



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU

CIVIL SUIT NO. 28 OF 2013

JAPHET MBAE RUTERE.....1ST PLAINTIFF
MARY M. MUTWIRI.....2ND PLAINTIFF
JAKUBU M'ARII M'RUTERE.....3RD PLAINTIFF
JAMES GATOBU M'IKIUGU.....4TH PLAINTIFF
MONICA MWARIUMWE KITHINJI.....5TH PLAINTIFF
GILBERT MBAABU.....6TH PLAINTIFF
JOSHUA KABURU KIMATHI.....7TH PLAINTIFF
MOSES GITUMA HARUN.....8TH PLAINTIFF
PATRICK KINYUA M'IRINGO.....9TH PLAINTIFF
MACHAEL MUGAMBI J KABUGO.....10TH PLAINTIFF
DOUGLAS MUTUMA MAGANA.....11TH PLAINTIFF
FELICIANA MUTHONI RUTERE.....12TH PLAINTIFF

VERSUS

REYNOLDS CONSTRUCTION COMPANY (NIG) LTD.....DEFENDANT

R U L I N G

This application is dated 3rd July, 2013 and seeks orders:

1. ***THAT*** the honourable court be pleased to certify this application of utmost urgency and to hear it *ex-parte* and on a priority basis in the 1st instance.
2. ***THAT*** the honourable court be pleased to issue an order directing the defendant to furnish security in the sum of Kshs.118,097,500 by depositing the said sum in court and in default the defendant's moveable properties to the value of Kshs.118,097,500 to be attached and held to the order of the court and the Defendant's expense, pending the interpartes hearing and determination of this application.
3. ***THAT*** the honourable court be pleased to issue an order directing the defendant to furnish security in the sum of Kshs.118,097,500 by depositing the said sum in court and in default the

defendant's moveable properties to the value of Kshs.118,097,500 to be attached and held to the order of the court, and at the Defendants' expense, until conclusion of this suit.

4. ***THAT*** the honorable court be pleased to issue a warrant of arrest to all the directors of the defendant and bring them before the court to show cause why they should not furnish security of Kshs.118,097,500 for their appearance.
5. ***THAT*** costs of the application be provided for.

It is supported by the affidavit sworn on 2nd July, 2013 by Japhet Mbae Rutere, the first plaintiff. It also has the following grounds:

1. ***THAT*** the defendant is a foreign company in Kenya only for the sole purpose of completing their contracts and they could leave Kenya any moment and leave the plaintiffs without redress.
2. ***THAT*** the defendant is about to leave Kenya under circumstances affording reasonable probability that the Plaintiffs will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit.
3. ***THAT*** the defendant has disposed of or removed from the local limits of the jurisdiction of the court their property or some part thereof
4. ***THAT*** the defendant has actually completed the Mikumbune-Marimba-Mitunguu road which it was constructing and has begun moving their property from the local jurisdiction of the honourable court.

This application was for the first time heard *ex parte* on 4.7.2013. On 11.7.2013, the parties resolved, by consent, to have the application canvassed by way of written submissions. On 3.3.2014 Mr. Mutuma, the plaintiff's advocate told the Court that the defendant's advocate had been in touch with him on telephone that morning and was seeking more time to put in his written submissions. Mr. Mutuma also intimated that the parties were exploring a settlement.

On 27.5.2014, Mr. Mutuma came to Court and urged the Court to give a date for delivery of a ruling. The Court delivered its ruling regarding Mr. Mutuma's oral application to have the court give a date for the delivery of a ruling regarding this application on the same day.

The Court gave its ruling and took into account that there was no evidence that the defendant had been served with this court's orders which were issued on 27.01.2014. the Court also pointed out that Mr. Mutuma had not told the Court the outcome of the intended negotiations for a settlement which Mr. Mutuma had told the Court on 3.3..2014 were on-going. In the circumstances and in the interest of justice, the Court directed as follows:

1. Defendant is to file and exchange his submissions within 21 days.
2. Plaintiffs to serve upon the defendant the next date for directions and all the orders issued herein and evidence of that service to be availed.
3. Directions on 19.6.2014.

On 19.6.2014, Mr. Mwirigi held brief on behalf of Mr. Mutuma on behalf of the plaintiff's. He asked the Court to give a date for delivery of the ruling in this application. It transpired that there was no evidence that the plaintiffs had obeyed the Court orders issued on 27.5.2014. The Court stood over the matter generally and directed that it not be brought back to Court earlier than during the next term.

On 3.10.2014, Mr. Mutuma informed the Court that both parties had filed their written submissions. The Court fixed the date for delivery of the apposite Ruling to be on 3.10.2014.

PLAINTIFF'S SUBMISSIONS

The applicants have stated that the application is brought pursuant to order 39 rules, 1, 2, 5 and 6 and order 51 rule 1 of the Civil Procedure Rules 2010 and all enabling provisions of the law. They have set down Rules 1 and 2 of Order 39 as stating:

“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 otherwise:-

affidavit or

(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 is about to abscond or leave the local limits of the jurisdiction of the court; or

(ii) has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof; or

(iii) that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may obstruct or delayed in the execution of any decree that the defendant in the suit, the Court may defendant and bring him before the furnish security for his **thereby be may be passed against issue a warrant to arrest the court to show cause why he should not appearance.**

Provided that the defendant shall not be arrested if he pays to the office entrusted with the execution of the warrant any sum in the warrant as sufficient to satisfy the plaintiff's claim; be held in deposit by the court until the suit is order of the Court.” **specified and such sum shall disposed of or until the further**

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 against him, or to furnish security for his appearance at any the claim time 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”.

The plaintiffs submit that they may get a judgment against the defendant but find that there will be no judgment debtor to settle the judgment as the defendant, being a foreign company, could leave the local jurisdiction. They claim that they have a water tight case against the defendant as they have documents from environmental experts analysing the types of pollution occasioned by the activities of the defendants and quantifying it as being in the sum of Kshs.118,097,500/=.

They submit that there was a letter by NEMA addressed to the defendant demanding that it restores the environment to a satisfactory level but which was ignored by the defendant. They argue that this clearly shows that the defendant does not care much for the rule of law and being a foreign company could just vanish in thin air and all the pollution and loss it has caused could go unpaid.

The plaintiffs have proffered the case of Clement Muturi Kigano Versus Shegli Engineering Group Co. Ltd (HCC No. 212 of 2011, Nairobi) in support of the application.

DEFENDANT'S SUBMISSIONS

The defendant has submitted that this application is premised on the unfounded and baseless allegation that the defendant is likely to leave the country having finished the road construction of the Meru, Nkubu, Chogoria, and Mitunguu roads project commissioned by the Government of Kenya. The defendant says the project commenced in 2007 and was concluded and handed over to the Government in

early 2012. They submit that the project was carried out in strict compliance with the law and this explains why the Plaintiffs herein did not raise any complaints during the implementation of the said project and waited until the works had been completed and handed over to the Government of Kenya before lodging their claim one year later. It says that, it will at the full trial demonstrate that the plaintiffs' claim for compensation for some purported loss of some cows, goats, chicken, rabbits and crops with a staggering value of over Kshs.118 million lacks merit.

Among other things, the defendant says that if the plaintiff's application is allowed, it would unfairly contravene the defendant's right to a fair hearing without unnecessary limitations as guaranteed by Article 50 of the Constitution of Kenya. They also bring to this Court's attention that the suit was filed over one year ago and yet the plaintiffs had taken no steps to prepare the suit for trial other than embarking on applications designed to harass the defendant, which conduct ought not to be condoned by this Court.

The defendant in its averments has submitted that it is an established company which has branches and holding companies in Kenya and various other parts of the world including the United States, Uganda, Nigeria, United Kingdom, Cameroon, Italy, the Netherlands, Togo, Benin, Switzerland, Ivory Coast, Ghana, Guatemala, El Salvador, Costa Rica, Romania, Poland, Hungary, Czech Republic, Croatia etc. It states that it has no intention of leaving the court's jurisdiction as alleged by the plaintiffs. To demonstrate its not having any intention to leave the jurisdiction of the Court, it says that it is undertaking other projects in Kenya one of which is the Missing Links Contract which they signed on 5th May, 2014 with the Contract anticipated to run for five years.

DETERMINATION

The main thrust of the plaintiffs' case in this application is that they fear that the defendant will leave the jurisdiction of this Court, and if that happens and they eventually win their case, their claim will not be paid. I reproduce the four grounds contained in their application here below;

1. ***THAT the defendant is a foreign company in Kenya only for the sole purpose of completing their contracts and they could leave Kenya any moment and leave the plaintiffs without redress.***
2. ***THAT the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiffs will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit.***
3. ***THAT the defendant has disposed of or removed from the local limits of the jurisdiction of the court their property or some part thereof.***
4. ***THAT the defendant has actually completed the Mikumbune-Marimba-Mitunguu road which it was constructing and has begun moving their property from the local jurisdiction of the honourable court.***

The Defendant has shown that it has signed a contract with the European Union and the government of Kenya that has a price of Kshs.4,578,162,618.40. This is, to use less statistical language, a contract worth over four and a half billion shillings. The contract commenced on 5th May, 2014 and will run for an anticipated period of 5 years.

The case of Clement Muturi Kigano V Shehgli Engineering Group Co. Ltd does not have similar circumstances to those of the present case in that in the case construction work was ongoing when the suit was filed. In this case the suit was filed one year after the defendant had completed its work. Also in the Muturi Kigano case, the defendant did not demonstrate that it had other work in Kenya. In the present case it is veritably pellucid that the defendant will be in Kenya for at least another 5 years.

The jurisdiction of this Court is national. The removal of the defendant's property from the Meru-Mikumbune-Marimba-Mitunguu road environs to another part in Kenya does not remove it from the jurisdiction of this Court.

The defendant has satisfied me that it has no intention to leave the jurisdiction of this court and that it is desirous of defending this suit. I opine that the best approach in this matter is to set the suit down for hearing, after satisfaction by the parties of all pre-trial prerequisites, so that there can be a decision on its merits.

In the circumstances, the Plaintiffs' application dated 3rd July, 2013 is dismissed with no order as to costs.

It is so ordered.

Dated and delivered in Open Court at Meru this 3rd day of November, 2014 in the presence of :

Cc Lilian

Muthamia h/b Mutuma for Applicant

P. M. NJOROGI

JUDGE