



REPUBLIC OF KENYA



**Freudenthal & another v Ryrrie & another; Philiphs & another (Interested Parties) (Environment and Land Case Civil Suit 51 of 2023) [2024] KEELC 3848 (KLR) (24 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3848 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 51 OF 2023**

**EK MAKORI, J  
APRIL 24, 2024**

**BETWEEN**

**EMMANUEL FREUDENTHAL ..... 1<sup>ST</sup> PLAINTIFF**

**KAMINI KUMAR MENON ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**SONIA RYRIE ..... 1<sup>ST</sup> DEFENDANT**

**CHARLES BRUCE ARTHUR ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**MICHAEL MAX PHILIPHS ..... INTERESTED PARTY**

**JULIA MARY BUCKNAIL ..... INTERESTED PARTY**

**RULING**

1. The Notice of Motion dated 14<sup>th</sup> December 2023 brought pursuant to the provisions of Section 3A of the [Civil Procedure Act](#), Order 39 Rule 5(1) of the [Civil Procedure Rules](#) seeks *inter alia*:
  - a. Spent.
  - b. Spent
  - c. The Court be pleased to direct the defendant /respondent to show cause why they should not furnish security for USD 200,000/- or deposit title for land parcel No. Nairobi Block 218/82(formerly LR No. 5917/6) and log book No. KAD 361Y Subaru Leon 1989 in Court as security for the amount claimed in the main suit.
  - d. Costs be in the cause.



2. The application is supported by the supporting affidavits of the 1<sup>st</sup> applicant herein Mr. Emmanuel Freudenthal sworn on 14<sup>th</sup> December 2023 and 2<sup>nd</sup> of February 2024.
3. The 1<sup>st</sup> defendant/respondent Mr. Bruce Arthur Ryrie has filed a replying affidavit sworn on 15<sup>th</sup> January 2024.
4. The 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs entered an agreement for sale dated 18<sup>th</sup> September 2021 with the 1<sup>st</sup> defendant in respect of all that parcel known as plot No.676 within Kitangani, Takaungu measuring approximately 4.3 acres together with the improvements standing thereon for a consideration of USD 200,000/-
5. The 1<sup>st</sup> defendant undertook to indemnify the plaintiffs against any actions, proceedings, claims and demands, costs and damages, and expenses which may be levied or made against the purchasers if any such claim arising or related to the said suit property is raised. Contemporaneously, and because the suit property did not have a title, the 1<sup>st</sup> defendant executed a specific Power of Attorney as a donor in favour of the plaintiffs as donees for various acts concerning the suit property.
6. The full purchase price was duly paid. Upon meeting with the neighbour Philip Mason, it was discovered that the property was not available for sale as it belongs to the Mazrui Trustees. It was also revealed that Mr. Philip Mason had a lease over the said land. Based on the foregoing, the plaintiff is now forced to take another option by sub-leasing the suit property with the said Mr. Mason.
7. The applicant avers that there is apprehension that the 2<sup>nd</sup> respondent is in the process of disposing of the known property to migrate to New Zealand hence the current suit and application. Already the 2<sup>nd</sup> defendant has sold a motor vehicle and is in the process of selling known parcel No. Nairobi Block 218/82(formerly LR No. 5917/6) and log book No. KAD 361Y Subaru Leon 1989. That is why the current application has been brought to have those properties secured by this Court as security for the amount claimed in the main suit.
8. On the legal front the applicant submits that Order 39 Rule 5(1) of the *Civil Procedure Rules*, provides for attachment before judgment. The applicant contends that the standard for attachment before judgment is as elaborated in the case of *Godfrey Oduor Odhiambo v Ukwala Supermarket Kisumu Limited* [2016] eKLR.
9. The applicants aver that from the social media platforms, the 2<sup>nd</sup> respondent is keen to sell his known property in Kenya and completely migrate to New Zealand. There is no other known property held by the 2<sup>nd</sup> respondent.
10. The applicant further cites the decisions of *Susan Mumbua & 6 Others v Navitas Limited & 2 Others* [2015] eKLR and *Raymond Namoya v Theo Vermeun & Another* [1997] eKLR. The cases highlight how to deal with a party absconding or selling property with a view to evanescence from the jurisdiction of this Court.
11. The respondent is of the view that the allegations by the applicants are unfounded since no hardships have ever been reported since the sale agreement was executed in the year 2021. The respondent avers that the burden of proof that the respondent was about to abscond rests with the applicant per Section 107(1) of the *Evidence Act*. There is no iota of evidence that the respondents intend to vacate permanently in New Zealand. The respondent cites the case of *Evans Otieno Nyakwana v Cleopas Bwana Ongaro* [2015] eKLR which enunciates that the legal burden is on the applicant to prove allegations of absconding from the jurisdiction of the Court. The respondent further cites the cases of *Priscilla Nyambura v Marathon Corporation (K) Limited & 3 Others* [2007] eKLR, *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others, Aggrey Shivona v Standard Group Plc* [2020]eKLR,



Bayusuf Grain Miler v Bread Kenya Limited[2005]eKLR and Godfrey Oduor Odhiambo v Ukwala Supermarket Kisumu Limited [2016]eKLR, all dealing with the test to be achieved before attachment before judgment is decreed.

12. The respondents take issue with the evidence produced electronically from the internet without the requisite certificate and conclude that pursuant to the decision in Juja Coffee Exporters Limited and Another v NIC Bank Limited & Another Mombasa HCCC No. 107 of 2018 where the Court disallowed evidence produced as screenshots minus certificate under Section 106A and B of the Evidence Act as inadmissible.
13. The respondents submit that the 1<sup>st</sup> defendant has no intention of leaving Kenya while the 2<sup>nd</sup> defendant lives in New Zealand. The respondents aver that the applicants wish to continue to stay in the suit property and at the same time have USD 200,000/- secured to await the outcome of the matter.
14. The respondents state that one cannot be condemned unheard or that no hurdles should be placed on one's way to access justice pursuant to Article 50 of the Constitution, and the authorities cited abhor the provision of Security before one is heard.
15. From the materials and submissions by the parties, what stands for the decision of this Court is whether the applicants have demonstrated that this Court on the set of facts placed before it should issue an attachment before judgment, with the attendant costs.
16. It will be noted from the onset that initially the Court issued prohibitory orders concerning the dealing in respect to land parcel No. Nairobi Block 218/82(formerly LR No. 5917/6) it was been discovered that the land had long been disposed of and passed on to the interested parties.
17. Order 39, Rule 1 of the Civil Procedure Rules provides as follows:
  - “ 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 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."

18. Order 39, Rule 5 provides that:

"5.

- (1) 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 sum 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.
- (2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.
- (3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified."

19. For an application for attachment before judgment succeeds it has to be shown as held in the case of *Chanan Agricultural Contractors Limited v Mumias Sugar Company Limited* [2019] eKLR:

"The principles governing attachment before judgement were laid down by the Court of Appeal in the case of *Kuria Kanyoko t/a Amigos Bar and Restaurant v. Francis Kinuthia Nderu, Helen Njeru Nderu and Andrew Kinuthia Nderu* (1988)2 KAR 1287-1334 as follows: -

"The power to attach before judgement must not be exercised lightly and only upon clear proof of the mischief aimed at by Order 38, Rule 5, namely that the Defendant was about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him."



The same was adopted in the case of *Shiva Enterprises Limited v. Jivaykumar Tulsidas Patel t/a Hytech Investment* (2006) eKLR, where the following was stated-

“That a party would need to meet that high standard of proof before a party is ordered to supply security for the amount claimed. The jurisdiction that the Plaintiff invoked has to be appropriately exercised to ensure that a party meets the aforesaid high standards. It ought to always be remembered that the purpose of that jurisdiction is to secure the Plaintiff against the Defendants act aimed at defeating judgment that may be entered. It is however not the intention of that jurisdiction to harass or to punish the Defendant before judgment is entered against him. It is worthy to quote from the case of *Kuria Kanyoto T/A Amigos Bar and Restaurant v Francis Kinuthia Nderu, Helen Njeru Nderu and Andrew Kinuthia Nderu* [1988]2 KAR ...”

10. In *Awo Shariff Mohamed t/a Asmi Services Station v. Caltex Oil Kenya Ltd* [2008] eKLR, the court while discussing the provisions of Order 39 of the [Civil Procedure Rules](#) (which then was Order 38) stated-

“It is my view that the interpretation of the provisions of Order 38 is clearly set out in the above authorities. The purpose of the procedure is to secure the Plaintiff against any attempt on the part of the Defendant to defeat the execution of any decree that may be passed or to delay the proceedings in the Plaintiff’s case. But because the Court has not had opportunity to try the case yet the Court has to act carefully and not to grant orders lightly. Always remembering that justice demands that both parties be heard before the dispute is determined. Therefore, the requirements of the provisions of the Order (38) must be complied strictly.”

11. This position was reiterated in *FTG Holland v. Afapack Enterprises Limited & Another* [2016] eKLR, where the Court of Appeal held the view that -

“The power to attach before judgment is not to be exercised lightly and without clear proof of the mischief to be avoided.”

20. In the instant case, applicants have systematically shown that the suit property and the agreement entered between the parties is in jeopardy. The ownership documents are in the hands of a 3<sup>rd</sup> party. The applicants through evidence have shown that the 2<sup>nd</sup> respondent has gone on a spree of selling properties here in Kenya the latest being parcel No. Nairobi Block 218/82(formerly LR No. 5917/6), which unknown to the applicants has long been transferred to the interested party. What remains as per the current application is log book No. KAD 361Y Subaru Leon 1989. The respondents have not answered whether they will be in a position to indemnify the respondents in case this matter goes in favour of the applicants.
21. I am satisfied that the applicant has shown that the respondent is not only disposing of the properties here in Kenya but also relocating to New Zealand.
22. Considering the circumstances in this case it is my finding that the applicants have proved that there is a need for attachment before judgment and I will propose to issue the following orders:



- a. Logbook for Motor Vehicle No. KAD 361Y Subaru Leon 1989 be deposited in this Court as security for the amount claimed in the main suit.
- b. The costs for the current application and that of the interested parties dated 12<sup>th</sup> February 2024 be borne by the respondents.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 24<sup>TH</sup> DAY OF APRIL 2024.**

**E. K. MAKORI**

**JUDGE**

In the Presence of:-

M/s Ndirangu for the Plaintiff.

Mr. Gikandi for the Defendant

Mr. Idris for the Interested Parties

