



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 630 OF 1996

KARL JENNING PLAINTIFF

- VERSUS -

ALI LIWALI DEFENDANT

RULING

Under O.38 r 5 of the Civil Procedure Rules this court may at any stage of proceedings upon being satisfied either by Affidavit or otherwise that the defendant with intent to obstruct or delay the execution of any decree that may be passed against him is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, direct the defendant to either furnish security or appear and show cause why he should not furnish security.

The object of the Rule as stated by Mulla in his treatise on the Indian Code.

“----- is to pre sent the decree that may be passed from being rendered Infructual the Order that certificate by this rule is not an incidental one directing attachment of property but one calling upon the defendant to furnish security or show cause why security sho uld not be furnished.”

It has also been held that:

“an exparte attachment before Judgement without directing the defendant either to furnish security or to appear and show cause why he should not furnish security breached order 38 r 5 and was a nullity. ”

- See Ndirangu v Abdallah CA 10/79 (UR)

courts are normally slow to order the attachment of a defendant’s property before judgement because as the court of Appeal stated in Kana Kanyoro v Francis Nderu and Others CA 142/87

“It is hardly consistent wi th justice to exact “punished” before the defendant’s liability to execution is established but also because in view of the hardy and time consuming process of the courts, the rights and liabilities of the parties may not be determined for a long time, pos sibly years.”

It is with these principles in mind that I have to consider an application brought under certificate of

urgency by the defendant in this case. It was brought ex parte on 19.5.97 seeking 3 orders:

- 1) That the defendant do within 10 days either furnish security in the sum of Shs.2.5 million or appear and show cause why such security should not be furnished.
- 2) In the meantime the property belonging to the defendant be conditionally attached.
- 3) That the Kenya Police do render assistance to enforce the aforesaid order for conditional attachment.

To qualify for the grant of first order, the applicant must satisfy the court that the requirement of Rule 5(1) (b) as cited above have been complied with.

The plaintiff was a employee of the defendant in the years 1995 and 1996. He claims a sum of US Dollars 39,553 of its equivalent in Kenya shillings for arrears of salary and other benefits payable to him by the defendant.

The defendant is a foreign national who was carrying an transport business in Mombasa. He is said to be a national of Zaire (now the Democratic Republic of Congo) with his major operations in the Town of Goma. He also has residence in Brussels Belgium where his family resides. The Defendant had earlier came to court for similar orders in December, 1996 but the orders were not granted for reasons stated in the ruling of Ang'awa J. An ex parte judgement which had also been obtained on 5.2.97 was set aside by consent of the parties on 9.5.97. By that date some of the defendant's property had been attached but was released in accordance with the consent order. It is now the plaintiff's case that circumstances surrounding the case between December 1996 when he brought his first application and 19.5.95 when he filed the present application have changed so drastically that if the orders sought are not granted the plaintiff's claim will be rendered nugatory. That is because there is now sufficient proof that after the filing of the first application which sought the attachment of 5 trucks and their trailers, two of those trailers and trucks were spirited away from the jurisdiction of this court. The remaining trucks and trailers which were under attachment were released but the arrangements are now underway to have them cross the boarder to Uganda, Kigali or Congo. The particulars of the motor vehicles and their value are specified. These motor vehicles are said to be the only known property of the defendant in this country save for some office furniture.

To satisfy the court that the defendant intends to remove his property from the jurisdiction o this court with the only intention of defeating execution of any decree that may be passed against him. The plaintiff swore an Affidavit to that effect and also called the witness who not only swore an Affidavit in further support but also gave Viva Voce evidence. He is James Namada Mahham who is also one of the employees of the defendant. He confirmed that the motor vehicles belonged to the defendant. He also testified that the defendant is resident in Brussels, Belgium with the family but had his business headquarters in Goma and branch in Mombasa. He is the Workshop Manager in the business in Mombasa. The defendant was in Kenya recently to secure the release of the motor vehicles earlier attached in this case. Thereafter the witness was instructed that the motor vehicles should be serviced ready to travel to Kigali. Two of the trucks and their trailers are in a garage in Mombasa and although there are no known instructions that they should leave, there is nothing to prevent the defendant from taking them. Another truck is said to be in Molo. The only business premises in Mombasa were closed down and the premises rented out to other tenants due to non payment of rent. The employees of the Company have not been paid since November, 1996 and have been thrown out of the premises after closure. The witness did not know of any other property which may be attached in execution of any decree.

I have considered the Affidavits in support of this application and the oral evidence tendered. I am of the view that this is a proper case where orders should be issued for the defendant to either furnish security or appears and show cause why he should not furnish such security. Accordingly I order that the defendant do within 21 days of service of this order furnish security in the sum of Kshs.2,500,000/= or alternatively appear within the same period and show cause why he should not furnish such security.

I have the discretion under Rule 5 (3) to direct in a deserving case that conditional attachment of the property be made. I have considered the evidence so far on record and I am satisfied that this is a proper case to make such an order.

Accordingly, I direct that the motor vehicles specified in the application be attached pending service of the order for furnishing security or showing cause why it should not be furnished. The costs of such attachment shall be borne by the Plaintiff/Applicant

I decline to grant the prayer that the Kenya police be involved in this civil matter. Such procedure was discouraged by the Court of Appeal in "The Ripples Case" CA NAI 186/92 (NAI.77/92 UR) court Bailiffs have sufficient powers under the law to enforce court orders. Orders accordingly.

Dated and Delivered at Mombasa this 19th day of May, 2007.

P.N. WAKI

JUDGE