



REPUBLIC OF KENYA

INDUSTRIAL COURT NAIROBI

CAUSE 498, 501, 503 & 509 of 2011& 501, 502 & 503 OF 2012

PETER NZIOKI NZIOKA

ZACHARY IRUNGU

ISAIAH OMBEKA MANYANGE

EJIDIO NYAGA

BOSCO

MUNYUOKI.....CLAIMANTS

CHARLES NG'ANG'A NJOGU

MOSES MWANGI KAMAU

SIMON N. KARIUKI

VERSUS

**SHENGLI ENGINEERING CONSTRUCTION
COMPANY LIIMITED.....RESPONDENT**

RULING

The Application before me is the Notice of Motion dated 2-5-2012 by the Claimants. It seeks for orders that the Respondent's Director and/or Principal Officer be directed to show cause why they should not furnish security for their appearance and for the sum sufficient to cover decree if passed in favour of the suit herein and/or in the alternative the Respondent's Director and/or Principal Officer be directed to furnish security, produce and place at the disposal of the Court some property or value of the same sufficient to cover decree if passed in favour of the suit herein.

The Motion is supported by the affidavit of Simon N. Kariuki on behalf of the other Claimants. The main grounds for the application are that the Respondent is a foreign company and it is about to leave Kenya. The basis for belief is that the Respondent is about to complete the Construction of the Thika Super Highway where the Claimants were working after which the Respondent will wind up their operation within the jurisdiction of the Court. That the end result will be to defeat and render the proceedings of the Court nugatory.

The application is opposed by the Replying Affidavit filed in Court on 30-5-2012. The gist of the reply is

that the Respondent is not about to leave the jurisdiction of the Court or dispose off her assets. That she has new contracts in Naivasha Road with the Government. That even if the Thika Super Highway was about to end the Respondent still has a lot of assets in Kenya including the Kshs. 1 billion being the 10% retainer by the Government for two years after the completion of the contract. The Respondent has also deposed that application is incompetent and improperly filed.

Both parties have filed written submissions to argue the application which I have considered on reaching this decision, the issues for determination are:-

- (1) whether the application is incompetent in law?
- (2) whether the applicant has satisfied the Court that the orders sought should be granted?

On the first issue, I am satisfied that the application is properly before the Court and therefore the Court has jurisdiction to entertain the same. Firstly, the application is brought under Rule 16 of the Industrial Court Rules which provides that an interlocutory application shall be brought by way of Notice of Motion. Secondly, the application is founded on Order 39 which is basically about execution before judgment. This provision is presumed to be applied under Rule 31(2) of the Industrial Court Rules which provides that rules on execution of an order and a decree applicable in the High Court shall be applicable to an order and a decree of this Court.

As regards the second issue for determination, the said Order 39 Rule 1(a) and (b) provides for the grounds upon which the orders sought can be granted. The applicant must satisfy the court by way of affidavit or otherwise that the said grounds exist before the order can issue. The grounds are:-

- (a) That the defendant with intent to delay the Plaintiff or to avoid any process of the court or 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 off or removed from the local limits of the jurisdiction of the court his property or any part thereof or
 - (iv) 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 execution of any decree that may be passed against the defendant in the suit.

The applicants maintain that they are apprehensive that the Respondent is about to abscond or leave the jurisdiction of this Court in circumstances that probably will render the proceedings herein nugatory. There is no tangible evidence other than the fact that the only known business which is the construction of Thika Super Highway is about to be completed. The applicant has asked the court to take judicial notice of such fact and find in favour of the applicant.

The Respondent has insisted that she is going nowhere and that even if she were to go, there still is a lot of her properties in Kenya. That she has a new road recarpeting contract to do in Naivasha. No evidence, however has been adduced to support the allegation. The Court notes the submissions of the Respondent that the applicants' claim is minimal compared to the Respondent's stake in the Country.

At this stage, I am not bound to consider the merits of the suit because that will await the trial. The duty of the Court is to consider whether or not the Respondent has left or is about to leave the jurisdiction of the Court, or whether she has disposed off or removed from the jurisdiction of the Court her property or part thereof with the intention of obstructing or delaying execution of any decree which may be passed against her. As such, the applicant must prove to the court that the Respondent is about to leave the country and dispose off or remove her property with the intention to render the proceedings herein

nugatory.

The applicant has not satisfied me on the aforesaid criteria of granting the orders sought. I understand the reason for their fear was mainly that the court diary was congested due to the number of judges dealing with the matters in the former court. That problem is, however gone for good because we now have 12 judges who can deal with the matter quickly. I will, therefore decline to grant the application and instead direct the parties to fix the suit for hearing on priority basis due to the fears registered by the Claimants. I direct that the matter be heard in this month of October, 2012 to conclusion. I also give the applicants liberty to make fresh application should there be tangible evidence of departure or disposal of property by the Respondent before the conclusion of the matter.

That shall be the decision of the Honourable Court.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 5th day of October, 2012.

Onesmus Makau

JUDGE