



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 38 OF 2016**

*(Before Hon. Lady Justice Maureen Onyango)*

**GODFREY ODUOR ODHIAMBO ..... CLAIMANT**

**-Versus-**

**UKWALA SUPERMARKET KISUMU LIMITED..... RESPONDENT**

**RULING**

By a notice of motion dated 21st March, 2016 filed under certificate of urgency the Claimant/Applicant seeks the following orders:-

1. **THAT** this application be certified as urgent and it be heard on priority basis.
2. **THAT** this honourable court be pleased to issue summons to director of the Respondent for them to appear before court to show cause why they should not furnish security for their appearance.
3. **THAT** upon hearing the said director, this Honourable court be pleased to order them to deposit in court money, bank bond or other sufficient property to answer the claim as against the Respondent.
4. **THAT** this Honourable court be pleased to issue any other order it may deem fit to grant in the interest of justice.
5. **THAT** costs of this application be provided for.

The application is made under section 1A, 1B, 3A, 63(a) & (e) of the Civil Procedure Act, Order 39 Rule 1A(ii) & (iii), 2 and 6, Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law. It is supported by the grounds on the face thereof and the undated affidavit of Godfrey Oduor Odhiambo, the Claimant/Applicant.

The purport of the application is that the Claimant/Applicant having filed the claim herein in which he is seeking certain orders against the Respondent for unlawful dismissal, has learnt that the Respondent is in the process of selling its business to Choppies Enterprises Kenya Limited through gazette notice No.8206 of 30th October, 2015. The notice in the gazette states that the transferee shall not assume any of the debts or liabilities incurred by or on behalf of the Respondent. The Claimant is concerned that should this happen any Judgement that may be granted to him by this court should his claim be successful is likely to be rendered unimplementable as the Respondent is likely to abscond or leave the jurisdiction of the court.

The Respondent filed a replying affidavit of DOMNIC OSICHE in which he states that the Respondent

has no intention to abscond and further that the Respondent the Respondent is unlikely to be found liable as it did not terminate the services of the Claimant but it is the Claimant who failed to report to work on 4th October 2015 for which he was served with a notice to show cause by the Respondent.

The application was argued on 30th June, 2016. Mr. Onyango instructed by the firm of Olel, Onyango, Ingutia & Company Advocates appeared for the Claimant while Mr. Omondi instructed by Omondi Abande & Co. Advocates appeared for the Respondent.

It was submitted for the Claimant that should the orders sought not be granted he will be left in a situation where should his claim succeed there will be no judgement debtor against whom he can execute the decree rendering the same nugatory as Ukwala Supermarket, the Respondent, may not be existing by then.

Mr. Omondi for the Respondent submitted that although the Respondent has sold its business to Choppies Enterprises Kenya Limited, the Respondent is a limited liability company incorporated under the Companies Act of Kenya and being a juristic person it cannot be said that it will leave the jurisdiction of the court. He submitted that it has not been shown that the Respondent has initiated a process of winding up, or that it is insolvent. He further submitted that the allegation that the Respondent is leaving the jurisdiction of the court is unfounded.

Mr. Omondi submitted that Order 39 gives conditions for attachment before judgement which the Claimant has not demonstrated.

### **Determination**

I have considered the motion by the applicant, the grounds and the affidavit in support thereof, and also considered the grounds in opposition thereof as stated in the replying affidavit. I have further considered the submissions by counsel for and against the application.

Attachment before judgement is provided for under section 63 of the Civil Procedure Act and Order 39 which provide as follows:-

#### **63. Supplemental proceedings**

*In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed—*

*(a) issue a warrant to arrest the defendant and bring him before the court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to prison;*

*(b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order the attachment of any property;*

*(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;*

*(d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;*

*(e) make such other interlocutory orders as may appear to the court to be just and convenient.*

**[Order 39, rule 1.] Where defendant may be called upon to furnish security for appearance.**

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.

**[Order 39, rule 5.] Where defendant may be called upon to furnish security for production of property.**

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.

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 off his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him."

**(NOTE: Order 39 under the Civil Procedure Rules 2010 is the initial Order 38 of the repealed rules.)**

Section 63 and Rule 39(1) and (5) are very specific on the circumstances under which the orders of attachment before judgement or an order to provide security may be granted. It is only where the Respondent has deliberately taken action to avoid any process, obstruct or delay execution of a decree that such orders may be made. The applicant must therefore show that the action taken by the Respondent has been taken with the sole aim of frustrating the applicant's enjoyment of a decree or anticipated decree.

In the present case, the gazette notice relied upon by the applicant is dated 19th October, 2015 and appeared on the gazette of 30th October, 2015 while this suit was filed on 11th February, 2016, several months after the gazette notice was published. It can therefore not be alleged that the intention of the transfer of the Respondents business was to deny the claimant the fruits of any decree that he may obtain from this court if he is successful in his claim.

I also agree with the submissions by Mr. Omondi that the Claimant has not proved that the Respondent has either absconded, or intends to remove its property out of the jurisdiction of this court. As submitted for the Respondent, it is a juristic person and has not started any process for winding up or become insolvent. The Claimant has further not proved that the Respondent will be incapable of complying with any decree that may be issued by this court should his claim be successful.

For the foregoing reasons, I find that the claimant has not proved that he is entitled to the prayers sought. The application is dismissed with costs in the cause.

**Ruling Dated, signed and delivered this 29th day of July, 2016**

**MAUREEN ONYANGO**

**JUDGE**