



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO. 285 OF 2016

RAKESH RAJSPAL.....PLAINTIFF

=VERSUS=

PAOLA GIACOSA.....DEFENDANT

RULING

1. I have before me an application dated 25th October 2016 brought under the provisions of Order 39 Rules 1 and 2(1) and (2) of the Civil Procedure Rules. The Applicant prays for Orders: -

(i) Spent

(ii) THAT this Honourable Court be pleased to issue a warrant of arrest(against) the Respondent and bring her to court to show cause why she should not furnish security for her appearance in court at any time when called upon during the pendency of the suit and until the satisfaction of the decree as may be passed in favour of the Applicant.

(iii) THAT this Honourable Court be pleased to order the Respondent to deposit the sum of Kshs 3,500,000 in court within 7 days as security for satisfaction of the Plaintiff's claim and costs.

2. The Application is based on a number of grounds and is supported by the annexed affidavit of Rakesh Rajpal sworn at Malindi on 25th October 2016. The grounds upon which the application is brought are: -

(i) The Respondent is a foreigner and an Italian national with no known assets in the Republic of Kenya within the jurisdiction of this court, save for the suit property.

(ii) The Applicant has lodged a claim of Kshs 3,500,000/ with interests, a substantial sum of money had and received by the Respondent under false pretence on the purport that the Respondent was selling the suit property.

(iii) The Respondent who has since limited her visits to Kenya has expressed an interest in disposing of the suit property to third parties with the intention of defeating, delaying or obstructing the execution of any decree as may be issued against her in this matter.

(iv) That the entire claim will be rendered useless unless the court grants the orders sought.

3. On her part, the Respondent opposes this application. In Grounds of Opposition filed herein on 6th March 2017, she outlines three main grounds for opposing the application as follows: -

1. The suit is for the determination of a right to or interest in immovable property and by virtue of the provisions of Order 39 Rule 1 of the Civil Procedure Rules this court has no power or authority to grant the said application.

2. In the alternative, the Applicant has failed to satisfy this court that the Defendant has the intention 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 her as purported; and

3. By virtue of Articles 50 and 159 of the Constitution, this Honourable Court must act with restraint before considering granting the application unless it is obvious that the defendant has or intends to abscond.

4. At the hearing hereof, both parties filed written submissions and authorities. I have taken time and considered the same. The orders sought herein are in the nature of a freezing order or what is commonly referred to as a Mareva injunction (named after the U.K. case of ***Mareva Compania Nanierra SA -vs- International Bulkcarriers SA (1975) 2 Lyold 509***).

5. The interlocutory relief referred to as the Mareva injunction has now been statutorily codified in Kenya under Order 39 of the Civil Procedure Rules which provide 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; or

(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/her before the court to show cause why he should not furnish security for his appearance.

6. It has been contended by the Respondents that the suit herein falls squarely under Section 12(d) of the Civil Procedure Act by virtue of which the provisions of Order 39 Rule 1 do not apply. Section 12(a) to (d) of the Civil Procedure Act deals with the places to file certain suits and provides as follows: -

12. Subject to the pecuniary or other limitations prescribed by any law, Suits-

(a) For the recovery of immovable property with or without rent or profits;

(b) For the partition of immovable property

(c) For the foreclosure, sale or redemption in the case of a mortgage of or charge upon

immovable property;

(d) For the determination of any other right to or interest in immovable property...

Where the property is situated in Kenya shall be instituted in the court within the local limits of whose jurisdiction the property is situate.

7. As I understand it and contrary to the respondent's assertions, while the cause of action herein may have resulted from a disagreement over immovable property, the nature of claim as framed has nothing to do with the determination of any right or interest in the immovable property. It is evident from the pleadings herein that the plaintiff is no longer interested in the parcel of land whose purchase resulted in these proceedings as the plaintiff is only seeking a refund of sums of money alleged to have been paid to the Respondent towards damages resulting from the alleged misrepresentation of facts about the parcel of land involved. Accordingly, I find and hold that this court has jurisdiction to consider the application as brought before the court.

8. In Goode on Commercial Law, 4th Edition at page 1287, the Learned Authors state that:

“The grant of a freezing injunction is governed by principles quite distinct from those laid down for ordinary interim injunctions....

Before granting a freezing injunction, the court will usually require to be satisfied that: -

(a) The claimant has “a good arguable case” based on a pre-existing cause of action.

(b) The claim is one over which the court has jurisdiction.

(c) The Defendant appears to have assets within the jurisdiction.

(d) There is a real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted; and

(e) There is a balance of convenience in favour of granting the injunction.

9. As we have seen, the main grounds upon which the application has been brought is that the Applicant has a claim of Kshs 3,500,000/ lodged against the Respondent who is an Italian National with no known assets within the jurisdiction of the court save for what is described as the “suit property”. It is the Plaintiff's position that the Respondent has expressed an interest in disposing the suit property to Third Parties and that she has since limited her visits to Kenya.

10. Order 39 Rule 1 of the Civil Procedure Rules requires that before a court issues warrants or makes any other orders as sought herein, the court must be satisfied by affidavit or otherwise. As the Court of Appeal stated in *FTG Holland -vs- Atapack Enterprises & Another Nairobi Civil Appeal No. 171 of 2014*;

“It was incumbent upon the (applicant) to demonstrate, by affidavit, and the court to be satisfied, from that evidence, that the appellant was about to leave Kenya under circumstances that would lead to a reasonable apprehension that it intended to obstruct or delay the execution of any decree that may be passed.

11. As it were, other than the fact that the Respondent is said to be a foreign national, there was no scintilla of evidence placed before this court to prove either that the Respondent intends to abscond and/or that she was about to dispose any of her assets or repatriate them from the local limits of this court's jurisdiction.

12. Indeed, contrary to the Plaintiffs assertions, I am not persuaded that a parcel of land of the nature

described to be owned by the Respondent is something that could be disposed off on the blink of an eye and without notice of the Plaintiff. Having paid a deposit for the land and having a duly signed sale agreement with the Respondent. I think it is evident that the Respondent has immovable property in Kenya and there are other ways through which the Plaintiff can realise the fruits of his judgment if successful. In any case, there is no real risk that the respondent's known assets, which in this case are immovable can be removed from the jurisdiction and/or otherwise dissipate if the injunction is not granted.

13. Accordingly, I dismiss the application dated 25th October 2016 with costs to the Respondent.

Dated, signed and delivered in Malindi this 2nd day of June, 2017.

J.O. OLOLA

JUDGE