



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 483 OF 2015

ATHI RIVER STEEL PLANT LIMITED.....PLAINTIFF

VERSUS

CHINA CONSTRUCTION ENGINEERING (K) LTD....DEFENDANT

RULING NO.2

1. The application by the plaintiff seeks an order to compel the defendant to deposit in court, the sum of Kshs. 16,923,710/- or such other sum as will be sufficient to satisfy the Decree which would issued in favour of the plaintiff.
2. The plaintiff holds the view that the defendant was truly indebted to it, and that the defendant had admitted owing the money in issue.
3. According to the plaintiff, there existed some reliable information that the defendant was in the process of disposing of its assets, with a view to leaving the jurisdiction of this court.
4. In the light of the fact that the Directors of the defendant were persons of Chinese nationality, the plaintiff says that the defendant is therefore a foreign-owned company.
5. If the defendant was not required to deposit in court, the money that would be sufficient to satisfy such Decree as the court could ultimately pass against it, the plaintiff fears that there was a real risk that the decree would never be satisfied.
6. How did the plaintiff find out that the directors of the **CHINA CONSTRUCTION ENGINEERING (K) LIMITED** were about to leave the country?
7. The plaintiff's Senior Sales Executive, **AMAN REHAL**, got that information from somebody at the **CHINESE CONSULATE**, which is located along Ngong Road.
8. I agree with the defendant that the source of that information cannot be deemed as reliable, as the identity of the actual person who provided the said information remains unknown to the court.
9. In any event, when a witness seeks to rely on information which he obtained from another person, to prove a fact, such evidence is known as hearsay. Harris J. quoted with approval the following words from **HALSBURY'S LAWS of ENGLAND, 3rd Edition**, which give the meaning of the word "hearsay?;

“A witness cannot be called, in proof of a fact, to state that he heard someone else state it to be one. Care must be taken to distinguish between evidence which is tendered to prove that someone else has spoken certain words when the fact of which proof is required is merely the speaking, and evidence which is tendered to prove that someone else has spoken certain words as leading to a conclusion that the words spoken were true. The former is admissible (as in the cases where the uttering of a slander has to be proved); the latter is not ?.

- Per Harris J. in **MAYERS & ANOTHER Vs. AKIRA RANCH LIMITED [1974] E.A. 169, at page 171.**

10. In effect, it could be true that when Aman Behal went to the Chinese Consulate on 17th August 2015, some un-named person told him that the directors of the defendant company may leave the country at any time.

11. However, even if it is true that Aman Behal was given that information, that alone could not mean that it was also true that the defendant’s directors were about to leave the country any time soon.

12. I find no credible evidence of any kind, to show that the directors of the defendant company were about to leave Kenya.

13. In any event, if the directors of a limited liability company leave the country, that fact alone cannot be construed to mean that the company had left the country.

14. The plaintiff is well aware of the provisions of Order 39 Rule 5 of the Civil Procedure Rules, as it reproduced the same in the written submissions.

15. For completeness of this Ruling, I feel obliged to set out the said Rule, which is in the following words;

“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 the security?.

16. When canvassing the application, the plaintiff said;

“Accordingly, the purposes of any order that should be issued under Order 39 Rule 5 of the Civil Procedure Rules is to prevent the Defendant or would be judgement-debtor from dissipating his assets as to have the effect of obstructing or delaying the execution of any decree that may be passed against him?.

Having displayed such a clear understanding of the applicable rule, it would have been expected that the plaintiff would then demonstrate that the defendant was dissipating its assets, with the intention of obstructing or delaying the execution of any decree which may be passed against it.

17. However, the plaintiff has not provided evidence to show that the defendant has planned or embarked on any process which could put its assets beyond easy reach of the plaintiff, if the plaintiff later obtained a decree in its favour.

18. In my considered opinion, the plaintiff appears to have mixed-up a number of issues.

19. First, the plaintiff suggested that the defendant had admitted that it was indebted to the plaintiff. If it were to be held that there was an admission of liability, that would not be the basis for an order for the attachment of the defendant's assets, before the case was tried.

20. An admission of liability may be the basis for the court to grant judgement on Admission.

21. Secondly, the plaintiff alluded to the desirability of holding the directors of the defendant company liable for the debts (*if any*) owed by the company.

22. The act of attaching the liability of the company to its individual directors is known as the lifting of the veil. And before the court can order that the corporate veil of the company be lifted, the court must first have come to the conclusion that the company was liable.

23. Thereafter, if the corporate veil was held to be;

“...a mere cloak or sham, a device or a mask which the defendant held to his face in an attempt to avoid recognition by the eye of equity, the court could grant summary judgement even against the person behind the said company?.

- per Russell J. in **JONES & ANOTHER Vs LIPMAN & ANOTHER [1962] 1 WLR 832.**

24. In this case, the issue of the defendant company's liability is yet to be established.

25. Furthermore, the plaintiff has not provided the court with any factual basis upon which the court could conclude that any one or more of the directors had attempted to use the company as a cloak or a sham, a device or a mark which was calculated to help shield such director (s) from recognition by the eye of equity.

26. In the final analysis, I find and hold that the application for attachment before judgement lacks merit. It is therefore dismissed, with costs to the defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 1st day of February 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Muchiri for the Plaintiff

Wamae for the Defendant

Collins Odhiambo – Court clerk.