



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**CIVIL CASE NO.1 OF 2009**

**ALICE IKOLOMI THURANIRA .....PLAINTIFF**

**VERSUS**

**JAMES WACHIRA GITHAIGA .....1<sup>ST</sup> DEFENDANT**

**BERNARD NGUGI MWANGI .....2<sup>ND</sup> DEFENDANT**

**KIANJAMBA TRANSPORTERS CO. LIMITED .....3<sup>RD</sup> DEFENDANT**

**AND**

**GROFIN KENYA LIMITED .....OBJECTOR**

**RULING**

1. These proceedings were commenced by way of a plaint filed on 27<sup>th</sup> January 2009 in which the Plaintiff sued the current 1<sup>st</sup> and 2<sup>nd</sup> Defendants together with one Jose. The Plaintiffs claim was for **“a refund of 350 bags of beans or their current market monetary value”** on account of 350 bags of beans allegedly converted by the Defendants.
2. Simultaneously with filing that plaint the Plaintiff filed an application for attachment before judgment in the following terms :-

I.

II. ....

**III. That pending the hearing and determination of this suit the honorable court do make an order for attachment before judgement against the Respondents’ moveable property particularly motor vehicle reg. no. KBB 236F ZC 4552.**

**IV. The honorable court be pleased to make an order for security of costs**

That Application was dated the 27<sup>th</sup> of January 2009

3. Subsequently the Plaintiff sought and obtained leave to amend her pleadings. In the main, the leave sought to have Kianjamba Transporters Co. Ltd impleaded in place of Jose as the 3<sup>rd</sup> Defendant and the Plaintiffs claim was expanded to include a claim for ksh.1,056,000/= in “special losses” and for compensation in General Damages for breach of contract and loss of profits.
4. Grofin Kenya Ltd( the Objector) herein joined the fray when the Plaintiff obtained an order for attachment and sale of the Defendants property which included m/v KBB 236F ZC 4552. The claim by the objector shall be discussed in greater detail at a later stage of these proceedings.

5. What now is before this Court is the Plaintiffs Notice of Motion dated 17<sup>th</sup> June 2013 in which the Plaintiff seeks the following main orders.
  - I. **That pending the hearing and final determination of this suit the honourable court do make an Order for attachment before judgement against the Respondent's moveable property particularly a Prime Mover Truck Mercedes Benz Reg No.KBB 132F currently bearing plate Reg No.KBB 236F and a Trailer of make Bhachu Reg No.ZC 7903(currently bearing Reg No.ZC 4552).**
  - II. **That the Honourable Court be pleased to make an Order of transfer of this suit to Busia Chief Magistrate's court for hearing and final disposal.**
6. In an affidavit sworn on even date, the Plaintiff states how he contracted the Defendants to transport 350 bags of beans valued at ksh.2,200,000/= on her behalf from Busia to Nairobi. The beans were to be transported by a prime move truck Reg KBB 132F and trailer registration ZC 7903. Apparently the number plates have been changed to KBB 236F and ZC 4552 respectively. The beans were never delivered to Nairobi and the lorry and trailer are currently detained at Busia police station as they are a subject of criminal proceedings. The Plaintiff is apprehensive that her claim will be rendered nugatory if the lorry and trailer are released to the Defendants.
7. In opposition, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants filed a replying affidavit through the 1<sup>st</sup> Defendant filed on 4<sup>th</sup> November 2013. The Affidavit gives a history of how the Plaintiff sought and on 16/03/2009 obtained an order for attachment before judgment in respect to lorry KBB 236F and trailer No ZC 4552. In the order the Applicant was required to file an undertaking to compensate the rightful owner of the motor vehicle and trailer in issue if the attachment would occasion any loss or damage to the said owner. That order has not been set aside and it is the contention of the Defendants that the current application is an abuse of the process of Court and *res judicata*.
8. On its part the objector filed a Replying affidavit sworn by Rishi Khubchandani on 29<sup>th</sup> October 2013. Emphasized in that affidavit is that the motor vehicle currently bearing number plate KBB 236 F is motor vehicle Registration KBB 132F and trailer bearing registration ZC 4552 is trailer ZC 7903. That both the lorry and vehicle are co-owned by the 3<sup>rd</sup> Defendant and objector pursuant to a loan agreement executed on 5<sup>th</sup> March 2008 between the objectors parent company Grofin East African Fund LLC and the 3<sup>rd</sup> Defendant. The vehicle and trailer were to secure a loan granted by the financier to the 3<sup>rd</sup> Defendant who has currently fallen into arrears which stood at ksh.21,40,260/= as at 21<sup>st</sup> January 2009. It was further alleged that in attempt to avoid its creditors the 3<sup>rd</sup> Defendant changed the number plates of the said vehicles. The objector further stated that the commercial vehicles are a subject to Nairobi Milimani Commercial Court suit No.281 of 2009 between Grofin East Africa Fund LLC and the 3<sup>rd</sup> Defendant herein.
9. As I turn to determine this matter I note that the averments contained in the affidavits sworn on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants of the one part and of the objector of the other are not controverted by the Plaintiff. I take the contents thereto to be true. In respect to what the Defendants stated, there is indeed already existing in this matter a similar order as that now sought by the Plaintiff. That order which is dated 16<sup>th</sup> March 2009 has never been set aside or otherwise vacated. It would therefore seem to me that the Application now before Court is *res judicata* and an abuse of Court process. That would be enough reason to dismiss the Application.
10. But even on the merits the Application cannot see the light of day. The principles upon which a Court can make for an order for attachment of property are found in Order 39 Rules 1 and 2 of The Civil Procedure Rules.

**“1. Where at any state 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 proviso to rule 1.

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

- 11. In the affidavit filed in support of the Application the Plaintiff does not allege that the 3<sup>rd</sup> Defendant is about to dispose of the whole or any part of his property or is about to remove the whole or part of his property from the local limits of the jurisdiction of this Court. Indeed the vehicle and trailer are under the custody of the Kenya police as subject of pending criminal court proceedings. The Plaintiff has therefore failed to discharge the burden of proof placed on him by the law in these circumstances.
- 12. Another reason why the application must fail is because the properties sought to be attached are co-registered between the 3<sup>rd</sup> Defendant and the objector. The objector's parent company holds a debenture over the said property. As long as the 3<sup>rd</sup> Respondent has not discharged its obligation under the terms of the debenture, the property cannot be available for attachment now or in the future. The objector has demonstrated and the Plaintiff concedes in the very application that the vehicle with fake plates KBB 236F is motor vehicle KBB 132F while the trailers real registration is not ZC 4552 but ZC 7903. The objector is not the target to the Plaintiff's claim and property in which it has legal interest cannot therefore be attached in satisfaction of that claim.
- 13. The Result. The application of 17<sup>th</sup> June 2013 is dismissed with costs.

**F. TUIYOTT**

**J U D G E**

**DATED, DELIVERED AND SIGNED AT BUSIA THIS 15<sup>TH</sup> DAY OF MAY 2014.**

**IN THE PRESENCE OF:**

**KADENYI .....COURT CLERK**

**N/A.....FOR PLAINTIFF**

**N/A.....FOR 1<sup>ST</sup> DEFENDANT**

**N/A.....FOR 2<sup>ND</sup> DEFENDANT**

**N/A.....FOR 3<sup>RD</sup> DEFENDANT**

**OKUTTA H/B FOR DALY & FIGGS.....FOR OBJECTOR**