



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT 183 OF 1997**

**RAYMOND NAMOYA .....PLAINTIFF**

**Versus**

**THEO VERMEULEN..... 1ST DEFENDANT**

**DIAM DIVING & SAFARIS.....2ND DEFENDANT**

**RULING**

The applicant, whom I shall refer to as the 1st defendant brings in an-application by way of a chamber summons dated the 11th of September 1997 for the following prayer under Order 38r. 1 & 5 and Section 3(a):-

"1. That the order for attachment of the first Defendant's properties dated the 5th September, 1997 be, hereby vacated. 2. That costs be provided for I shall refer to the respondent as the plaintiff. The 2nd defendant was never served with the said application. The relationship between the 1st and 2nd defendant was that the 1st defendant has previously been a director of the company but has since sold his shares sometime this year.

In 1995, May 2nd, the plaintiff entered into an agreement with the defendant No. 1 & 2 to purchase a motor boat when the Plaintiff - according to his plaint, took possession of the boat. The boat broke down the following day. The 1<sup>st</sup> defendant refused to make any repairs on grounds that there was no spare parts.

After being aware that the 1st defendant has sold his equity in the 2nd defendant and may be returning to his home country, the plaintiff filed suit on the 17th of June, 1997 and prayed for orders that both defendants jointly and severally for:-

- (a) a declaration that the defendants are in fundamental Breach of contract and or orders for refund of the Purchase price.
- b) special and general damages.
- c) Interest on commercial rates & costs.
- d) any order or further relief the court may deem fit and just."

Attachment before judgment of the 1st defendant's properties as under-

i) Two motor boats

a) MSHIKI .....

b) .....

c) One motor vehicle Mercedes Benz Red Registration KAC 806S estimated cost KShs.600, 000/- lying at Diani.

iii) Banker Compressor "Mariner" estimated costs KShs.250 ,000/-.

d) .....

The orders granted by me were one of attachment of the 1st defendant's properties but limited to prayer (c) of the properties. Namely the Mercedes Benz vehicle and of the Banker Compression "Mariner", both estimated at KShs.600,000, & KShs.250,000/- respectively.

The plaintiff was ordered to give an undertaking of KShs.1,000,000/- in the event the ex-parte orders were erroneously obtained. These orders were issued on the 5th September, 1997.

The 1st defendant after the properties were attached by 6th September, 1997 entered appearance.

The 2nd defendant entered appearance and defence on the 7.7.97 and 17.7.97 respectively. The 1st defendant could not be immediately traced. The plaintiff gave an application under a certificate of urgency on 27th of August, 1997 stating that the 2nd defendant was disposing his properties and was about to leave the country, This application was later amended and the 4th of September, 1997.

It was brought under Section 3A of the Civil Procedure Act and Order 38 rules 1 a (ii) rule 5(a) of the Civil Procedure Rules and prayed for the following orders-

"a) ...

b) That the court do issue a warrant to arrest the 1<sup>st</sup> defendant to appear in court and show cause why he should

This was a case whereby the two plaintiffs prayed and obtained orders for a warrant before judgment. The three were formerly partners. The partnership ceased with the defendant leaving. The judge of the superior court issued a warrant of arrest against the defendant without there being any concise facts before him.

The advocate for the plaintiff therefore agreed that in this particular case there was insufficient information and facts put to the Court to show that the defendant was about to leave the country. This misled the court to issue the orders given! As such the orders issued were unprocedurally wrong and ought to be vacated.

In reply the advocate for the plaintiff stated that the 1st defendant's properties are uncertain. The case law of Portiqueter was correct and in agreement with him, namely that the court, before giving its orders must be satisfied with the evidence before it. That the 1st defendant's arguments put forward was inadequate to set the judgment aside. What should at this stage is that the 1st defendant should provide security under Order 38 r 9 of the Civil Procedure Rules.

This was of course objected by the advocate for the 1st defendant on grounds that rule 9 comes to play afterwards and not now.

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Should the orders for attachment be set aside and vacated?

The plaintiff has had attached out of the properties the Mercedes Benz motor vehicle registration No. KAC 806S estimated at the costs of KShs.600, 000/-. This was for the purpose of the defendant to show case why he should not provide security for his appearance.

When the attachment was made the defendant did show appearance and filed defence. The reasons for vacating the orders was mainly two. Namely that the orders were obtained unprocedural and that the orders was unlawfully obtained - no security has so far been offered.

Looking at the procedure under Order 38 of the Civil Procedure Rules, a plaintiff may apply for a warrant of arrest of the 1st defendant under rule 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 its obstruct or delay the execution of any decree that may be passed against him.

i) ....

ii) ....

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

b) that the defendant is about to leave Kenya under circumstance 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 as to order 38 r. 5 of the Civil Procedure. rules which reads -

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' or

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 sum as may be specified in the order or produce and place at the disposal of the court, when required the said property or the value of the one or such portion thereof is to satisfy the decree or and appear and show cause why he should not furnish security.

The 1st defendant is an individual whilst the 2nd defendant is a limited liability company. The prayers therein were directed to the 1st defendant. Either to have him arrested before judgment or to have his property attached.

I granted the application to have the defendant No. 1's properties attached instead of a warrant of arrest. Adequate evidence in both cases was required. Twice the advocate for the plaintiff was sent away by this court to supply adequate information before even the orders of attachment were issued.

I would agree with the Portqeiter case whereby the 1st defendant relied on to support his argument. The said case is distinguishable on the fact that the case dealt with the warrant of arrest of the defendant. In this case no warrant of arrest was dealt with but simply the attachment of the defendant's properties. The plaintiff had not been encouraged to obtain orders of arrest.

Reference was made to the affidavits relied on by the Plaintiff as being here say and not reliable to grant orders of attachment of properties.

The defendant though in his affidavit for this application states that he has bought another company - as proof that he still owns property in Mombasa, Kenya. He also admitted that he frequently travels outside the jurisdiction of Kenya.

I would hereby rule that the court received adequate information as regards the 1st defendant including his properties. I rule that he still requires to provide security for his appearance. That the attachment herein be and is hereby to remain in force until such security is provided and/or notice to show cause why he should not furnish security to the plaintiff within 14 days of to-day's date.

I dismiss this application. I award costs to the plaintiff/respondent.

Dated this 29th day of October, 1997 at Mombasa.

M. ANG'AWA

JUDGE 29.10.97

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10 Coram:

Lady Justice Ang'awa

Advocate for the Plaintiff/Applicant/Appellant Mr., Kabuki present. Plaintiff Present/Absent.

Advocate for the Defendant/Applicant/Respondent Mr. Kassim present. Defendant Present/Absent. Court clerk - Sibiyia

Ruling read and delivered in open court this 29th Day of October, 1997.

**M. ANG'AWA**

**JUDGE**

29,10.97

Mr. Kassim: I pray to appeal. Formal application be filed.

**M. ANG'AWA**

**JUDGE**

**29.10.97**