputes the plaintiff's claim stating that it is fabricated and unfounded and urges for dismissal of the suit.
The deponent further acknowledges that the subject property was sold by the charger for inability to service the loan.

Analysis And Disposition

11. In the Response to the Application under review the deponent as Administrator of the estate of the majority shareholder of the Defendant has not sufficiently responded to the issues raised.
What the Applicant seeks is attachment of the Respondents properties sufficient to satisfy the decree should it be successful in the suit and/or to furnish sufficient security equivalent to the claim of Kshs. 38,917,000/=.
12. The Defendant/Respondent has not told the court whether as the administrator of the Estate, the Estate would be financially able to pay the claim should the Plaintiff be successful in the suit.



13. The Defendant is a limited liability company incorporated and operating its business in Kenya. The CR-12 annexed hereto as JKH – issued by the Registrar of Companies on 11/01/2018 shows the Directors of the Defendant Company as Davinder Singh Hanspal and Inderfit Singh to be British Citizens, and holding 667 and 333 shares respectively. It is not in dispute that the majority shareholder Davinder Singh Hanspal is now deceased as stated in the grant of probate issued on 21/5/2012. The deponent has not told the court whether the other director resides in Kenya or not, but the CR-12 alluded to above, he is resident in the United Kingdom, unless otherwise proved.

14. Order 39 Rule 5 of the *Civil Procedure Rules* provides:

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; or
- b. Is about to remove the whole or any of his property; or
- c. Is about to remove the whole or any of his property from the local limits of the jurisdiction of the court the court may direct 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.

15. The only known property of the defendant has already been sold as confirmed in the Replying Affidavit to the application. However, the defendant's advocates submitted orally that the rent from the property is being collected by the plaintiff, a submission not supported by any tangible evidence.

The Applicant has the burden to prove that the Respondent's objective and goal is to obstruct or delay any decree that may be passed against it.

The court of Appeal in *Kuria Kanyoro t/a Amigos Bar & Restaurant V. Francis Kinuthia Nderu & Others* (1988) 2KAR 126 rendered itself thus: -

“The power to attach before judgment must not be exercised lightly and only upon clear proof of 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”.

16. Whereas the Plaintiff/Applicant seeks for an order of attachment or provision of security under Order 39 Rule 5 of the *Civil Procedure Rules* also provides that the Respondent ought to be given notice to attend court to appear and show cause why he should not furnish security.

17. This in my view would be more appropriate as the application is opposed. The Respondent denies that the Defendant's directors are foreign and at the same time submitting that the Directors are all deceased, and that mechanisms are being put in place to rectify the situation.

18. Indeed the court in the *Kanyoro case* (supra) held that vague allegations are insufficient for an order for security to be granted.

However by the averments in both the supporting and opposing affidavits by the parties, I find reasonable apprehension that the defendant may not be able to satisfy the judgment sum should the



plaintiff's case succeed. That apprehension is established not only by the Plaintiff/Applicant but also by the Defendant/Respondent itself. See paragraph 20 above, among other reasons stated in the affidavits.

19. The Court is therefore satisfied in terms of Order 39 Rule 5(1) *Civil Procedure Rules* that there is real need that the sum claimed by the plaintiff from the defendant be secured by a court order.
20. The court therefore orders and directs that summons to attend court do issue to the Administrator of the estate of the Late Davinder Singh Hanspal and Inderjit Singh a co-director of the Defendant to attend court on 25/7/2024 at 9:00 am to show cause why they should not furnish security in the sum of Kshs. 38,917,000/= before hearing and determination of the suit herein in terms of provisions of Order 39 Rule 5 (1) of the Civil Procedure Rules as prayed for at paragraph 3 of the motion dated 28/9/2023.
21. Costs of this Application shall abide outcome of the case.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF JUNE, 2024

JANET MULWA

JUDGE

