



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 31 of 2013

SUNDIP JAGDISH PATEL PLAINTIFF

VERSUS

ERAD SUPPLIES AND GENERAL CONTRACTORS LTD. DEFENDANT

R U L I N G

1. The matter coming before court this morning was the hearing of the Plaintiff's Notice of Motion dated 30 January 2013. The substantive prayers of the application was that an interim order of Attachment Before Judgement be granted attaching firstly, all the sale proceeds of the public auction scheduled to take place on 5 February 2013 or any other date or secondly, for any realisation whatsoever made in the execution of the Decree as between the Defendant and the National Cereals and Produce Board given on 17 February 2012. The Plaintiff requested of the court that it should secure the sum of US dollars 3,334,288 out of the said Decree for US dollars 5,859,822. In this regard, the Plaintiff was seeking an interim order pending the inter-parties hearing of his Application and secondly pending the hearing and determination of the same.
2. As of this morning, the Advocates for the Respondent had filed a Notice of Preliminary Objection dated today and they have also filed Grounds of Opposition similarly dated. Counsel for both parties seemed to be in agreement that prior to the hearing of the Application, the Respondent would file and serve a Replying Affidavit. Mr. Ahmednassir leading Mr. Saende then made an oral application under Order 19 Rule 2 to cross examine the Plaintiff herein upon the contents of his Affidavit in support of the Application dated 30 January 2013. The respondent had no idea who the Plaintiff was or what his claim as against the Defendant/Respondent amounted to.
3. Mr. Kimamo Kuria had no objection to the application that his client be cross-examined but felt that cross-examination should take place after the filing of the Defendant/Respondent's said Replying Affidavit. However, counsel then applied for interim orders as per prayer 3 of the Application and requested this court to order that the sale proceeds of the public auction scheduled to take place tomorrow 5 February 2013 should either be paid into court or in any other way safeguarded as regards the Plaintiff's claim.
4. Mr. Ahmednassir vigorously opposed Mr. Kuria's oral application. He maintained that there was no basis for any interim order that there was no law that allowed a party to attach a Decree of another party involving a party who was not a party to the suit. He submitted that the Decree as between the Defendant and the said National Cereals and Produce Board was unsatisfied and under active litigation in the Court of Appeal. He noted that there was a judgement pending in the said Court, due to be delivered on the 15 March 2013, as to whether the Decree should be set aside or not. However, the Court of Appeal had not ordered a stay of the execution of the said Decree. The same had nothing to do with the Plaintiff herein.

Counsel went on to state that **Order 39** is very clear on when the court can exercise its power in that regard - the Plaintiff must satisfy the court that the Plaintiff is a foreign company or that the Defendant is in the process of disposing of property to prevent the Plaintiff attaching the same. He maintained that an Order of attachment before judgement is a Draconian power for the court to exercise. If the court cared to examine the material placed before it by the Plaintiff in regard to his claim, it would note that there was nothing attached to the Supporting Affidavit by way of copies of cheques, bank transfers or details of deposits to prove the Plaintiff's claim.

5. **Order 39 Rules 1 and 2** of the *Civil Procedure Rules 2010* provides as follows:

“39. 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;

(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”.

It would appear from the material produced before court by the Plaintiff that the two parties to this suit are Kenyan entities as are the parties in *High Court Miscellaneous Civil Case No. 639 of 2009*. Consequently, there is no relevance to a party absconding or leaving the local limits of the jurisdiction of this court or disposing of or removing from the local limits of the court any property or part thereof. It seems therefore that Rule 1 as above is not pertinent to the Plaintiff's Application.

6. As it stands at the present moment in relation to the provisions of **Rule 2 (1) of Order 39**, the Defendant has not had an opportunity to show cause why this court should not order it either to deposit in court the money that may be realised from the public auction scheduled for tomorrow or other property sufficient to answer the Plaintiff's claim against it. What the Plaintiff is asking this court to do is, pending the inter-parties hearing of his Application, to order that the monies realised at the said public auction should be deposited in court. I have perused the Supporting Affidavit sworn by the Plaintiff on 30 January

2013. The Plaintiff maintains that in 2004 he met with a **Grace Wakhungu** the principal director and shareholder of the Defendant Company. By oral agreement they had proceeded to explore and discuss several possible joint-venture businesses. As a result of such discussions the Plaintiff maintains that he agreed to advance to the Defendant the sum of Shs. 30 million particularly as regards to a contract being negotiated between the Defendant and the said National Cereals and Produce Board. The Plaintiff also maintains that the Defendant did ultimately enter into a contract with the said Board dated 26 August 2004. Subsequent to that date he stated that he advanced further monies to the Defendant. He also recited the fact that the said contract had gone for arbitration and the subsequent award of the Arbitrator, more particularly the enforcement of the same, was the subject of the proceedings in *High Court Miscellaneous Cause No. 639 of 2009*.

7. The most pertinent part as regards the Affidavit in Support of the Application was that the Plaintiff maintained that the Defendant/ Respondent Company had duly passed a resolution in the form of an Undertaking to pay him his dues under the oral arrangement in which he had agreed to advance monies to the Defendant/ Respondent. A photocopy of that Resolution dated 12 November 2009 was exhibited as "SJP 1" to the Supporting Affidavit. I have perused that document carefully. It is supposedly executed under the Common Seal of the Defendant Company but no impression of the Company Seal is discernible from the photocopy. Further, the said Undertaking is not stamped as would be required under the provisions of the Stamp Duty Act. As a result, I must confess to being somewhat suspicious as to the genuineness of the so-called Undertaking. This is the only written evidence that the Plaintiff had advanced any monies to either the said director, Grace Wakhungu or the Defendant/Respondent Company. It is also somewhat surprising to this court that counsel for the Defendant/Respondent submitted from the bar that his client had no knowledge of the Plaintiff nor his claim. This is despite copies of the 6 letters written by the Plaintiff's advocates on record and exhibited as pages 36 - 41 to the Supporting Affidavit.

8. All in all, I remain unconvinced as to the genuineness of the Plaintiff's claim as against the Defendant/Respondent. In any event there is no proof whatsoever provided by the Plaintiff that the Defendant/ Respondent has any intention of disposing of its property or indeed any monies that it may obtain from the proceeds of the said auction sale due for tomorrow. I find myself bound by the finding of the Court of Appeal in the case of **Kuria Kanyogo T/A Amigos Bar and Restaurant versus Francis Kinuthia Nderu & others (1988) 2 KAR 126** which detailed as follows:

"The power to attach before judgement must not be exercised likely and only upon clear proof of the mischief aimed at by Order 38, rule 5 (now Order 39 rules 1 and 2) namely that the defendant was about to dispose of his property or to remove it from the jurisdiction within intent to obstruct or delay any decree that may be passed against him." (Bracketing mine).

Accordingly, I dismiss the Plaintiff's Application dated 30 January 2013 in relation to prayer 3 thereof. Parties may now take a date for the hearing of the Plaintiff's Substantive Application.

DATED and delivered at Nairobi this 4th day of February 2013.

**J. B.HAVELOCK
JUDGE**