REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 196 OF 2008

(Being an Appeal from the Ruling and Order of Hon. Kirui – Principal Magistrate in Chief Magistrate's Civil Case Number 1033 of 2008)

EMKE GARMENTS (K) LTD. …..... 1ST APPELLANT

EMKE COMMODITIES LTD. …..... 2ND APPELLANT

VERSUS

SEA ANGEL SERVICE STATION LTD. …..... 1ST RESPONDENT

GULAMHUSSEIN F. GURAMHUSSEIN

T/A HUSSEIN SERVICE STATION .....2ND RESPONDENT

JUDGMENT

On the 13th day of November, 2008 Honourable Kirui – Principal Magistrate (as he was then) delivered a ruling to the effect that the Defendants do offer security for their appearance in the sum of Ksh. 1 million within forty five (45) days from the date of the ruling in default of which attachment to issue.

Being aggrieved of that ruling the Defendants filed this appeal.

The grounds being that it was not proved on a balance of probability that the appellants were about to dispose off or were disposing off their assets so as to Warrant the grant of the orders for the appellants to deposit security in the sum of Ksh. 1 million.

(2) That the learned trial magistrate erred in law and fact in finding that the Appellants did not deny having closed down the factory in the light of the replying affidavit of Sabu George sworn on 20th May, 2008 denying these facts.

(3) That the learned trial magistrate erred in law and in fact in ordering the Appellants to deposit security as prayed by the Respondents without first giving them an opportunity to show cause why they should not furnish security for their appearance.

(4) That the security sought to be deposited was at variance with the amount prayed for in the plaint and therefore the orders sought in the application ought not to have been granted.

(5) That the learned trial magistrate relied on the Supporting affidavit of the 2nd Respondent sworn on the 5th day of May, 2008 in support of the chamber summons dated 5th May, 2008.

(6) That the learned trial magistrate erred in law and fact in finding that the Application did not talk of security for appearance as argued by the Defence but for the satisfaction of the Decree that may be passed.

(7) That the learned trial magistrate erred in Law and in fact in holding that in default of the Appellants complying with its order to provide security, their property or assets be attached without the Respondents specifying the particular property or assets and their estimated value as required by law.

(8) That the application dated 5th May, 2008 was fatally defective.

(9) The the learned magistrate erred in law and fact in finding that the Appellants did not have to appear and how cause why they should not furnish security before ordering them to furnish security.

(10) That the learned trial magistrate gave vague orders.

Counsel for the Respondents Wambo submits on ground 1 that in their replying affidavit to the application it was not denied that they were to dispose their property. That at page 31 paragraph 11 and 12 of the affidavit the Appellants had admitted that they had closed.

On grounds number 2 and 3 it is submitted that the appellants had been given sufficient notice to show cause by the replying affidavit at page 30 of the record.

On grounds number 4. It is contended that the issues were not raised before the learned magistrate and in any event taking into account interest, the total amount was in excess of Ksh. 1 million.

Ground number 5. It is submitted that the Supporting affidavit was perfectly within the law.

Grounds 6 and 7. Failure to specify the property did not prejudice the Appellants.

Grounds 8, 9 and 10. That orders granted were not vague. There was no prejudice on the appellants.

Order XXXVIII rule 5(1) of the previous Civil Procedure Rule provided thus,

> ***" 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 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 dismissal 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".***

In his ruling at page 3 line 19 the learned trial magistrate had this to Say,

> ***" I have perused both the plaintiffs Supporting affidavit sworn on 5th May, 2008 and the Defendants replying affidavit sworn on 20th May, 2008 and note that the Defendant did not deny having closed down their factory and are in the process of disposing off their property. Instead they admitted that the first Defendant has temporarily closed down operations. That seems to buttress the plaintiffs fears and confirm the position".***

In the replying affidavit of Sabu George at paragraph 12 he avers that due to the instability that occurred between December 2007 and February 2008, our production and sales from 1st Defendant went down partly due to workers failing to report to work and difficulties accessing and supplying our products so as a decision was reached to temporarily close down the operation and commence re-organization of the 1st Defendant then re-open sometimes in September2008. Though the Defendant admitted to partial closure of their business, the reasons for that closure was sufficiently explained.

Under order 38 rule 5(1) the salient and or main requirement is for the Court to satisfy itself by affidavit or otherwise that the Defendant ***with intent to obstruct or delay the execution of any decree that may*** be passed.....

The operative word is, ***"With intend to obstruct or delay"***.

There is nothing to show that the partial closure of the defendants business was with the intention of obstructing or delaying the execution of a decree.

A partial or complete closure of a business in itself is not sufficient ground for an order to furnish security.

Order 38 rule 6(1) of the previous Civil Procedure Rules provided,

> ***"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 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".***

It can be deduced from the above that before an order for furnishing security can be made the Defendant ought to be afforded an opportunity to Show Cause

In the present case this was not done.

The same rule provides for he property to be specified or any portion of it. There was failure to do so.

Theamount claimed in the plaint was a sum of Ksh. 779,966/= yet the security sought was Ksh. 1 million. This anomaly was not sufficiently explained to the Court.

I am satisfied that the appeal has merit and it is allowed. I accordingly set aside the orders made in the ruling delivered on 13th November, 2008 Chief Magistrate's Civil Case Number 1033 of 2008.

Costs to the appellants.

Judgment delivered dated and signed this **12th** day of **June, 2014**.

….....

M. MUYA

JUDGE

12TH JUNE, 2014

In the presence of:-

Court clerk

Absence of both Counsels having been duly notified of the date of Judgment.