



**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. E219 OF 2020**

**BETWEEN**

**KENNETH GITONGA NYAGA ..... 1<sup>ST</sup> PLAINTIFF**

**NJIRU JANE WAMWARI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ICHAIN HUB LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**TRISHA MUTHONI MURANGI ..... 2<sup>ND</sup> DEFENDANT**

**CAROLINE MATHEKA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Plaintiffs have moved the court by a Notice of Motion dated 8<sup>th</sup> June 2020 under **Order 39 rule 5 and 6** of the **Civil Procedure Rules** seeking the following orders:

*[2] That this Honourable Court be pleased to make an Order for the defendants/respondents to furnish security in sum of Kshs. 70,111,480 within 14 days as claimed by the plaintiffs in this suit or order the respondents to place at the disposal of this court a property of a value sufficient to satisfy the decree that may be passed against them.*

*[3] That in the alternative, this court be pleased to issue a freezing order of all such accounts held by the defendants, either wholly or as a per centum of the total, pending the hearing and determination of the suit.*

*[4] That in the alternative, a temporary injunction do issue to restrain the respondents, or their servants, or agents from selling, transferring, or in any manner moving any of their movable or immovable property from the local limits of the jurisdiction of this court pending the hearing and determination of this suit.*

2. The application is supported by the 1<sup>st</sup> Plaintiff's affidavit sworn on 8<sup>th</sup> June 2020. The substance of their case is that in 2018, they entered into a real estate investment with the Defendants trading in the name and style of Landmax Realtors. The Defendants later opened Ichainhub, the 1<sup>st</sup> respondent, whose main business was online forex trading. Plaintiffs invested in the business by depositing money in the Defendants' accounts on condition that they would receive periodical payments of interest and capital at the maturity of each contract. The Plaintiffs paid the money to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants personal accounts and also through *PoaPesa* which is an online payment system

3. Following investments of cash with the Defendants, the Plaintiffs claim that the Defendants owe them Kshs. 54,024,000.00 and USD 160,874.80 being the principle investment and unpaid 20% instalments. The Plaintiffs complain that despite several demands, the Defendants have not paid them, given them false promises and have given them the run around. They also claim that the Defendants have issued cheques that have been dishonoured on presentation. They state that failure to pay them has caused embarrassment including attachment of their personal possession by their creditors and anguish resulting from failure to pay their bills and other liabilities as they fall due.

4. The 1<sup>st</sup> Plaintiff also deponed that the Defendants suddenly closed their offices in KCS House, relocated to a place unknown and could not be reached through their normal communications channels. The Plaintiffs believe that the Defendants have used their money to acquire personal assets and in order to defeat their claims, incorporated other companies for that purpose.

5. The Defendants opposed the application through the 2<sup>nd</sup> Defendant's replying and supplementary affidavits sworn on 13<sup>th</sup> July 2020 and 12<sup>th</sup> August 2020 respectively. She denied all the allegations made by the Plaintiffs and specifically that the Defendants used the Plaintiffs money to acquire personal assets and register them in other limited liability companies. They claim that the Plaintiff has failed to meet the threshold of the application sought.

6. As regards the business, she informed the court that the reason the business in which the Plaintiffs invested failed is that without notice or prior warning, the Central Bank of Kenya published a notice dated 16<sup>th</sup> August 2019 titled, "*Unlicenced Online Foreign Exchange (Forex) Dealers*" which affected their business as it was considered unlicenced and could not transact with banks or carry on business. She explained that since the Defendants could no longer carry on business, they made efforts to settle liabilities with the Plaintiffs and other investors leaving the Defendants with very little cash in their accounts. They deny that they own property, moveable and immovable, as alleged by the Plaintiffs and the orders even if issued would not serve any purpose other than embarrass the court.

7. The parties' respective advocates made brief oral submissions to support their respective positions. The main issue for determination is whether the Plaintiffs have made out a case for the grant of the orders sought in the application as I have set out above. The Plaintiffs contend that the Defendants are disposing of properties in order to delay and defeat any judgment that may ultimately be passed against them. For context **Order 39 rule 5** of the **Civil Procedure Rules** 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.*

8. The principles governing attachment and or arrest before judgment were laid down by the Court of Appeal 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** 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.*

9. Elucidating further on the subject rule in **Shiva Enterprises Limited v Vijaykumar Tulsidas Patel t/a Hytech Investment ML HC COMM No. 501 of 2006 (2006) eKLR**, Kasango J., 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.*

10. Regarding the same rule, in **Awo Shariff Mohamed t/a Asmi Services Station vs. Caltex Oil Kenya Ltd ML HCCC No. 1962 of 1999 [2008] eKLR**, the Court, after considering various authorities, reiterated the applicable principles as follows:

*It is my view that the interpretation of the provisions of Order 38 is clearly set out in the above authorities. The purpose of the procedure is to secure the Plaintiff against any attempt on the part of the Defendant to defeat the execution of any decree that may be passed or to delay the proceedings in the Plaintiff's case. But because the Court has not had opportunity to try the case yet the Court has to act carefully and not to grant orders lightly. Always remembering that justice demands that both parties be heard before the dispute is determined. Therefore, the requirements of the provisions of the Order (38) must be complied strictly.*

11. What the cases show is that the threshold for granting the orders under **Order 39 rule 5** of the **Civil Procedure Rules** is high and the court should grant the orders sparingly. While it is true that the parties entered into some risky and volatile investments in online forex business, the fact that the Defendants have not made good on the returns is not a ground granting the orders sought. The Plaintiffs bear the burden of showing that the Defendants are disposing of the property with the intention of defeating the Plaintiffs claims.

12. I have read and re-read the 1<sup>st</sup> Plaintiff's deposition in support of the application and key paragraph states as follows:

*[34] THAT we have reasons to believe that the Respondents are using out money to acquire personal assets as well as acquiring properties and registering them in the name of other limited companies in an effort to defeat out claim. One of such companies known as Landmax Realtors where the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are also directors.*

13. The Plaintiffs have not shown or proved that the Defendants are in the process of disposing properties or money with the intention of defeating the Plaintiffs' claims. They have not shown what properties Landmax Realtors purchased and are disposing off. The assertions in the deposition are bare and bland and do not set out any facts upon which the court can conclude that the Defendants' conduct runs afoul **Order 39 rule 5** of the *Civil Procedure Rules*.

14. The Notice of Motion dated 8<sup>th</sup> June 2020 is dismissed with costs to the Defendants.

**DATED and DELIVERED at NAIROBI this 2<sup>nd</sup> day of SEPTEMBER 2020.**

**D. S. MAJANJA**

**JUDGE**

Mr Maroa instructed by Maanzo and Company Advocates for the Plaintiffs.

Mr Wamwea instructed by Oyomba Mosota and Wamwea Advocates for the Defendants.