



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL CASE NO 15 OF 2016

CHANAN AGRICULTURAL CONTRACTORS LIMITED...PLAINTIFF

VERSUS

MUMIAS SUGAR COMPANY LIMITED.....DEFENDANT

RULING

1. The applicant herein has filed an application dated 15th June 2017 brought under the provisions of sections 1A ,1B, 3A and 63(a) & (e) of the Civil Procedure Act and Order 36 Rule (1), (2) and (8), Order 39 Rule (1) and (2) and Order 51 Rule 1 of the Civil Procedure Rules. The applicant seeks the following substantive orders:

(a) That summons be issued to the Managing Director of the respondent to appear before court and show cause why they should not furnish security for the decree that may be passed against them;

(b) That the respondent be ordered to deposit a sum of Kshs 20,993,079.00 in court or in a joint interest earning account; and

(c) That the court be pleased to enter summary judgment in favour of the applicant against the respondent for a sum of Kshs 20,993,079.00.

2. The applicant relies on the grounds on the face of the application, together with those in the supporting affidavit. It is their position that the defence filed by the respondent herein is a mere denial and a sham, and that there is high risk of non-compensation to the applicant at the point of entry of judgment as the respondent would have closed down.

3. The respondent on its part opposed the application vide a replying affidavit sworn 8th October 2017.

4. The application was argued on the 16th July 2018. Counsel on record reiterated their arguments as raised in their respective filings.

5. The following issues of determination emerge from the application, the replying affidavit and the oral submissions -whether the prayer for costs under Section 63 (a) of the Civil Procedure Act and Order39 Rule 1(2), 5 of the Civil Procedure Rules met the requirements of the quoted provisions, whether the application for summary judgment meets the threshold, and whether the defence set up by the respondent in the affidavit raises triable issue(s).

6. It is the contention of the applicant that the respondent is likely to go under and that it's Managing Director is likely to fly out of the country. The respondent denies this position. It is their position that the orders sought could not be granted under the cited provisions. They contend that the applicant has not availed any evidence to prove that they were about to close shop.

7. Order 39, rule 1 of the Civil Procedure Rules provides that

“1. Where at any stage of a suit, other than a suit of the nature referred to in paragraphs (a) to (d) of section 12 of the Act, the court is satisfied by affidavit or otherwise—

(a) that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him—

(i) has absconded or left the local limits of the jurisdiction of the court; or

(ii) is about to abscond or leave the local limits of the jurisdiction of the court; or

(iii) has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof;

or

(b) that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance:

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the court until the suit is disposed of or until the further order of the court."

8. Order 39, rule 5 provides that

'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.'

9. The principles governing attachment before judgement were laid down by the Court of Appeal in the case of *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.'

The same was adopted in the case of *Shiva Enterprises Limited vs. Jivaykumar Tulsidas Patel t/a Hytech Investment* (2006) eKLR, where the following was stated-

'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. It is worthy to quote from the case of Kuria Kanyoto T/A Amigos Bar and Restaurant v Francis Kinuthia Nderu, Helen Njeru Nderu and Andrew Kinuthia Nderu [1988]2 KAR ...'

10. In *Awo Shariff Mohamed t/a Asmi Services Station vs. Caltex Oil Kenya Ltd* [2008] eKLR, the court while discussing the provisions of Order 39 of the Civil Procedure Rules (which then was Order 38) stated-

'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. This position was reiterated in *FTG Holland vs. Afapack Enterprises Limited & Another* [2016] eKLR, where the Court of appeal held the view that -

'The power to attach before judgment is not to be exercised lightly and without clear proof of the mischief to be avoided.'

12. In the instant suit, the applicant's main argument was that the respondent is likely to go under and that its Managing director was scheduled to fly out of the country. No evidence on the same has been tendered before court to prove the said allegation. The respondent on its part denied the allegations and stated that being a company registered in Kenya it had assets that the applicant could still attach in case of a decree in their favour. As stated in the case of *Shiva Enterprises Limited vs.- Jivaykumar Tulsidas Patel t/a Hytech Investment* (2006) eKLR, the burden of proof is on the applicant to prove that the respondent is about to close shop and that it will suffer great prejudice as a consequence.

13. In *Godfrey Oduor Odhiambo vs. Ukwala Supermarket Kisumu Limited* [2016] eKLR, the court was of the view that where there is an allegation that a company was closing shop, being a juristic person evidence of winding up or insolvency must be produced. The court emphasized that-

'Section 63 and Rule 39(1) and (5) are very specific on the circumstances under which the orders of attachment before judgement or an order to provide security may be granted. It is only where the Respondent has deliberately taken action to avoid any process, obstruct or delay execution of a decree that such orders may be made. The applicant must therefore show that the action taken by the Respondent has been taken with the sole aim of frustrating the applicant's enjoyment of a decree or anticipated decree.'

14. In the absence of evidence to prove the allegations it is my finding that the applicant has utterly failed to satisfy the requirements under section 63 (a) of the Civil Procedure Act and Order 39(1) and (5) of the Civil Procedure Rules, and as such the prayer sought cannot be granted.

15. It is the applicant's prayer that summary Judgment be entered against the respondent on the grounds that the defense on record is a sham. The respondent on its part has denied the allegations in the plaint.

16. The law on summary judgments was elaborated in *Postal Corporation of Kenya vs. Inamdar & 2 Others* [2004] 1 KLR 359, where the Court of Appeal stated as follows: -

'However, we have accepted that the application that was before the learned Judge was an application for summary judgment under Order XXXV rule 1 and 2. We must now consider whether the principles of law that need to be satisfied before such a judgment is entered were indeed satisfied. The law is now well settled that if the defence filed by a Defendant raises even one bona fide triable issue, then the Defendant must be given leave to defend. There are several authorities in support of this proposition. One of them is this Court's decision in the case of Continental Butchery Limited vs. Samson Musila Ndura, Civil Appeal No. 35 of 1997 where this Court stated:

"With a view to eliminate delay in the administration of justice which would keep litigants out of their just dues or enjoyment of their property, the court is empowered in an appropriate suit to enter judgment for the claim from the Plaintiff under summary procedure provided by Order 35 subject to there being no triable issues which would entitle a Defendant leave to defend.

If a bona fide triable issue is raised the Defendant must be given unconditional leave to defend but not so in a case in which the Court feels justified in thinking that the defences raised are a sham."

17. The same principle in determining was stated by the same court in the case of *Moi University vs Vishva Builders Limited* CA No. 296 of 2004 (unreported), thus -

'The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend. In this appeal we traced the history from the commencement of relationship between the parties herein. The dispute arises out of a building contract. In the initial Plaint the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Shs. 185,305,011.30/- We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As we know even one triable issue would be sufficient – see HD Hasmani v. Banque Du Congo Belge (1938) 5 E.ACA 89. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in Patel vs. E.A. Cargo Handling Services Ltd. [1974] E.A. 75 at P. 76 Duffus P. said: -6

"In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as Sheridan, J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

The same was reiterated and adopted in *Isaac Awondo vs. Surgipharm Limited & Another* [2011] eKLR, and recently in *Ternic Enterprises Limited vs. Waterfront Outlets Limited* [2018] eKLR.

18. In the instant suit, the applicant termed the defence as a sham that raises no triable issues. From the affidavits presented in court it is obvious that the respondent admits owing the applicant money due from the suit contract. In paragraph 9 of the replying affidavit, the officer of the respondent depones that the actual amount owed by them was 14,000,000.00, and that the zonal claims had not been computed. It is clear that the amount owed or owing is in dispute. The actual amount is a matter for determination at the trial after all the parties have been given an equal forum to ventilate their issues. From the foregoing, is therefore my holding that the defence filed by the respondent raises triable issues and as such summary judgment cannot be granted.

19. In the upshot it is my finding that the application herein has no merit on the basis that the applicant has failed to satisfy the requirements under Section 63 (a) of the Civil Procedure Act and Order 39(1) and (5) of the Civil Procedure Rules, and that the summary judgment cannot be entered as the respondent's defence raises triable issues that ought to be determined at the trial. I shall accordingly dismiss the same with costs.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 14TH DAY OF JUNE 2019

W MUSYOKA

JUDGE