REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO.122 OF 2010

AMOS KOECH KIPYEGO……..…..…..……..…PLAINTIFF /APPLICANT

VERSUS

AL-HYDER TRADING CO. LTD…….....……..RESPONDENT

RULING

By Notice of Motion dated 28th September, 2013 brought under Order 39 Rules 1, 2, 5 and 6 of the Civil Procedure Rules and Sections 1, 1A, 3 and 3A of the Civil Procedure Act the plaintiff prays that a warrant of arrest against the defendant do issue to bring it before the court to show cause why it should not furnish security to the tune of Kshs.1,700,350/- for his appearance in court, that the court orders he deposits Kshs.1,700,350/- to court until the suit is heard and determined and for costs.

The application is based on the grounds that the applicant purchased from the respondent's motor vehicle registration No. KBE545 P for Kshs.1,900,000/- out of which he paid a sum of Kshs.1,434,000/- excluding other costs/expenses in the sum of Kshs.266,350/- as at 17th July, 2009 leaving a balance of Kshs.466,000/- at which point the defendant repossessed the said motor vehicle in breach of a contract namely a sale agreement, that the defendant has since closed its offices in Eldoret and that the grand total of the amount the applicant has incurred between 1st December, 2008 and 17th December, 2009 is Kshs.1,700,000/- including the sum of Kshs.1,434,000/- which the applicant had already paid.

The application is supported by the affidavit of the applicant sworn on 28th September, 2013. The affidavit gives the background giving rise to the dispute herein which Is that the applicant bought the motor vehicle registration number KBE 545P at a consideration price of Kshs.1,900,000/- which was paid as follows;

a. Kshs.1,000,000/- as down payment made on1st December 2008.
b. Kshs.900,000/- being the balance of installment with effect from 31st January 2009 until 31st December 2009 as follows:

    i. March 2009 ---------Kshs. 100,000/=

    ii. March 2009 ---------Kshs. 55,000/=

    iii. March 2009 ---------Kshs. 49,000/=

    iv. April 2009 ----------Kshs. 30,000/=

    v. April 2009 ----------Kshs.37,000/=

vi. April 2009 (M-pesa) Kshs. 8,000/=

vii. June 2009 ---------Kshs. 100,000/=

viii. July 2009 ---------Kshs. 55,000/=

ix. July 2009 Kshs. 55,000/=

Subtotal Kshs. 489,000/=

The above figure brought the total payment to Kshs. 1,435,000 as at 17th July, 2009 leaving a balance of Kshs. 466,000/=. A further payment of Kshs. 99,000/- was made at the end of July 2009. According to the applicant he incurred repair costs of Ksh. 266,350/=. On 17th of July 2009 in breach of the sale agreement the defendant repossessed the said motor vehicle and packed it in its packing yard in Eldoret. On the 21st of July 2009 the applicant found the said motor vehicle parked at Kisumu with damages for which he incurred the aforestated expenses of

Kshs.266,350/- in repairing it. The amount of Kshs.1,700,350/= which the applicant asks that the respondent deposits in court is made up as follows:

a. Down payment of the purchase price Kshs.1,000,000/-.
b. Monthly installments of Kshs. 434,000/-.
c. Repair costs Kshs.266,350/-.

The gist of the claim is that the respondent has since relocated the offices from Eldoret to an unknown place.

The application is opposed vide grounds of opposition dated 14thFebruary, 2014 which articulates the following:

1. **That the application is futile and incurably defective for having been brought under the wrong provisions of the law.**
2. **The affidavit in support of the application is bad in law.**
3. **The application has no merits.**
4. **The application is an abuse of court process and not made in good faith.**
5. **The application does not serve to meet the ends of justice.**
6. **The applicant is guilty of laches and extreme of indolence.**

The application was disposed of by filing written submissions. Those of the applicant are dated 27th June, 2014 filed on his behalf by Joseph C.K. Cheptarus Advocates and for the respondent are dated 8th July, 2014 filed on his behalf by OdhiamboOuma& Co. Advocates.I have accordingly considered them and I take the following view of the application.

The application is majorly brought under Order 39 Rules 1,2, 5 and 6 of the Civil Procedure rules. The order in general provides for arrest and attachment before judgment. I duplicate the cited rules as under:-

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.

2 (1) Where the defendant fails to show such cause the court shall order him either to deposit in court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of the decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the provision to rule 1.

2. **Every surety for the appearance of the defendant shall bind himself, in default of such appearance to pay any sum of money which the defendant may be ordered to pay in suit.**

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; 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 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.

6. **(1) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required within the time fixed by the court, the court may order that the property specified or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.**

(2) Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the court shall order the attachment to be withdrawn or make such other order as it thinks fit.

An avalanche of case law exists setting the precedent on the application of the above cited rules. I will cite afew which will guide the court in making an objective determination in this application.

In the case of ***KuriaKanyoko t/a Amigos Bar and Restaurant Vs. Francis KinuthiaNderuHellenNderu and Andrew KinuthiaNderu [1988] 2 KAR 1287-1334, at pg 127*** *the learned Judges Nyarangi, Gachuhi and Apaloo JJA held that:*

> **"The power to attach before judgment must not be exercised lightly and only upon clear proof of the mischief aimed at by Order 38, r 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" (*Note that Order 38 Rule 5 referred to in the foregoing judgment is the current Order 39 of the 2010 rules).***

The learned judge Apaloo J.A. held as follows:

> **There is no rule permitting attachment of property before judgment according to English practice. Our order 38 which sanctions this practice, was borrowed from the Indian Code 13th edn, p 1502) says, inter alia, of Order 38, r 5.**
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> **The object of this rule, is to prevent the decree that may be passed from being rendered infructuous.The order that the contemplated by this rule is not an unconditional one directing attachment of property, but one calling upon the defendant to furnish security or to show cause why security should not be furnished. Where the defendant offers to give security, the court should go into the question of its sufficiency, before issuing final order of attachment.**
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> **In this case, the appellant showed by affidavit evidence by that he was in a prosperous business and was in a position to meet any decree that may be passed against him. He even gave full particulars of landed property that he owned and its worth in money terms. He also swore that he had not the slightest intention of leaving the jurisdiction. The facts deponed by the appellant were weightier than the bare hearsay information the first respondent related and balance, the weight of the affidavit evidence tilted in the appellant's favour" (*As per Apaloo JA, at pg 130;***

The learned judges further observed as follows:

> **"It is difficult to resist the observation that the order of the seizure of the appellant's property was made somewhat lightly. AccordingtoMulla, when the rules required the judge to be satisfied.**
>
> **'Vague allegationareinsufficient. The power to attach is not to be exercised lightly and without clear proof of the mischief aimed at' (See Mulla Code of Civil Procedure (13th edn) p 1502)**
>
> **The respondent's hearsay assertion that the appellant was about to abscond was as vague an allegation as can be imagined. And there is no proof of any sort that the appellant was minded of committing the mischief against which the rule is directed, namely the disposal of his properties" (As per Apaloo JA, at pg 131).**

In***Saving and Loan Kenya Limited vs. ErustusMwangiMungai Nairobi High Court Civil Case No. 775 of 2000,*** the learned judge Ringera J. as he then was observed that before a Court can either order a defendant to furnish security or attach his property conditionally before judgment as provided by order XXXVIII, Rule 5 of the Civil Procedure Rules, it must be satisfied that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, is either about to dispose of the whole of his property, or is about to remove his property from the jurisdiction of the court and that mere apprehension however well grounded without evidence that the defendant intends to do what is feared does not suffice.

In the case of***BenzoDallagness vs. Gianfranco Guerratto and others Civil application. No. Nairobi 265***

of 2002,learned judges Omolo, O'kubasu andOtienoJJA, held that the jurisdiction to security for due performance of any decree which may eventually issue under order XXXVIII of the Civil Procedure Rules is an elaborate procedure and the court has to be satisfied, on a proper application that there is a case for calling upon the respondent to furnish security for the satisfaction of the decree that may eventually be passed against the respondents. See also ***in the Matter of Remo Lenzi and others vs. CozziCorrodo and others Nairobi Civil Application No. 56 of 1997.***

In the case of ***Equip Agencies Limited vs. MbakiAricImputs Limited Civil Application No. Nairobi 307 of 2004,*** the learned judges Omolo, O'kubasu and Githinji JJA noted that it is arguable whether the removal of the goods by the appellant from one place (Mombasa Road) to another (Dar-er-Salam Road) but within the jurisdiction of the court entitles one to orders under Order XXXVIII of the Civil Procedure Rules as under XXXVIII, rule 5 (1) defendant may be called upon to furnish security where the court is satisfied that the defendant has intention to obstruct or delay the execution of the decree by selling his property or removing it from the jurisdiction of the court.

In***Afrofreight Forwarders (K) Ltd vs Kenya Railways Corporation and another Mombasa High Court Civil Case No. 229 of 2005,*** Maraga J, (as he then was) held that in an application under Order XXXVIII, Rule 5 is to prevent the decree that may be passed from being infructuous and like the order for attachment before judgment an order for security under this rule is draconian remedy and the court called upon to grant it must act with utmost circumspection. The learned judge observed further that the applicant for such order must satisfy the court that the defendant is about to dispose of his property or is about to remove the property from the jurisdiction of the court and that the defendant is intending to do so with a view to causing obstruction to, or delaying the execution of any decree that may be passed against the defendant and the essential requirement for an order of security is therefore the *malafide* intention of the defendant in disposing of or about to dispose of is property.

In the case of***Ndirangu vs. Abdalla [1984] KLR 746-750,*** the learned judges Law, Miller and Potter JJA delivered themselves as follows:

> **"Examination of Order XXXVIII rules 5 and 6 shows that the court must move step by step. Before the court can take any action under those rules it must be 'satisfied' that the defendant, with intend 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 or any part of his property from the local limits of jurisdiction of the court. The final step is set out in rule 6(1) where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, the court may order the attachment or property sufficient to satisfy the decree. In my own view the learned judge ordered an attachment of property in this case in total disregard of the provisions of rules 5 and 6." (As per Potter JA. at pg 749 and 750 respectively)**

The learned judge law JA delivered himself as follows:

> **This purported attachment was a nullity, as property cannot be ordered to be attachment before judgment at the instance of a plaintiff unless the defendant is given an opportunity to show cause why he should not furnish security, or fails to show cause, why he should not furnish security, or fails to show cause, or to furnish the required security,"**

While the learned judge Miller JA observed as follows:

> **"By rule 6 of the order, it is upon the defendant's failure to show cause why he should not furnish security, or to furnish the security required within the specified time that the court may order the attachment of the property sufficient to satisfy the decree**

which may be passed in the suit. The learned judge was in error to order the summary attachment of the vehicle at first instance on the respondent's application without calling upon and requiring the appellant to show cause." at pg 749.

In a more recent decision Honourable Justice Muya in the case of ***Freight Forwarders Kenya Limited vs. Aya Investment Unganda Limited [2013] @ KLR H.C. at Mombasa Civil suit No. 161 of 2012, the learned Judge held as follows:***

> **"The Court of Appeal had the occasion to deal with a similar matter in the case of KuriaKanyoko t/a Amigos Bar and Restaurant Vs. Francis KinuthiaNderu&others (1988) 2KAR 126 and rendered itself thus,**
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> **"The power to attach before judgment must not be exercised lightly and only upon clear proof of 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 instant application is sought as to compel the respondent to furnish security in the sum of Kshs.1,700,350/- sought and that the same be deposited in court on grounds that the respondent seized the subject motor vehicle and has relocated its offices from Eldoret to Kisumu. On the part of the respondent it stated that the Eldoret office was a subsidiary office and has always been situate in Kisumu. As clearly enunciated in the above case law an order for execution before judgment must not be exercised lightly, I say the following:-

One, there is no evidence presented to the court indicating that the defendant/respondent's office was stationed in Eldoret and that it relocated to Kisumu with a view of obstructing or delaying justice in this case. In that respect the court is unable to fathom that there is mischief in the defendant's current location in Kisumu. A possibility exists that Kisumu is their main office and may have shut up the subsidiary office in Eldoret. In any case, Kisumu is still within the jurisdiction of this court.

Two,no evidence has been furnished to this court demonstrating that the respondent owes the applicant the amount of Kshs.1,700,350/- To say the least, no annexures were attached to the supporting affidavit to demonstrate that the entire amount is owing. Even if the court were to go by the list of documents filedalongside the suit the same are for an amount far below the sum that is subject ofthisapplication. That list filed on 17th August, 2011, outlines the amount expended after the purported Kshs.1,000,000/- was made as a deposit towards the purchase price.

Three, the sale agreement not having tendered before the court casts doubts on the applicant's assertion that there existed the transaction of the sale of the subject motor vehicle and an initial deposit of Kshs.1,000,000/- made.

Four, the import of the above three observations is that the applicant has been unable to discharge the main objective and goal that is preliquisite to granting the orders; which is that the respondent is intent on obstructing and delaying the realization of the judgment and decree in the suit.

Five, and lastly, I totally agree with the respondent's counsel that this application was filed as an afterthought, the applicant having failed to exercise his right to have the suit heard expeditiously. In the event and unfortunately this application will not bail him out.

In the end, I find the application is not meritorious. It is not hinged upon good grounds and the same must fail. I accordingly dismiss it with costs in the cause.

DATED and **SIGNED** this 22nd day of June 2015.

G.W. NGENYE-MACHARIA

JUDGE

DELIVERED at **ELDORET** this 6th day of July, 2015

BY: G. K. KIMONDO

JUDGE

In the presence of:

Mr. Mwinamo for Mr. Cheptarus for appellant

No appearance for the respondent