



REPUBLIC OF KENYA



Kivindyo v Mwalimu Asset Management Limited (Employment and Labour Relations Cause E575 of 2023) [2024] KEELRC 432 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 432 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E575 OF 2023
BOM MANANI, J
FEBRUARY 29, 2024**

BETWEEN

ANNACIATA NDUMI KIVINDYO CLAIMANT

AND

MWALIMU ASSET MANAGEMENT LIMITED RESPONDENT

RULING

Background

1. The application dated 21st July 2023 seeks to attach the Respondent's property as security for performance of the decree that the Claimant anticipates in the cause. According to the Claimant, the Respondent has been disposing off some of its assets and the Claimant fears that by the time the cause is heard and determined, there will be nothing left to satisfy the anticipated decree.
2. The Claimant says that the properties that she seeks to attach are the only assets that the Respondent owns which are known to her. She has annexed an audit report suggesting that the Respondent may be having liquidity challenges.
3. The application is opposed. The Respondent denies that it is engaged in activities that are intended to avoid satisfaction of the anticipated decree as alleged by the Claimant. The Respondent contends that developing and selling of housing units is part of its core mandate. Therefore, the activities flagged by the Claimant are undertaken in the ordinary course of its business and cannot be the basis for casting aspersions on its (the Respondent's) intentions.
4. The Respondent avers that most of the assets that the Claimant seeks to attach are charged to financial institutions which have priority in realizing them in the event of default in servicing the loans for which the properties were pledged as security. Further, some of the assets have already been sold to third parties and attaching them will affect third party property rights.



5. The Respondent contends that it has sufficient property to satisfy the anticipated decree. Further, it denies that it is trying to move its assets outside the jurisdiction of the court.

Analysis

6. Order 39 rule 1 of the [Civil Procedure Rules](#) provides as follows:-

“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 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: has absconded or left the local limits of the jurisdiction of the court; or is about to abscond or leave the local limits of the jurisdiction of the court; or has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof; or 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.”

7. Order 39 rule 2 provides in part as follows:-

“Where the defendant fails to show such cause the court shall order him either to deposit in court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of the decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to rule 1.”

8. Order 40 (1) (b) rule of the aforesaid rules provides as follows:-

“Where in any suit it is proved by affidavit or otherwise that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

9. What is apparent from the above provisions of statute is that the court has power to order a defendant in a suit to deposit security for the performance of an anticipated decree. However, such order can only be issued in specified circumstances. It does not issue as a matter of course.

10. My reading of these provisions leaves me with no doubt that the order for attachment before judgment can only issue if the defendant is shown to be engaged in acts which are intended to defeat the performance of an anticipated decree. The defendant must be shown to be taking deliberate steps to frustrate or obstruct satisfaction of the anticipated decree.



11. Therefore and to my mind, the state of the mind of the defendant in executing the impugned activities is critical. And the burden of proof lies with the Claimant to demonstrate that the impugned acts by the defendant are being executed with the sole intent of defeating or delaying or frustrating execution of the anticipated decree
12. In my view, these rules are not to be resorted to for any other purpose. For instance, the Claimant may not resort to them to secure part of the defendant's properties for satisfaction of an anticipated decree merely because the defendant is facing liquidity challenges. Where the defendant has liquidity challenges, the matter will be addressed at the appropriate time using the applicable insolvency law.
13. The Claimant in the instant action has moved the court for attachment of the Respondent's assets pending determination of the suit. Whilst she (the Claimant) avers that the Respondent is engaged in acts that are intended to defeat performance of her anticipated decree, she offers no evidence to support her fears. The only assertion she makes is that the Respondent is selling some of its assets. The preliminary record shows that the impugned sales are in the ordinary course of the Respondent's business. There is no evidence to demonstrate otherwise.
14. Further, the Claimant has annexed an audit report to demonstrate that the Respondent may be experiencing solvency challenges which may impair its capacity to satisfy the anticipated decree. However and as indicated earlier, solvency challenges cannot be the reason to invoke the above provisions of statute.
15. Insolvency challenges must be handled in accordance with the applicable insolvency laws which prioritize settling of liabilities by an individual or company that is insolvent. A party to an action cannot invoke the provisions of law that the Claimant has invoked to distort the application of the insolvency law by seeking to claim priority over other creditors outside the prioritization that is provided for under the *Insolvency Act*.

Determination

16. The upshot is that I find that the application dated 21st July 2023 is devoid of merit.
17. Accordingly, it is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 29TH DAY OF FEBRUARY, 2024

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

