



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NYERI
ELC CASE NO. 122 OF 2015
(Formerly NYERI HCCC NO. 109 OF 2009)

KASTURI LIMITEDPLAINTIFF/RESPONDENT

-VERSUS-

NYERI WHOLESALERS LIMITED DEFENDANT/APPLICANT

RULING

1. The notice of motion dated **11th April, 2016** and amended on **12th April, 2016** seeks:

- 1. Certification of the application as urgent and deserving to be heard ex parte in the first instance;**
- 2. A prohibitory order to prohibit any dealings with the plaintiff's property known as title No. Nyeri Municipality Block II/1007 pending the hearing and determination of the application;**
- 3. An order compelling the plaintiff herein to furnish security in the form a bank guarantee in the sum of Kshs. 15 million or as may be sufficient to satisfy the decree which may ultimately be passed against the plaintiff in respect of the defendant's counter-claim;**
- 4. An order of attachment before judgment of the plaintiff's property known as title No. Nyeri Municipality Block II/1007 to answer to such decree as may be passed against the plaintiff in the defendant's counter-claim hereto;**
- 5. An order requiring the plaintiff/respondent to furnish security for costs of this suit.**
- 6. An order for release of the money held in account No.055000015325 opened in the names of the advocates of the parties to this suit at Family Bank Limited plus the accrued interest to the defendant/applicant's advocate.**

2. The application is premised on the grounds on its face and the affidavit sworn on **11th April, 2016** (supporting affidavit) and further affidavit sworn on **3rd June, 2016**.

3. As can be discerned from the grounds on the face of the application and the affidavit sworn in support

thereof, the application is premised on the grounds that the plaintiff is truly indebted to the defendant; that the defendant is apprehensive that the plaintiff may not be able to satisfy such decree as may ultimately issue against it in respect of the defendant's counter-claim and that the Kshs. 150,000/- held in the account referred to hereinabove, was meant to meet the costs of eviction of the plaintiff from the defendant's premises.

4. The application is opposed through the affidavits sworn on **25th May, 2016** and **1st July, 2016** (that is to say replying affidavit and further replying affidavit of Bipinchandra P. Shah, one of the directors of the plaintiff company).

5. Vide those affidavits, it is pointed out that there is no pending decree against the plaintiff and that the application is based on anticipatory decree against the plaintiff and submitted that it would be unjust to condemn the plaintiff before the case urged against it is heard and determined.

6. It is also contended that the property sought to be attached no longer belongs to the plaintiff (has been sold to Mount Kenya Bottlers Limited).

7. Terming the defendant's counter-claim hopeless, the deponent of the replying affidavit maintains that it would be unjust to condemn the plaintiff to furnish any form of security.

8. Concerning the plea for release of the money held in the account herein, to the defendant's advocate, it pointed out that there is no taxed bill, in respect of the auctioneers costs and submitted that in a taxed bill, the money cannot be released to the defendant's counsel as it was not deposited as auctioneers costs but security for payment of the auctioneer's costs once verified/ascertained.

9. Concerning the allegation that the plaintiff has transferred its stock to Kasturi Supermarket, it is pointed out that Kasturi Supermarket is a different entity from the plaintiff and contended that there is no evidence of such allegation.

10. When the matter came up for hearing, counsel for the defendant **Mr. Mahinda** informed the court that the defendant is apprehensive that the plaintiff will dispose off the only remaining property of its own, known to the defendant hence jeopardizing its ability to execute any decree ordered against it.

11. With regard to the plea for release of the money held in the account herein, he informed the court that it was meant to cover eviction costs.

12. Explaining that the defendant used its own money to finance the eviction, Mr. Mahinda urged the court to order the release of the money as it was meant for that purpose.

13. Based on the provisions of **Section 63(b)** and **Order 39(6) (1)** of the Civil Procedure Act and Rules respectively, counsel for the defendant submitted that this court has power to grant the orders sought.

14. Concerning the contention that the application is *res judicata*, he explained that the former applications were dismissed because they did not prove that the property was being sold.

15. Arguing that in the current application they have demonstrated that the property is on sale, the defendant's counsel urged the court to allow the application.

16. Counsel for plaintiff, **Mr. Gori**, pointed out that the defendant had brought a similar application which was dismissed.

17. Besides terming the application *res judicata*, Mr. Gori reiterated the plaintiff's contention that the property sought to be attached has been disposed of.

18. Concerning the allegation that the plaintiff has transferred its property to Kasturi Supermarket, he submitted that there is no evidence of that fact.

19. Terming the defendant's claim to be based on fantasies, he contended that there is no proof of the rent arrears on which the defendant's counter-claim is premised.

20. On whether the money held in the account herein should be released to the defendant's counsel he reiterated the plaintiff's contention that a taxed bill of costs is required before the amount or any part thereof can be released to the defendant.

21. In a rejoinder, Mr. Mahinda submitted that from the extract of title to the defendant's application the property as at the time the application, was filed (11th April, 2016) was still registered in the name of the plaintiff.

22. Concerning the allegation that the auctioneer must first tax its bill before the money can be released, he submitted that the auctioneer's bill submitted to the defendant suffices to form a basis of release of the security for payment of the auctioneer's costs.

Analysis and determination

23. From the pleadings filed in this matter and the submissions filed in respect thereof, it is common ground that the defendant had brought a similar application to the instant application. The application is dated 18th May, 2011.

24. In that application, the defendant sought to attach the property herein to satisfy such decree as might ultimately issue against it in respect of its counter-claim. In alternative to the prayer for attachment, the defendant urged the court to compel the plaintiff to furnish security in the sum of Kshs. 6.5 million or as may be sufficient to satisfy the decree which might ultimately issue against it in respect of its counter-claim.

25. Like in the instant application, in the previous motion, the defendant was apprehensive that the plaintiff, whom it accused of disposing its properties with a view of obstructing or delaying execution of such decree as may ultimately issue against it, was apprehensive that unless the orders sought were granted, the plaintiff may dispose of all its properties thus rendering the execution of an decree that may ultimately issue against it impossible.

26. The court record shows that the previous application was dismissed. This is what the court said about the application:

“In the motion the defendant prays for attachment before judgment of the plaintiff's title No. Nyeri Municipality Block II/1007. The defendant has also sought for alternative prayer for an order directing the plaintiff to furnish security in the sum of Kshs. 6.5 million. A careful consideration of the provisions of order 39 rule 5(1) of the Civil Procedure Rules; will reveal that the aforesaid orders can only be granted if the court is satisfied that the respondent is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court. Let me examine whether the defendant has discharged that burden. I regret to state that the defendant has failed to show that the plaintiff intends to dispose of its title No. Nyeri Municipality Block II/1007. That prayer must therefore fail. In the alternative prayer, the defendant has asked the court to order the plaintiff to furnish security in the sum of Kshs. 6.5 million. With respect, I do not see any justification for the prayer. To begin with there is no evidence that the plaintiff is moving out of the jurisdiction of the court nor is there evidence to show that the plaintiff will be unable to satisfy the decree. In any case the counter-claim is yet to be heard and determined. From the material placed before me, there is a dispute as to which lease should be used to calculate the outstanding rent. One lease fixes the monthly rent at Kshs. 40,000/= while the other fixes the monthly rent at Kshs. 60,000/=. The question is, which between the two leases should the court go by? Again, I find the motion to be unmeritorious. It is dismissed with costs to the plaintiff.”

27. Whereas counsel for the plaintiff claims that the previous application was dismissed because the defendant did not prove that the property was under threat of being sold, a review of the above determination of the court reveals that the defendant's failure to prove that the property was under threat of being sold was not the only reason the application was dismissed.

28. Besides finding that there was no evidence to show that the plaintiff intended to dispose of the property sought to be attached, the court also found the application to be unjustified because:

(i) There was no evidence that the plaintiff was moving out of the jurisdiction of the court;

(ii) There was no evidence to show that the plaintiff was unable to satisfy the decree;

(iii) The counter-claim was yet to be heard;

(iv) The court had no basis of calculating the amount of security, if any to be ordered.

29. In view of the foregoing, the sole issue for determination is whether the current application, in as far as it seeks the orders that were denied, is *res judicata* the previous motion that was dismissed.

30. My answer to that question is in the affirmative. I say this because, the court did not determine the earlier application merely on the alleged failure to prove that the respondent was disposing of his properties or moving its properties outside its jurisdiction. The decision in my view turned on the finding that the court could not grant the orders because the counter-claim on which it was premised was yet to be heard. There was also the issue of want of the basis on which the court could assess the applicant's plea for security given the fact that there were different sets of leases executed between the applicant and the respondent.

31. Concerning the plea for release of the money held in a joint account as security for the auctioneer's cost, since the auctioneer's bill is disputed, I agree with the respondent that it is necessary for the auctioneer to tax his bill before the amount held in the joint account or part thereof can be released to the applicant or his advocate.

32. In view of the foregoing, I find the application herein to be lacking in merits and dismiss it with costs to the respondent.

Dated, signed and delivered in open court at Nyeri this 2nd day of March, 2017.

L N WAITHAKA

JUDGE.

In the presence of:

Mr. Kihara h/b for Mr. Mahinda for the defendant/applicant

Mrs. Muhoro h/b for Mr. Gori for the respondent

Court clerk - Esther