



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC. CIVIL CASE NO. 197 OF 2017

SAMSON TEELA AKUTEPLANTIFF /APPELLANT

VERSUS

KENNETH J. KAMAU NGIGI.....1ST DEFENDANT/RESPONDENT

TWFORD CERAMICS COMPANY LIMITED.....2ND DEFENDANT/RESPONDENT

THE HON. ATTORNEY GENERAL3RD DEFENDANT/RESPONDENT

RULING

What is before court for determination is the Plaintiff's Notice of Motion Application dated 25th November, 2020 where he seeks the following orders:

- a) Spent
- b) That an order for security to satisfy a decree be granted. That this Honorable court be pleased to grant an order for attachment before judgment, directed to and or issued against Twyford Ceramics Company Limited, the 2nd Defendant (herein also referred to as "Twyford") and or to KEDA (Kenya Ceramics Company Limited) hereinafter referred to as "KEDA" and or to their, respective, successors and assigns, if any, to forthwith, and in any event within fourteen (14) days of this order being served upon them or any one of them, pay into a sum of Kenya Shillings five hundred millions (Ksh.500,000,000=) to be held in deposit by and or to be at the disposal of the Court until this suit is disposed of or until further orders of this court.
- c) An order for further deposit for security for decree and costs. That this honorable Court be pleased to grant an order, for further attachment before judgment, directing Twyford and or KEDA and or their, respective, successors and assigns to deposit into court, monthly, on the 15th day of every calendar month commencing from 15th December 2020 a sum of Kenya Shillings ten million (Kshs.10,000,000=), such order to remain in force until further orders of this court.
- d) That pending payment into court of the first said sum of Kenya shillings five hundred million (Kshs.500,000,000=) this honorable court be pleased to grant an order of temporary injunction directing Twyford and or KEDA and or their respective, successors and assigns to forthwith cease all operations and or works on the suit property, Title Number: KAJIADO DALALEKUTUK/1320, until the order is fully complied with.
- e) That for reasons to be recorded, this Honorable Court be pleased to order and or grant that the Plaintiff/Applicant be and is at liberty to add or enjoin KEDA (Kenya Ceramics Company Limited as Defendant in this suit.
- f) That this honorable court do grant and direct that the Plaintiff/Applicant need not amend the Plaint, just because of adding KEDA as party, Defendant, in this suit.
- g) That for reasons to be recorded, this honorable court be pleased and or deliver any other or further orders or rulings which may be necessary or become necessary to enable the court to effectually and completely adjudicate upon and settle all or any questions and or issues involved or that may arise, in this suit.
- h) That the 1st and 2nd Defendants/Respondents be condemned to pay costs of this Application.
- i) That the Court be and is at liberty on application by the Plaintiff/Applicant to issue any other and or further orders that this Honorable court may, in the circumstances, deem fair and just to grant in the interest of justice.

The application is premised on the grounds on the face of it and the supporting affidavit of Samson Teela Akute where he deposes that the Government Printer's, by its letter dated 22nd July, 2016 Ref: GP/OP/14/535 confirmed that his title deed of the suit property was genuine while that of the 1st Defendant was not genuine. He contends that the 2nd Defendant's change to a new entity 'KEDA' with different shareholding and directorship of Chinese nationals despite retaining its membership number, makes its non-existent. He insists that if 'KEDA' is not enjoined to the suit, he will suffer irreparable loss and damages. He asserts that he is reliably informed that the 2nd Defendant is secretly moving machinery from the suit property. He claims that KEDA's debentures of USD. 600, 000 and Kshs. 300, 000,000 implies that it is heavily indebted with no known assets in Kenya. He alleges that the 1st Respondent sold the suit property to the 2nd Respondent at Ksh.235, 000,000 yet its market value was Kshs. 500, 000,000. He asserts that the 2nd Defendant paid Ksh.3, 030,500 to the 1st Defendant despite its occupation of the suit property since 2015.

The Application is opposed by the 1st Defendant who filed Grounds of Opposition dated 11th January, 2021 seeking dismissal of the instant Application with costs. He relied on the case of **Okiya Omtatah Okoiti v Communication Authority of Kenya & 8 Other (2018) eKLR** to assert that orders cannot be issued against 'KEDA' who are not party to the suit for they have not been granted an opportunity to be heard nor respond to the said allegation. He deposes that the Applicant has not made any case to warrant the orders sought and seeks to drag the hearing and conclusion of the suit. He insists that the Applicant cannot confer ownership of the suit property which is pending for determination before this court. He states that the Applicant has not shown the difficulties of enforcing these court orders.

The 2nd Defendant opposed the Application by filing a replying affidavit sworn by Li Ruiqin, who is its Managing Director. He avers that upon conducting due diligence, the 2nd Defendant established that the 1st Defendant was the registered owner of the suit property. He explains that this made them enter into a Sale Agreement in respect to the suit property on 23rd December, 2015 and even executed a Deed of Variation. He states that this court prohibited transfer and dealing with title of the suit property due to Plaintiff's claim of ownership. He confirms that although the 2nd Defendant changed its name to 'KEDA' and was issued with a Certificate of Change of name by the Company Registrar, it retained its registration number. He alleges that the 2nd Defendant's change of name is a typical commercial decision to meet financial and marketing needs which does not affect its liabilities and responsibilities. He deposes that the Plaintiff has not proved that the suit property was valued at Kshs. 500,000,000 before the 2nd Defendant commenced investing thereon nor any difficulties in recovering costs from it. He contends that the Plaintiff cannot claim ownership of the suit property until this suit is concluded. He reiterates that the 2nd Defendant has invested Ksh.6, 600,000,000, employed approximately 3,000 people and paid approximately Ksh.1, 800,000,000 as tax. He insists that the 1st Defendant was paid Kshs.3,030,000 and Kshs.20,499,500 upon execution and possession as well as occupation of the suit property while the remaining purchase price of Ksh.211,765,500 is being held by the 2nd Defendant's Advocate. He affirms that the 2nd Defendant does not intend to either dispose its property or abscond this court's jurisdiction. He states that the Application is unmerited and should be dismissed with costs.

The 3rd Defendant opposed the Application by filing Grounds of Opposition dated 18th January, 2021. It relied on Section 63 of the Civil Procedure Act and Order 39 Rule 5 of the Civil Procedure Rules and contended that the 2nd Defendant is still operational as no proof has been provided of how it will frustrate the Court's decision. The 3rd Defendant relied on the decisions of **Bayusuf Grain Millers v Bread Kenya Limited (2005) eKLR** and **Paul Kiplagat Birgen & 25 Others vs Interim Independent Electoral Commission & 2 Others (2011) eKLR**, to state that orders of attachment cannot be issued against 'KEDA' who is not a party to the suit. The 3rd Defendant averred that if the 2nd Defendant had taken debentures, then it is not planning to leave this court's jurisdiction or frustrate the outcome of this case. Further, the Applicant has not provided documentary evidence from the Registrar of Companies. It relied on the decisions of **Awo Shariff Mohamed t/a Asmi Services vs Caltex Oil Kenya Ltd (2008) eKLR** and **Shiva Enterprises Limited vs Jivaykumar Tulsidas Patel t/a Hytech Investment (2006) eKLR** to support its averments. The 3rd Defendant urged the court to dismiss the application with costs.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion dated the 25th November, 2020 including the respective affidavits, Grounds of Opposition and rivaling submissions, the following are the issues for determination:

- Whether the 2nd Defendant should be ordered to deposit Kshs. 500, 000, 000 in court as security pending hearing and determination of the main suit?
- Whether 'KEDA' should be enjoined as a party to the suit?

As to whether the 2nd Defendant should be ordered to deposit Kshs. 500,000,000 in court as security pending hearing and determination of the main suit and if 'KEDA' should be enjoined in this suit? The Plaintiff in his submissions reiterated his claim and argued that change of name by the 2nd Defendant to KEDA violates Section 52 of the Transfer of Property Act 1882. He argued that the 2nd Defendant who intends to place its assets outside this court's jurisdiction will obstruct any Decree passed against it and delay justice. He submitted that the orders sought would not prejudice the 1st and 3rd Defendants unless they were acting in cohort with the 2nd Defendant. He argued that the 2nd Defendant changed its name to KEDA, in 2018 after the Plaintiff had already filed the Plaintiff in 2015. He relied on Section 1A (1) of the Civil Procedure Act to argue that parties must assist court to further the overriding objectives of the Act.

The 1st Defendant in his submissions reiterated the contents of his Grounds of Opposition. While the 2nd Defendant in its submission on whether the Plaintiff is entitled to an order of attachment before judgment, relied on Order 39 Rule 5 of the Civil Procedure Rules, and the decisions of **John Kipkemboi Sum and Lavington Security Guards Limited (1998) eKLR**; **Tuffsteel Limited v Boleyn Magic Wall Panel Limited (2020) eKLR**; and **John Kahaito Bari & 3 Others v New Kenya Co-operative Creameries Limited & Another (2017) eKLR** to support its averments. It further argued that the 2nd Defendant never intended to frustrate this court's decision by disposing of its

property outside the court jurisdiction. It submitted that change of name by the 2nd Defendant did not change its status as a company domiciled and incorporated in Kenya and therefore the allegation of foreign directorships was racially abusive. The 2nd Defendant argued that no independent valuation report of the suit property was produced to confirm its value was Kshs. 500, 000, 000. On whether the Plaintiff is entitled to an order for temporary injunction, the 2nd Defendant relied on the following decisions: **Giella v Cassman Brown & Co. Ltd (1973) EA 358; Kenya Commercial Finance Co. Ltd vs Afraha Education Society (2001) 1 EA 86; Export Processing Zones Authority vs Kapa Oil Refineries Limited & 6 Others (2014) eKLR; Mrao Limited v First American Bank of Kenya Limited & 2 Others (2003) KLR 125 and Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others (2016) eKLR** to argue that the Plaintiff's claim that he is the rightful proprietor of the suit property is speculative and not genuine as the authenticity of the title deed is pending determination before this court. It further relied on the case of **Albert Mario Cordeiro & Another v Vishram Shamji (2015) eKLR** to dispute the Plaintiff's assertions of devaluation of the suit property as untrue as the 2nd Defendant's investment increased its valuation. On whether the Plaintiff is entitled to an order granting leave to enjoin KEDA as a defendant, it argued that the 2nd Defendant and KEDA relate to the same entity. The 3rd Defendant in its submissions argued that the Plaintiff had not shown how the 2nd Defendant who is still operational has undergone insolvency and will frustrate this court's decision by absconding its jurisdiction. To buttress this argument, it relied on section 63 of the Civil Procedure Act, Order 39 Rule 5 of the Civil Procedure Rules 2010, including the following decisions: **Kuria Kanyoko T/A Amigos Bar & Restaurant v Nderu & 2 Others (1988) eKLR, Shiva Enterprises Limited vs Jivaykumar Tulsidas Patel t/a Hytech Investment (2006) eKLR, Godfrey Oduor Odhiambo vs Ukwala Supermarket Kisumu Limited (2016) eKLR and Bayusuf Grain Millers vs Bread Kenya Limited (2005) eKLR; and Paul Kiplagat Birgen & 25 Others vs Interim Independent Electoral Commission & 2 Others (2012) eKLR**. The 3rd Defendant further argued that no documentary evidence from Registrar of Companies was provided to prove that the 2nd Defendant had taken debentures. It submitted that Order 39 of Civil Procedure Rules excludes cases involving immoveable property from it and therefore attachment orders before judgment cannot be issued on hearsay evidence whose sources cannot be disclosed. To support these arguments, it further relied on the following decisions: **Awo Shariff Mohamed t/a Asmi Services Station v Caltex Oil Kenya Ltd (2008) eKLR; Shiva Enterprise Limited vs Jivaykumar Tulsidas Patel t/a Hytech Investment (2006) eKLR; Bayusuf Grain Millers vs Bread Kenya Limited (2005) eKLR; Godfrey Odour Odhiambo v Ukwala Supermarket Kisumu Limited (2016) eKLR; Medina Corporation Co. Ltd v Medina Properties Ltd & Another (2014) eKLR; John Kahiato Bari & 3 Others v New Kenya Co-operative Creameries Limited & Another (2017) eKLR and Alice Mumbi v BOL Ronald Gerdinus & Another (2020) eKLR**. It reiterated that change of name by 2nd Defendant is of no consequence as the orders sought are for the 2nd Defendant and not persons who incorporated it. It argued that security of costs is only granted where sufficient evidence has been provided that the Defendants cannot pay once judgment is issued against them as held in the following decisions: **Mugo Muruachimab alias Mugo Nyage v Moffat Nyaga Kagau & 2 Others eKLR; Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others (2014) eKLR**.

The legal provisions governing attachment before Judgment are contained in Order 39, rule 5 (1) of the Civil Procedure Rules which provides that:

'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 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.'

In this instance, the Plaintiff has sought for the 2nd Defendant to deposit Kshs. 500,000,000 in court before the entry of judgement herein. On perusal of the Pleadings filed by the respective parties, I note the dispute herein revolves around ownership of the suit property. Further, both the Plaintiff and the 1st Defendant each hold a title in respect to the suit property. The 2nd Defendant purchased the suit property from the 1st Defendant and has invested thereon. I note this matter has proceeded for hearing and it is only the 3rd Defendant who is yet to call some extra witnesses. The Plaintiff contends that his witness from the Government Printer confirmed his title is genuine and the one held by the 1st Defendant is fake. To my mind, I opine that these are issues which are pending determination by this court after all parties have tendered their evidence and a decision cannot be made at this juncture. The Plaintiff claimed the 2nd Defendant has debentures, changed the company name and is in the process of disposing of the company assets. The 2nd Defendant explained that they had invested heavily on the suit property and despite the name change, the company registration was still the same.

In the case of **Kuria Kanyoko t/a Amigos Bar and Restaurant –vs- Francis Kinuthia Nderu & Others (1988)2 KAR 126**, the Court of Appeal while dealing with an issue of attachment before judgment held that: **“On the material presented to the court, it cannot be gain said that the Appellant deponed to facts which constitute more than plausible answer to the respondents plea for “attachment before judgment”. The burden of showing that the appellant has disposed of his properties or removed them from the courts jurisdiction or was about to abscond in either case with the object of defeating any decree that maybe passed against him, lay on the respondents. And it seems clear that on the state of the pleadings and in the view of the conflicting affidavits, that burden can only properly be discharged by testing the rival averments by evidence in the conventional way. The respondents averments only rested on information given to him by parties whom the court did not see or listen to.Our Order 38 which sanctions this practice was borrowed from the Indian Code of Civil Procedure. The learned author, Mulla in his treatise on the Indian Code (13th Edn p. 1502), says, inter alia, of order 38 r. 5:-**

“The object of this rule is to prevent the decree that may be passed from being rendered infructuous... The order that is contemplated by this rule, is not unconditional one directing attachment of property, but one calling upon the defendant to furnish security or to show cause why security should not be furnished. Where the defendant offers to give security, the court should go into the question of its sufficiency before issuing a final order of attachment.”

While in the case of **Bayusuf Grain Millers v Bread Kenya Limited [2005] eKLR**, the Judge held that: **‘Having considered the**

rival reasons given by the Plaintiff and the Defendant in support of their respective argument for and against the application, it is my considered opinion that the Plaintiff has not discharged the burden placed on it to enable this court grant the application sought. The basis of the Plaintiff's application is an alleged conversation between its director Mr Nasser Bayusuf and a director of the defendant company, Mr Chandrakant Shah.There is no evidence to support the Plaintiff's contention that the Defendant company intends to dispose of its assets to defeat the cause of justice. The Plaintiff has not discharged the onus of proof placed upon him. This court is aware that for the order of an attachment before judgment to be issued, this court must be satisfied beyond peradventure that indeed the Defendant intends to abscond from the jurisdiction of the court or dispose his assets with a view of defeating the cause of justice. The order of attachment before judgment is draconian and can only be issued in the clearest of the cases. In the instant case, the Plaintiff has failed to establish that it is entitled to the said order sought.'

Based on the fact as presented while relying on the provisions of Order 39 Rule 5 of the Civil Procedure Rules and associating myself with the decisions cited above, I find that except for the Plaintiff's averments, no tangible evidence was presented in court to prove the 2nd Defendant is moving its assets from this Court's jurisdiction to defeat the outcome of this case. Further, no valuation report on the value of suit property was presented in court to confirm the value stands at Kshs. 500,000,000. It is my considered view that since the fulcrum of the dispute herein revolves around title to land, it does not warrant attachment before judgement as envisaged in Order 39 of the Civil Procedure Rules and will decline to grant the orders as sought.

As for joinder of KEDA as a party to the suit, at this juncture, noting that KEDA and the 2nd Defendant company share the same registration, I do not see the need of enjoining it in these proceedings and will decline to do so.

On the issue of the Plaintiff's seeking an injunction against the 2nd Defendant, I note the Plaintiff had made an initial application dated the 25th July, 2016 seeking injunctive reliefs and this court had already made a determination of the same on 18th day of July, 2017. I will hence decline to deal with this issue.

It is against the foregoing that I find the Plaintiff's Notice of Motion Application dated 25th November, 2020 unmerited and will dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 16TH DAY OF SEPTEMBER, 2021

CHRISTINE OCHIENG

JUDGE