IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPLICATION NO. 22 OF 2015 (UR. 20/15)

BETWEEN

CAPRICORN FREIGHTS FORWARDERS LIMITED ……..…… APPLICANT

AND

VICTOR OMONDI T/A

FIRST IMPEX & FIRST WESTLINK …… RESPONDENT

(Being an application for temporary injunction/stay of execution of the orders in the High Court of Kenya at Mombasa (Kasango, J.) dated 19th March 2015

in

H.C.C.C. No. 26 of 2015)

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RULING OF THE COURT

This is an application from the ruling of the High Court (**Kasango J**.) wherein the application dated 13th February, 2015 in which the applicant sought orders for conditional attachment of the four containers namely **MAEU 8386788, PONU 7522661, MRKU 4595019 and MRKU 2541395** then lying at the port of Mombasa and for the respondent to furnish security in the sum of Kshs.15,973,831/- was dismissed.

Vide a plaint dated 18th February 2015, the applicant claimed as against the respondent Kshs.15,973,831/-, general damages for breach of agreement, costs and interest on account of clearing and forwarding transactions it undertook on behalf of and at the instance and request of the respondent regarding its consignments passing through the port of Mombasa.

In response, the respondent denied the applicant's claim and specifically denied existence of a written agreement appointing the applicant as its sole clearing agent. It was further pleaded that in the event that there was such an agreement then it was a forgery. Pursuant to the claims of forgery, the respondent mounted a counterclaim against the applicant for a refund of all customs penalties and demurrage charges on account of the applicant's failure to account or issue receipts for money paid to it by the respondent; diverted payments made by the respondent; forged documents relating to the applicant's consignments; irregular charges on the respondent's account for various consignments of third parties;

fraudulently and irregularly made import entries with Kenya Revenue Authority; and unlawfully demanded payment from the respondent for services not rendered. In the alternative, the respondent prayed that the applicant be ordered to compensate him for the loss.

The parties in their rival affidavits in support of and in opposition to the application, more or less deponed and or reiterated the above averments. However, and as we have already stated, the application was eventually dismissed. In dismissing the application, **Kasango, J.** delivered herself thus:

> *" …….. In my consideration of the first issue, I find the plaintiff has failed to satisfy the conditions set out in Order 39. The plaintiff has not shown that Defendant has intent to delay, avoid the court process or obstruct the execution of the decree, has absconded (sic) out of jurisdiction of this Court or has disposed its property. Having found the first issue in the negative there is no basis for consideration of the second issue. There is no basis of ordering the defendant to show cause or to order him to provide security."*

Not happy with the determination, the applicant, on 24th March, 2015 lodged a Notice of Appeal to this court signaling its intention to appeal the decision. On 15th April, 2015 the applicant filed a motion on notice seeking in the main that pending the hearing of the intended appeal the court should issue a temporary injunction restraining the respondent from clearing and or removing the four containers already mentioned elsewhere in this ruling, from the port of Mombasa through Pentagon Forwarders Limited and or any other clearing agent and secondly, that the court do make further orders as it may deem fit and just in the circumstances. The application was hoisted on **Sections 1A, 1B, 63(b)** & **(e)** and **66** of the Civil Procedure Act, **Orders 40 Rules 1 & 2** and **42 Rules 1** & **6** of the Civil Procedure Rules, **Sections 4, 43, 47, 49** and **82** of the Appellate Jurisdiction Act and all other enabling provisions of the law.

The grounds in support of the application were that:-

> *" - the applicant intends to appeal against the ruling and had already filed Notice of Appeal,*
>
> *- following the ruling the respondent intends and has started the process of clearing and disposing the containers and,*
>
> *- unless the orders sought were granted the intended appeal will be rendered nugatory."*

In support of the application the applicant reiterated and expounded on the above grounds in an affidavit sworn by **Lameck Oluoch Ogonda,** the Managing Director of the applicant. Suffice to add that the applicant was ready and willing to abide by any conditions or terms that this Court may impose in granting the application. Further that save for the containers sought to be attached as security, the applicant was not aware of any other assets of the respondent within the jurisdiction of this Court. Finally that the respondent and his business partner were passport holders who travel in and out of the country frequently hence the applicant's apprehension that it may obtain a judgment in vain if the conditional attachment or provision of security was not provided for.

Countering the depositions of the applicant aforesaid, the respondent through, its proprietor, **Victor Okello Omondi**, deponed, where pertinent that, the respondent was formed on or about 14th November, 2013 with the sole objective of engaging in the business of importation and sale of second hand clothes on the advice of his brother, **Michael Ouma Omondi**, a regular traveler in and outside the country. It was his brother aforesaid who dealt with the applicant with regard to shipment, clearance and logistics of the business. He therefore could not have entered in any agreement with the applicant as claimed. That all the documents exhibited by the applicant in the affidavit in support of the application were forgeries. In any event, the respondent further deponed, the applicant was guilty of non-disclosure of material facts and had approached the court with unclean hands in breach of the core principles of equity and finally, the evidence so far tendered did not meet the threshold for an application of this nature.

Urging the application before us on 22nd June, 2015, **Mr. Koech**, learned counsel for the applicant conceded that the containers had since the filing of the application been released to the respondent. In the premises he was no longer keen in pursuing the prayer for injunction as it had been overtaken by events. He instead opted to pursue the prayer for security.

Mr. Onyango, learned counsel for the respondent confirmed the fact that indeed the subject containers had been released to the respondent. He was also in agreement that as things stood, the applicant could only perhaps pursue the issue of security.

Submitting, Mr. Koech stated that the applicant was claiming Kshs.15,973,830/- from the respondent and if security was not given the intended appeal and the main suit in the High Court would be rendered nugatory. That the suit in the High Court had overwhelming chances of success and the applicant's interest could only be safeguarded by an order for security. For these submissions, counsel relied on the following authorities:-

- *Air Connection Ltd v M.R.C. Nairobi EPZ Ltd (2007) eKLR ; and,*

- *Suleiman v Amboseli Resort Ltd (2004) KLR 589*.

Mr. Onyango in opposing the application submitted that the grant or refusal of an order for security is a matter of discretion. The applicant had not demonstrated that **Kasango J.** exercised that discretion wrongly. For this submission counsel relied on the cases of **Obwogi v Abuvi [1995 – 98] 1 E.A. 252** and **Sergeant v Palet [1949] 16 EACA 63.** It was argued that the applicant had not annexed in his supporting affidavit the pleadings in the High Court. That the applicant's claim in the High Court was inconsistent. With regard to the amount owed, counsel further submitted that the respondent had demonstrated a substantial counterclaim against the applicant. Indeed the counterclaim was more than what the applicant was claiming. In any event, counsel maintained, the applicant had not satisfied the principles for granting security as set out in the case of **Kanyoko t/a Amigos Bar & Restaurant v Nderu & 2 others [1988] eKLR**.

From the prayers in the application, the applicant was clear as to what relief it wanted from this Court. It was for a temporary injunction. That prayer having been overtaken by events, the applicant has changed tact and through Mr. Koech now wishes us to grant it security. Asked by us what sort of security it was seeking, counsel was at a loss. However we want to assume that the security sought is for due satisfaction of the decree under **Order 39** of the Civil Procedure Rules. The application in the High Court had a similar prayer. It would appear that when it filed the instant application it had abandoned the prayer altogether only to renew it when it dawned on it that the carpet had actually been pulled under its feet. The applicant has anchored that claim on the prayer in the application beseeching us to make "*any order that we may deem fit and just to grant*". We do not think that the applicant can successfully anchor that prayer on the aforesaid rubric. We say so because in our view any other orders that we can make as we deem fit and just can only be in furtherance of the main order sought in the application. What the applicant is seeking is a totally different prayer from that sought in the application. The best that the applicant could have done, was may be to seek to amend the application so as to include that substantive prayer for security. That was not done. Further there is a specific provision in the Civil Procedure Act that caters for this kind of application. The applicant cannot therefore ride on the general powers of this Court or the overriding objective.

Finally, the application was essentially brought under **Rule 5(2)** &**(b)** of this Court's rules although it was not cited in the body of the application. The prayers that can be sought under this rule are clear and specific; stay of execution, an injunction or stay of any further proceedings and nothing else. This being the case, how then can this Court possibly grant the prayer for security under **Order 39** of the Civil Procedure Rules, the applicant having abandoned the prayer for injunction and having failed as well to move this Court as appropriate?

Even if we were persuaded that we had jurisdiction to grant the order sought, has the applicant made out a case? The object of an order for security is to secure the plaintiff against any attempts on the part of the

defendant to defeat the execution of a decree in event that the plaintiff is successful in his suit or claim. Such an order will be granted where the trial court is satisfied on evidence that the defendant with intent to delay or avoid court process or execution of the decree passed against him, engages in acts the court will ordinarily frown upon such as absconding from the jurisdiction of the court, disposing of or removing from the jurisdiction of the court his property or any part thereof and lastly intention to flee the country under the circumstances affording reasonable suspicion that in doing so, he is bent on obstructing or delaying the execution of the decree that may be passed against him. It does appear to us though that before this jurisdiction is invoked the plaintiff must demonstrate a cause of action which *prima facie* is unimpeachable and that the court should have reason to believe that unless the jurisdiction is exercised there is real and imminent danger that the defendant will remove and put himself beyond the reach of the court. In the case of **Shivam Enterprises Ltd v Jivaykumar Tulsidas Patel T/A Hytech Investments [2006] eKLR** this Court expressed itself thus on the issue:

> *" … 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 aforestated high standards. It ought always be remembered that the purpose of that jurisdiction is to secure the plaintiff against the defendant's 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 …."*

In **Kanyoko T/A Amigos Bar and Restaurant v Francis Kinuthia Nderu & others [1988] 2 KAR 126**, this Court in considering the circumstances when an order of attachment before judgment can be given held:-

> *"… The power to attach before judgment must not be exercised lightly and only upon clear proof of the mischief aimed at by Order 38, rule 5 (now Order 39) namely that the defendant was about to dispose of his property or to remove it from the jurisdiction with the intent to obstruct or delay any decree that may be passed against him. In an application under Order 38 rule 5, the onus of showing a plausible case for resisting the application can only shift to the defendant, once the plaintiff fully satisfies the requirements under the order …."*

What then were the applicant's grounds in support of its request? It was simply that the applicant has a claim of Kshs.15,973,830/- against the respondent and if security was not granted the intended appeal and the suit in the High Court would be rendered nugatory. These are hardly grounds to support such demand. They do not prove that the respondent has undertaken positive steps to dispose of its assets, nor do they prove that the proprietor of the respondent has gone out of the jurisdiction of the court with the sole intention of avoiding the execution of the decree against him. In the High Court, the applicant had alluded to the fact that the said proprietor had a British Passport and therefore not a Kenyan citizen. By virtue of this fact, according to the applicant it would have been almost impossible for the execution of the decree to be levied against him as he would dash for the woods; United Kingdom. However, this argument was rebutted by the respondent when he demonstrated that he was indeed a Kenyan by tendering in evidence his National Identity Card as well as Kenyan Passport. That position has not changed. The applicant also argues that a substantial sum is involved and in the event that the order of security is not made, the appeal as well as the main suit will be rendered nugatory. Again this is not one of the grounds upon which an order for security can be made. Indeed such submission would have been relevant if the applicant was urging an application for stay of execution of the decree. Is the applicant mixing the two jurisdictions?

We are keenly aware *that " … The courts should always be extremely anxious to ensure that the due administration of justice does not cause unnecessary expenses. If any course of action which either litigant chooses to adopt would result in unnecessary expense, the courts should be zealous to ensure that such a course of action is not open. A court should, not itself be used as a tool to incur unnecessary expenses where it is satisfied that such expense is unnecessary …."* See as per **Charles Newbold in Meru Farmers' Co-operative Union v Suleiman (No. 2) [1966] E.A. 442**. The prayer for security by the applicant has no basis at all and if we were to grant it, we would be imposing an unnecessary expense

on the respondent. Again, we must also reiterate that an application of this nature must be made in good faith. On the material before us, we doubt whether the application was *bona fide*. It was simply meant to exert pressure on the respondent to accede to the applicant's demand in one way or another. Lastly, we must not lose sight of the fact that whether or not to grant the order is an exercise in discretion. **Kasango J**. had that discretion and she exercised it by refusing to accede to the request. The applicant has not been able to demonstrate to us that the discretion was wrongly, capriciously or whimsically exercised to call for our intervention.

All said, we are satisfied that the prayer must fail. Accordingly, the application is dismissed with costs to the respondent.

Dated and delivered at Malindi this 31st day of July 2015.

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