



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)

CIVIL APPEAL NO. 171 OF 2014

BETWEEN

FTG HOLLANDAPPELLANT

AND

AFAPACK ENTERPRISES LIMITED.....1ST RESPONDENT

AFA CHEMICALS LIMITED.....2ND RESPONDENT

(Being an appeal from the Ruling and Orders made in the High Court of Kenya at Nairobi (Kimondo, J.) dated 19th March, 2013

in

H.C.C. No.352 of 2012)

JUDGMENT OF THE COURT

The appellant instituted in the High Court Civil Suit No. 352 of 2012 claiming €314,660.20 from the respondents for goods supplied. The respondents denied the claim, filing a defence and counter-claim. In the counter-claim the respondents instead contended that the appellant owed it, in overpayments, €118,731.5. Shortly afterwards the respondents took out a motion on notice pursuant to **order 39 rule 1 (b)** and 2 of the Civil Procedure Rules for orders that;

“1. The Court issues warrant of arrest to the Director(s) of FTG HOLLAND, the Plaintiff and Defendant in the counter- claim/Respondent, to show cause why the Plaintiff and Defendant in the counter-claim/Respondent should not furnish security in the sum of Euros €118,731.5:

(a) By depositing the same with the Honourable Court; or

(b) By way of bond or guarantee issued by a Kenyan Bank acceptable and/or approved by this Honourable Court.”

The application was brought, in the main on the basis that;

“...being a foreign company the (appellant) is likely to leave the jurisdiction of the court and obstruct or delay execution of any decree that the (respondent) may get from.... the court on the counterclaim.”

To that the appellant filed three grounds in opposition to the effect that **order 39 rule 1 (b)** and **(2)** aforesaid did not give the court the power to order for the furnishing of security for a defendant's appearance in court; that there was no evidence that the appellant intended to delay or avoid the process of the court or to delay execution of any decree; and that in the absence of that evidence, it was punitive to require the appellant to provide security merely because it is a foreign company.

In deciding the application, **Kimondo, J.** observed that, whilst it was not in dispute that the appellant was domiciled in the Netherlands, there was no supporting evidence that it had any attachable assets in Kenya hence, in his opinion, the respondent had established a *prima facie* counterclaim. Appreciating that the application was brought under **order 39 rule 1** for the arrest of the respondent's directors to show cause why they should not furnish security, the learned Judge believed that the application ought to have been brought under **rule 5** for an order to furnish security and preceded to determine the application under that rule. He identified the two things that must be proved to obtain the order, namely that the plaintiff has absconded or about to abscond from local limits of the jurisdiction of the court, or has disposed of his property with intent to delay or obstruct execution of a decree. Instead of applying these tests, the learned Judge completely went off on a tangent, purporting to be guided by the provisions of sections **1A, 1B** and **3A** of the Civil Procedure Act, to consider the domicile of the appellant and the fact that it had no known attachable assets in Kenya. After finding that the appellant was a foreign registered company and that it had failed to file a replying affidavit to demonstrate tha

1. the appellant to furnish security in the sum of €118,731.5 or the equivalent in Kenya shillings within 30 days of the ruling.
2. that in default the appellant's movable properties of the equivalent value be attached and held to the order of the court until conclusion of the case.
3. the appellant to pay the costs of the application to the respondent.

The appellant now brings this appeal complaining that the learned Judge failed to satisfy himself as to the requirements of **order 39 rule 1**; and that he misdirected himself on the nature of the application before him with the discriminatory result that a foreign company suing in Kenya is liable to furnishing security, merely because of that fact.

Parties reiterated these arguments in their written submissions and relied on authorities which we have duly considered in determining this appeal. Since the respondent's application was specifically anchored on **order 39 rules 1(b)** and **2** of the Civil Procedure Rules, of necessity that will be our starting point, but emphasise that the application was essentially one for attachment before judgment. **Order 39 rule 1(b)** provides that 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. The court will only issue the warrant if it is satisfied by affidavit or otherwise-

“1.

(c) ... 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.”

Rule 2 provides for the consequences of failure to show cause. The foregoing are the only considerations for the court to issue a warrant under **sub rule (b)**. The respondent sought to persuade the court below that, since the appellant is a foreign company domiciled in Holland with no known assets in Kenya, there was real likelihood that should the respondent succeed in its counter-claim, it will be unable to execute the decree. In that case, by **sub rule 1 (b)** of **rule 5**, it was incumbent upon the respondent 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 reasonable apprehension that it intended to obstruct or delay the execution of any decree that may be passed in the counter-claim. There was no scintilla, not a whit of evidence to prove any of the above. Having found no such evidence, but concerned that the appellant was a foreign registered company with no known assets in Kenya, the learned Judge, quite uncharacteristic, so to speak, fished out **rule 5** to protect the respondent's interest. That rule 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.”

Again for the court to have resorted to this rule it had to be satisfied that the appellant was about to dispose of its assets or repatriate them from the local limits of the court's jurisdiction. The respondent provided no evidence at all to demonstrate that any of the above was about to happen. The learned Judge sought to find answers in the overriding objective **sections**, that is, **1A, 1B** and **3A** of the Civil Procedure Act, which, in the circumstances of the case, had no application.

Throughout the ruling the learned Judge consistently emphasized that the appellant had no known attachable assets in Kenya but curiously, made a default order that the appellant's movable properties to the value of €118,731.5 be attached.

We learn from a long line of judicial authorities that in our adversarial system of litigation, strange results would follow if a judge adjudicating on a matter were to participate as a party by determining issues not before him, or by looking for material, not presented by the parties, in order to find in favour of one party. See **Kenya Commercial Bank Ltd v Osebe (1976-1985)** EA 205.

Cockar, Gicheru and Kwach, JJA, explained in **Sheikh v Sheikh and Others** (1991) LLR 2219 (CAK) that;

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the Court will be called upon to adjudicate between them. It thus serves the two fold purpose of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the Court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which we, the court will have to determine at the trial.”

By its pleadings the respondent put forth a case that the appellant was about to leave Kenya in order to frustrate execution of the decree that may be passed in its favour. That was the case the appellant prepared to rebut in court and indeed arguments before the learned Judge oscillated around the question whether there was evidence that the appellant intended to avoid payment of the decretal sum in the counter-claim by leaving the country. Without giving the parties an opportunity to address him, the learned Judge *suo moto* invoked **rule 5** whose consideration is different from those in **sub-rule (b)** of **rule 1**. In the former the appellant was expected to rebut the claim that it was about to dispose of or remove its property from Kenya. The power to attach before judgment is not to be exercised lightly and without clear proof of the mischief to be avoided.

For these reasons, although the learned Judge had complete discretion to order for security, we think he improperly exercised that discretion, and in the result erred by making a general proposition that a foreign registered company sued in Kenya must provide security even in the absence of evidence that the company intends to dispose or repatriate its property out of the jurisdiction.

Accordingly we allow the appeal with costs, set aside the orders issued on

19th March, 2013 and dismiss the motion dated 19th July, 2012 with costs.

Dated and delivered at Nairobi this 25th day of November, 2016

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR