



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 123 OF 2015

OPULENT TRADE LINKS (K) LIMITED..... PLAINTIFF

-VERSUS-

NG'ENDA LOCATION RANCHING

COMPANY LIMITED.....DEFENDANT

R U L I N G

1. Opulent Trade Links (K) Ltd, the Plaintiff herein, by its Amended Plaint dated 30th May 2017 seek judgment against Ngenda Location Ranching Company Limited, the Defendant for Kshs. 19,082,438. It is alleged in the amended Plaint that this amount is due under contract by which the Plaintiff provided management services to the Defendant. The Plaintiff's claim is denied in its entirety by the Defendant.

2. The Plaintiff has filed a Notice of Motion application dated 27th July 2017. By that application, brought under Section 3A of the Civil Procedure Act and Order 5, Rule 1 of the Civil Procedure Rules, (Herein after the Rules) the Plaintiff seeks the following Order:

“That this honorable Court be pleased to Order the Defendant to deposit the sum of Kshs. 19,082,438 as prayed in the amended Plaint amended on 30th May 2017 together with interest.”

3. That prayer is supported by a very scanty affidavit of Joe Thomas Chinga. The deponent does not state his position, if any, in the Plaintiff's company, but this is what he does state:

a) That the Plaintiff is contends that it has a good case with high chances of success and which case the Plaintiff intends to prove at the hearing thereof.

b) That through letter dated 2nd February 2015 the Defendant/applicant acknowledged owing the Plaintiff the sum of Kshs. 7,531,994 which amount was rejected as the actual sum due and owing to the Defendant by the Plaintiff is Kshs. 19,082,438 excluding interest. (Annexed is a copy of the said letter marked “A”).

c) That the Plaintiff/applicant is apprehensive that it might not recover the full amount owed by the Defendant if the matter proceeds to full hearing and the Plaintiff proves its case as the Defendant is now disposing its last known asset located in Nakuru.

d) That the Plaintiff is likely to suffer irreparable loss and damage if the matter proceeds to full hearing and the Court rules favour of the Plaintiff/applicant as the Defendant is unlikely to pay the decretal sum.

4. The application was opposed by the Defendant through the affidavit of one of its Directors, namely Felister Njeri Cheror. The Defendant through that affidavit deponed that the Plaintiff had failed to shift the burden of proof showing that the Defendant would be unable to pay the decretal sum, if the Plaintiff succeeded in the claim.

ANALYSIS AND DETERMINATION

5. I need to begin by confessing that I was uncertain the ground upon which the Plaintiff seeks the prayer in its application. Having read the Plaintiff's affidavit in support, reproduced above, and having considered the prayer in the application I was uncertain whether the Plaintiff was seeking the Defendant to deposit security of costs or was seeking attachment before judgment.

6. The submissions filed by the Plaintiff did not make matters any more clearer. In those submissions the Plaintiff submitted on different

heads, which it stated were represented in the prayer of the application.

7. The Plaintiff submitted on one head that it is entitled to an Order for security for decretal sum. It argued that it had shown a good arguable case and that it had shown a prima facie case with probability of success.

8. On the second head the Plaintiff submitted that it was entitled to an injunction, under Order 40 of the Rules. The Plaintiff did not elaborate why an injunction should be issued to it

9. In my considered view, having perused the parties affidavits and submissions, the Plaintiff's application lacks in merit and is misconceived.

10. Firstly if what the Plaintiff seeks is attachment before judgment, the Plaintiff then has not reached the threshold of such an application. The standard for such an application was discussed by Justice Maureen Onyango in the case: **GODFREY ODUOR ODHIAMBO V UKWALA SUPERMARKET KISUMU LIMITED (2016) eKLR** when the Learned Judge in discussing Order 39 (previously 38) of the Rules stated:

*“The principles governing attachment before judgment were laid down by the Court of Appeal in the case of **KURIAKANYOKO T/A AMIGOS BAR AND RESTAURANT V 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 off his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him.”

11. The Plaintiff, as seen in its reproduced affidavit above, other than stating that it is apprehensive it might not recover in full the amount it claims in this matter did not inform the Court what has caused it to have that apprehension.

12. Justice Hellen Wasilwa faced with a prayer similar to the one before me and with similar circumstances under which the prayer was sought in the case: **OSCAR JUMA V TELKOM KENYA LIMITED & 2 OTHERS (2019) eKLR** stated:

*“In **Bayusuf Grain Millers vs Bread Kenya Limited (2005) eKLR**, the Court held as follows:*

*“What is the Plaintiff required to establish under the provisions of Order XXXVIII of the Civil Procedure Rules? The Plaintiff is required to prove that the Defendant with the internet to delay the Plaintiff or to avoid the process of the Court or to obstruct or delay the execution of any decree that may be passed against him has either disposed off or removed from the local limits of the jurisdiction of the Court his property or is about to abscond or leave the local jurisdiction of the Court. In **Savings & Loan Kenya Ltd versus Eustace Mwangi Mungai Nairobi HCCC No.75 of 2001 (Milimani)** unreported, Ringera J (as he was then) stated at page 5 when a similar application for attachment before judgment was made:*

“Be that as it may, I think that howsoever well-grounded the Plaintiff's apprehension might appear to be, it remains just that; well-grounded apprehension. Without evidence that the Defendant intends to do what is feared, the Court cannot grant the Order of pretrial attachment of the Defendants property or ask him to furnish security. Is there any such evidence here? I fear not. There is no deposition of any positive fact tending to show that the Defendant intends to dispose of his assets. Such positive facts might have included the fact that the Defendant either negotiating the sale of his properties or entering into an agreement to sell the same.”

13. The Plaintiff, in Order to succeed in its application for attachment before judgment, under Order 39 Rule 1 has to satisfy the Court of the following:

a) That the Defendant with intent to delay the Plaintiff, or to avoid only 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 maybe passed against the Defendant in the suit.

14. A close examination of the Plaintiff's affidavit evidence clearly reveals that the Plaintiff did not meet the requirements of Order 39 Rule 1 of the Rules.

15. On the other hand if what the Plaintiff sought, by its prayer, is an Order for security for costs, as provided under Order 26 of the Rules, similarly the Plaintiff failed to provide evidence under which the Court can exercise its discretion to Order the Defendant to provide security for costs. Security for costs cannot be ordered because Plaintiff is apprehensive of not being paid the decretal sum, if its case succeeds.

16. On the whole, as stated before, the Plaintiff's application is unmeritorious and misconceived. It fails. Having failed, this is a case in my view that costs should follow the event.

17. In conclusion the Notice of Motion dated 27th July 2017 is dismissed and costs are awarded to the Defendant.

18. This case, because the claim is for Kshs. 19,082,438, it falls within the jurisdiction of the Chief Magistrate's Court. Accordingly this case is hereby transferred to Chief Magistrate's Court Milimani. At the reading of this Ruling a mention date will be given.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 13TH day of JUNE, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... **COURT ASSISTANT**

..... **FOR THE PLAINTIFF**

..... **FOR THE DEFENDANT**