



REPUBLIC OF KENYA

High Court at Kitale

Civil Suit 12 of 2009

GARISHON CHRISTOPHER ODARIPLAINTIFF.

VERSUS

JAMES OMARI

LIFEWOOD AUCTIONEERS LTD

MIHESO A.

MASIZA.....DEFENDANTS.

R U L I N G.

The plaintiff vide his application dated 17th February, 2011 seeks the following orders against the defendants namely:-

- (1) That, the defendants be ordered to deposit security in the sum of Ksh. 10 million or to furnish any other security of the same value or of such other value as may be sufficient to satisfy the decree that may be passed against them.
- (2) That the security be furnished within such period of time as the court may order.

The application is brought under sections 1a, 1b, 3a, 63 (b) and (c) of the Civil Procedure Act and Order 39 rule 5 of the civil Procedure rules and is supported by the grounds on the face of the appropriate notice of motion and further supported by the facts contained in the supporting affidavit deposed by the plaintiff dated 18th September, 2011.

In arguing the application and its supporting grounds, learned counsel for the plaintiff, **Mr. Omusundi**, relied on the authorities cited in his list of authorities dated 14th May, 2012.

The three defendants opposed the application on the basis of the averments contained in their respective replying affidavits dated 20th May, 2011 and 11th April, 2011. **Mr. Kiarie**, learned Counsel for the first and second defendant relied on his list of authorities dated 21st May, 2012 and contended that the application is not merited. **M/s. Munialo**, learned counsel for the third defendant associated herself with the arguments advanced by the first and second defendants in opposition to the application.

Order 39 of the Civil Procedure Rules is the operating provisions of the law for applications of this nature.

Rule 5 (1) of the said order provides that:-

“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 part of his property.

(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 suit as may be specified in the order, to produce and place at the disposal 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.”

To qualify for the orders sought herein, the plaintiff was required to satisfy this court that the defendants are about to dispose of the whole or any part of their property from the local limits of the jurisdiction of this court for the sole purpose of obstructing or delaying the execution of any decree that may be passed against them. The plaintiff avers that this suit was instituted against the defendants for having sold his 39 Pedigree cows in a purported execution of a decree issued in a lower court. He is claiming from the defendants a sum of Ksh. 1,149,000/= and loss of profits at a rate of Ksh. 150,000/= per month from the 23rd January, 2009 to the date of delivery of judgment in this suit.

The total amount claimed against the defendants is very high and would be out of reach of an ordinary person. It is against that background that this application has been made to this court.

However, all the defendants have denied the claim and filed their respective statements of defence. What is currently being awaited is the full hearing of the case and its final disposal. In the meantime, the plaintiff is fearful that the defendants have engaged or intend to engage in activities which suggest that their intention is to obstruct or delay the execution of any decree that maybe passed against them in this suit. The plaintiff is therefore asking this court to order the defendants to furnish security in the sum of Ksh. 10 million or to provide any other security of such value prior to the hearing and/or finalization of this suit.

The activities attributed to the defendants by the plaintiff are those indicated in the plaintiff's supporting affidavit dated 18th February, 2011 to the effect that the first defendant has divided the parcel of land known as plot No. 362 Namanjalala farm in Trans Nzoia District in several small portions with the intention to sell the property. The plaintiff says that he visited the property and confirmed as much. He also observed that a notice had been put up indicating that the property was on sale.

The plaintiff displayed an agreement dated 20th April, 2010 (exhibits marked “GCO 3”) entered between the first defendant and one Fred Damiano Musinja for the sale of a portion of the property. He (plaintiff) avers that he has reliably learnt that the first defendant is wantonly disposing off his assets to defeat the execution of any decree that may be passed against him.

With regard to the third defendant, the plaintiff avers that the third defendant owns a single parcel of land known as Kitale Municipality Block 17 (Bidii) 42 which is charged to Barclays Bank of Kenya Ltd.

On his part, the first defendant contends that he has a valid defence to the plaintiff's claim. On his own behalf and that of the second defendant, he contends that he has never disposed of his property nor has the second defendant sold any property with a view to defeating any decree that may be passed against them.

The first defendant avers that for the purposes of raising university fees for his three children he sub-divided his property known as plot No. 362 Namanjalala farm into several plots of 100” x 50” and more so in the year 2007 before this suit was filed. He displayed several sale agreements (Annexures marked JOM 4,5,6 and 7) to establish that fact and avers that the only remaining portion measures half an

acre containing his homestead.

As for the third defendant, he contends that he has never at any time disposed of his property and the fact that the property is encumbered does not translate into defeat of any decree that may be passed against him.

From all the foregoing, it is apparent to this court that the plaintiff has succeeded in showing that at one point after the institution of this suit, on the 29th January, 2009, the first defendant sold part of his property known as plot No. 362 Namanjalala farm. This was on the 20th April, 2010 and the fact is readily accepted by the first defendant. However, the explanation given by the defendant is that he has gradually been selling portions of his property for purposes of educating his children and that such sales having been going on even before the institution of this suit. The first defendant has exhibited sale agreements made in the years 2008, 2009 and 2010. The sales for the year 2009 and 2010 were made after the filing of this suit.

About three sale agreements were made after the filing of this suit. The first defendant has disclosed that the entire portion of the land has already been sold save a portion measuring half ($\frac{1}{2}$) an acre on which his homestead stands. The value of the portion and the homestead is not disclosed. There has also been no disclosure by the plaintiff as to whether or not the first defendant owns other property. There is no disclosure whatsoever of property (if any) owned by the second defendant and whether it is being disposed of with intent to defeat the execution of the decree that may be passed in this suit.

Although it has been shown that the first defendant has sold part of his property since the commencement of this suit, there is no cogent evidence from the plaintiff to show that the relevant transactions were done with the intent to defeat the execution of the decree that may be passed against the first defendant. It is not enough for the plaintiff to state that he has since learnt that the first defendant is wantonly disposing off his assets to defeat the execution of any decree that may be issued by this court against him. The source of this information is not disclosed, neither is it supported by any credible evidence. It may be noted that there has been no denial of the fact that the first defendant had been selling portions of his land prior to the commencement of this suit for purposes of educating his children.

The second defendant is a firm of auctioneers. There is nothing from the plaintiff to show that it is disposing of any of its property to defeat execution of any decree against itself.

The third defendant owns property which is charged to a bank. Sole ownership of property charged to a bank would not by itself be satisfactory reason to require furnishing of security otherwise each and every chargor would be required to furnish security in any case against him/her. Suffice to hold that the conditions set act in order 39 of the Civil Procedure Rules are clear and specific. Herein, the plaintiff has failed to satisfy this court that the defendants are about to dispose of the whole or any part of their property or are about to remove the whole or any part of their property from the local limits of the jurisdiction of this court with a view to obstruct or delay the execution of any decree that may be passed against them. It would be in the interest of all the parties to the suit to have this case fixed for hearing soonest rather than devote their energies to interlocutory applications which would only delay the matter, increase costs and the anxiety which come with it.

In the end result, this application is dismissed with costs to the defendants.

(Read and signed this 9th day of October, 2012.)

(In the presence of Mr. Ingosi H/B for Gicheru & Co. Advocates for plaintiff and Mr. Ndarwa for 1st and 2nd defendant and H/B for M/s. Munialo for 3rd defendant)

J. R. KARANJA.

JUDGE.