



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISCELLANEOUS APPLICATION NO. 59 OF 2003

SHALIMAR LIMITED.....1ST APPLICANT

SAZ CATERERS LIMITED.....2ND APPLICANT

ZULFIKAR RAHEMTULLA.....3RD APPLICANT

VERSUS

SADRUDIN KURJI.....1ST RESPONDENT

AKBAR KURJI.....2ND RESPONDENT

RULING

1. There are two motions presented by the applicants. The first is a notice of motion dated 8th November 2012. It seeks two reliefs: leave to execute the decree before taxation; and, an order for the respondents to furnish security for the decree pending the hearing of their intended appeal.
2. The second application is a notice of motion dated 20th June 2012. It seeks, in the main, to bar the respondents from dealing in or transferring shares in Meridian Holdings Limited and Fidelity Shield Holdings Limited; and, that those shares be attached in satisfaction of the decree.
3. Both motions are contested by the respondents. Regarding the application dated 8th November 2012, the applicants rely on the affidavit of Zulfikar Rahemtulla. The deponent avers that the respondents are transferring or disposing of their assets to defeat the decree. The respondents deny it in a replying affidavit sworn by Sadrudin Kurji filed on 17th December 2012. The respondents have not directly responded to the motion dated 20th June 2012. Instead, there are filed two replying affidavits by Shasherah Kurji and Abdulali Kurji. The pith of the response is that the respondents did not hold shares in Meridian Holdings Limited as absolute or sole owners; but rather as trustees.
4. On 3rd October 2013, the parties agreed that both motions be determined on the basis of depositions on record and written submissions of their counsels. The applicants submissions were filed on 19th February 2014; those by the respondents on 15th April 2014.

5. I will deal first with the motion dated 8th November 2012. A decree holder may with leave of the court execute the decree before taxation of costs. The language of section 94 of the Civil Procedure Act is unequivocal on that point. See also *Commercial Bank of Africa Vs. Lalji Karsan Rabadia and others* Nairobi, High Court case 109 OF 2011 [2013] e KLR. The applicants here obtained a decree on 13th March 2003. However, the applicants' party and party bill of costs dated 15th May 2013 was taxed on 26th June 2013. The applicants were awarded costs in the sum of Kshs. 71, 077. I thus agree with the submissions by the respondents that the substratum of the prayer for attachment before taxation has collapsed. That prayer is superfluous and is dismissed.

6. That would leave the prayer for security for the judgment sum. The applicants rely on section 63 (b) of the Civil Procedure Act. That section provides that a Court, in order to prevent the ends of justice from being defeated may:-

“a) Issue a warrant to arrest the defendant and bring him before the court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to prison;

b) Direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order the attachment of any property;

c) Grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;

d) Appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;

e) Make such other interlocutory orders as may appear to the court to be just and convenient”.

7. From a plain reading of the statute, the court is granted power to make certain interlocutory orders to prevent the ends of justice from being defeated. They include orders to furnish security or to secure properties belonging to the defendant or for their attachment before decree. The applicants here already hold a decree. The Civil Procedure Rules, particularly Order 22 contain a comprehensive code on execution of decrees. In a sense, the order to furnish security has been overtaken by the decree.

8. Before leaving the subject I am minded to comment on related proceedings at the Court of Appeal. On 19th July 2012, the High Court (Mutava J) dismissed an application by the respondents to set aside the decree dated 13th March 2003. The decree was for Kshs. 153, 428, 678.80. The respondents being aggrieved lodged an appeal to the Court of Appeal in Civil Application No. Nai 222 of 2012 (UR 161/2012). They sought a stay of execution of the order. Stay was granted on condition that the respondents deposit the sum of Kshs. 40,000,000 in an interest earning account within 30 days. The respondents did not do so. There is now an open pathway for the applicants to execute their final decree. The entire notice of motion dated 8th November 2012 is clearly water under the bridge and is dismissed.

8. I will now turn to the notice of motion dated 20th June 2013. It is common ground that the applicants have a decree for Kshs. 153, 428, 678.80 together with further interest and costs. The decree, like I stated, was made on 13th March 2003. When the applicants presented the earlier motion dated 8th November 2012, the respondents, through a deposition of Sadrudin Kurji sworn on 17th December 2012, denied they were disposing of their property or shares. They also stated they had heavy investments in Kenya and were major shareholders in Meridian Court Hotel. The applicants contend that the respondents are not truthful and are transferring their assets to defeat the decree.

9. The motion thus seeks to stop further dealings in shares held by the respondents or Abdul Kurji and Raim Holdings Limited in Meridian Holdings Limited and Fidelity Shield Holdings Limited; that those shares be sold in execution of the decree; that the respondents shares including any shares transferred to

Abdul Kurji or any other family member in Southern Shield Securities Limited and Southern Shield Properties Limited be attached; that the respondents be arrested and presented to court to show cause why they should not furnish security for the decree; and, lastly that there be a conditional attachment of all property owned by the respondents.

10. I have studied the replying affidavits of Shamsherali Kurji and Abdulali Kurji both sworn on 15th July 2013 and filed in court on the same date. In the first deposition, it is pleaded at paragraphs 16, 17 and 18 as follows:-

“16) That at the family meeting alluded above, in keeping with the family tradition in respect of the holding of the family wealth, it was agreed that the shares held by the respondents in Meridian Holding Limited, except those shares that they hold of their own right, would be transferred to Abdulali Kurji to hold on behalf of the family and not as absolute owner.

17) That the shares transferred to Abdulali as custodian do not and did not belong to any of the respondents absolutely.

18) With respect to shares in Southern Credit Bank Limited, there was no sale or disposal of shares. There was a merger of two banks and settlement was done by way of share swap”.

11. In the second affidavit of Abdurali Kurji, at paragraphs 11, 12 and 13, the averments of Shamsherali Kurji in the earlier deposition are confirmed. The applicants contest that position. They allege that because the respondents were aware of the judgment, the transfer of shares was fraudulent. Reliance is placed on the decision in Selanga Jill Birgit Gotke Vs. Settlement Fund Trustees [1966] E A 472 in which the court cited *Kerr on Fraud and Mistake* 7th edition as follows:-

“A voluntary conveyance pendent lite, or by a person against whom an action for damages is pending, and which he must have known would probably go against him, is always open to the imputation of fraud, though at the time of the settlement he was not in debt; unless the pending action is a claim for damages of a very speculative character, and the probability of substantial damages is slight”.

12. The decision in Gotke Vs. Settlement Fund Trustees (supra) was an interlocutory decision for attachment before judgment. The circumstances obtaining here are different. The applicants have a decree. To that extent, they are creditors of the respondents. The applicants contend the transfers are fraudulent.

13. I am well alive to the cardinal precept of the law of evidence that he who alleges must prove it. See Koinange and 13 others Vs Koinange [1986] KLR 23. The standard of proof for fraud is very high approaching but below proof beyond reasonable doubt. See Ratilal Gordhanbhai Patel Vs Lalji Makanji [1957] E A 314, Urmila Mahindra Shah Vs Barclays Bank International and another [1979] KLR 67. I do not have sufficient materials to state categorically that the transfer was fraudulent. It could be inferred. But that is well below the standard. Abdulali Kurji is saying simply that he is a trustee; that the respondents held shares as custodians for their larger family. I cannot say that property held by a trustee belongs to the trustee and should be available for execution in this suit. See Re estate of Allan Oyugi (Deceased) Nairobi, succession cause 578 of 1999 [2009] e KLR.

14. The text cited by the applicant in *Halsburys Laws of England*, 5th edition volume 11 para 746 relates to the court's power to order security for costs. It should not however be lost that this suit has been concluded, decree issued and costs assessed. Like I stated, there is an elaborate code for execution of the decree. I do not have sufficient basis to revoke the transfer of shares by the respondent or to attach the shares from the transferee. It is not a simple matter as urged by the applicant that the court should do so under its inherent jurisdiction. However, to avoid abuse of court process and to ensure the ends of justice are met, or the respondents attempts to defeat the decree, I would be prepared only to grant prayer 7 in the motion. There shall thus be a prohibitory order against any dealing or transfer of all moveable and immoveable property of the respondents including any shares held by the respondents. The remainder of

the notice of motion dated 20th June 2013 is dismissed.

14. As both the applicants and respondents have succeeded in part, and in the interests of justice the order that commends itself to me to grant is that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at **NAIROBI** this 5th day of June 2014.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of

Ms. Mathai for the Applicants instructed by Hamilton, Harrison & Mathews Advocates.

Mr. Idundo for Mr. Odera for the Respondents instructed by Oraro & Company Advocates.

Mr. C. Odhiambo, Court clerk.