



Case Number:	Civil Case E264 of 2020
Date Delivered:	22 Sep 2020
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)
Case Action:	Ruling
Judge:	David Shikomera Majanja
Citation:	Elizabeth Mary Okelo v Longliqi International (Kenya) Limited & 3 others [2020] eKLR
Advocates:	Mr Otieno instructed by Otieno and Amisi Advocates for the Plaintiff. Mr Kori instructed by H. Kago and Company Advocates for the 1st and 2nd Defendants. Mr Karanja instructed by K. Mberia and Partners Advocates for the 3rd and 4th Defendants.
Case Summary:	-
Court Division:	Commercial Tax & Admiralty
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed with costs to the Defendants.
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E264 OF 2020

BETWEEN

ELIZABETH MARY

OKELO.....PLAINTIFF

AND

**LONGLIQI INTERNATIONAL (KENYA) LIMITED.....1ST
DEFENDANT**

**LONGLIQI INTERNATIONAL (NIG) LIMITED.....2ND
DEFENDANT**

**LONGLIQI GLOBAL HOLDINGS CO. LIMITED.....3RD
DEFENDANT**

**JIA DIAN.....
.....4TH DEFENDANT**

RULING

1. The application before the court is a Notice of Motion dated 23rd July 2020 made, inter alia, under **Order 39 rule 5 (1) and (3)** of *Civil Procedure Rules* seeking the orders of attachment of the 1st Defendant's accounts at the Ecobank Kenya Limited and Stanbic Bank Kenya Limited to the extent of USD 240,740.12.

2. The application is supported by the Plaintiff's supporting and supplementary affidavits sworn on 15th July 2020 and 14th September 2020 respectively. The basic facts regarding the relationship between the parties is a matter of common ground. The 3rd Defendant is a company incorporated in China. It is a manufacturer of natural health and medical supplements commonly known as, "*Longliqi or Longrich products*". It appointed the 1st and 2nd Defendants as distributors of its products in Kenya and Nigeria. The Plaintiff entered into two agreements dated 11th November 2018 with the 1st and 2nd Defendants in which it was appointed an exclusive super stockist of *Longrich* products in Uganda and Rwanda. The 1st Defendant issued invoices to the Plaintiff for the purchase of the products which the Plaintiff paid for by transferring USD 115,198.25 and USD 125,541.87 directly to the 3rd Defendant's account in China.

3. The gravamen of the Plaintiff's case is that despite paying the amount, the 1st and 4th Defendants have not availed to her importation documents and that she has not received her commissions. She deponed that the 1st and 4th Defendants undertook to provide import documents to her bankers, Barclays Bank, immediately upon

importation of the goods from China in order to comply with anti-money laundering laws but they have done so. She also accused the Defendants of breaching the exclusive agreements by allowing third parties to import *Longrich* products into Uganda and Rwanda. In her deposition, she claimed that she later discovered that the Defendants presented fraudulent documents to her bankers purporting them to be genuine. She therefore claims a refund of USD 240,740.12 which she remitted.

4. The Plaintiff further stated that the 2nd, 3rd and 4th Defendants are of foreign nationality and the directors/shareholders of the 1st Defendant are also foreign national who may abscond from this court's jurisdiction in a bid to obstruct or delay execution of any decree that may be issued in this suit. She also deponed that the 1st Defendant's Bank accounts are the only known assets of the Defendants.

5. The 4th Defendant is a director of the 3rd Defendant. He filed a replying affidavit sworn on 5th September 2020. He deponed that after the Plaintiff made payments to the 3rd Defendant, the 1st Defendant went ahead and placed the order for the goods to be delivered on her behalf to named consignees in Uganda and Rwanda. That the 1st Defendant assisted in importing various goods and on 28th May 2019, the consignment arrived at the Port of Mombasa and on 30th May 2019 at the Malaba border where a release order was issued by Uganda Revenue Authority. The consignment was then transported to Kampala and delivered to *Longrich International c/o Senana Hypermarket*, Kampala, Uganda and was received by one Gloria Anori on behalf of the Plaintiff on 5th June 2019. He stated that subsequent purchase orders were made and goods delivered to Uganda and Rwanda even as late as June 2020.

6. The 4th Defendant further deponed that the Defendants never any received complaints from the Plaintiff and that she has been receiving all the benefits of a stockist including commissions and bonuses as evidenced by bank statement showing that money was paid to her by the Defendants into her bank account between August 2018 and March 2020. The 4th Defendant denied that the Defendants were in breach of the exclusivity agreement and in any case, he contended that the agreements were valid for one year and came to an end by effluxion of time. The Defendants denied the allegations of fraud against them and contended that the Plaintiff has not made out a case for the orders sought.

7. In response to the 4th Defendant's deposition, the Plaintiff pointed out the payments made on account of the invoices sent to her were not disputed. The Plaintiff demonstrated that there was a variance between the goods she ordered and those allegedly delivered. For example, some items she ordered were missing, the total of the items she ordered was different from what was purportedly delivered, the details of the goods in the import declaration forms were different from what she ordered and paid for, and some of the products delivered included kitchen tables and household items of iron and steel which did not fall within the purview of the items she agreed to distribute.

8. The Plaintiff also pointed out that whereas the carrier in the alleged Exit Note from Mombasa was Parth International Limited, the imports were delivered in Kampala by Pejon Freight Movers Limited Kenya. The Plaintiff contended that the Defendants did not exhibit anything to show that the products were delivered in Rwanda. She did not understand how deliveries could have continued in June 2020 when the Defendants argued that the agreement had expired. She stated that she had complained about the matter by issuing a demand letter in March 2020.

9. The parties' advocates filed written submissions and made brief oral submissions to support their respective positions which I have considered.

10. Counsel for the Plaintiff raised a preliminary issue in respect of the affidavit sworn on behalf of the 1st and 2nd Defendants by Harriet Mwari, a director of the 1st Defendant, on the ground that it was drawn by *H. Kago and Company Advocates* and commissioned in the presence of Hiram Kago Mukuna Advocate and Commissioner for Oaths contrary to the proviso to **section 4(1)** of the *Oaths and Statutory Declarations Act* which states:

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding concerned in the matter, or clerk to any such advocate, or in which he is interested.

11. Counsel for the Plaintiff is correct that the affidavit is a violation of the clear statutory provisions as the advocate on record is the one who commissioned the affidavit hence I need not belabor the point (see ***Peter Ndiritu Gitahi & 60 Others v Attorney General [2018] eKLR*** and ***Lee Njiru v J. K. Lokorio and Another [2019] eKLR***). I accordingly strike out the affidavit. The affidavit sworn by and on behalf of the 3rd and 4th Defendants was sworn in Nairobi and not Nigeria as the Plaintiff contends. There is no evidence that the deponent was in Nigeria at the time hence I decline to strike it out.

12. The main issue for determination is whether the Plaintiff has made out a case for the grant of the orders sought in the application as I have set out above. For context, **Order 39 rule 5** of the **Civil Procedure Rules** provides as follows:

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.

13. Counsel for the Plaintiff cited the case of ***Mcdouglas Kagwa v Weekly Review Ltd*** NBI CACA No. 39 of 1989 [1992] eKLR where the Court of Appeal explained the utility of **Order 39** aforesaid as follows:

*The Court of Appeal in England held in the case of **Chartered Bank v Daklouche [1980] 1 WLR 107**, that a “mareva” injunction can be granted against a defendant who, though served within the jurisdiction and having assets in England, was likely to leave and withdraw the assets at short notice. This is a jurisdiction which Courts in Kenya can properly and usefully exercise under order 39 of the Civil Procedure Rules.*

14. The principles governing attachment and or arrest before judgment were laid down by the Court of Appeal in ***Kuria Kanyoko t/a Amigos Bar and Restaurant vs. 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 of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him.

15. Elucidating further on the subject rule in ***Shiva Enterprises Limited v Vijaykumar Tulsidas Patel t/a Hytech Investment*** ML HC COMM No. 501 of 2006 (2006) eKLR, Kasango J., observed as follows:

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 aforesaid high standards. It ought to always be remembered that the purpose of that jurisdiction is to secure the Plaintiff against the Defendants 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.

16. Since the Plaintiffs case is founded on fraud and dishonesty, counsel for the Plaintiff relied on ***International Air Transport Association and Anther v Akarim Agencies Company Limited & Others* [2014] eKLR** where Gikonyo J., held that for a freezing order to be made, there must be a risk of dissipation of assets and in reaching this conclusion, the court may draw an inference from the evidence of unlawful conduct:

But a further hurdle has to be surmounted; that is, whether there is any risk of dissipation of assets" I wish to borrow from the writing of SMITH, I et al (editors) Asset Recovery: Criminal Confiscation and Civil Recovery 2003 (Lexis Nexis Butterworths: United Kingdom) that:

"Risk of dissipation can be shown in a number of ways. In most cases, the risk will be inferred from evidence of the Defendant's dishonest and unlawful conduct which has led to the investigation or charge".

17. What the cases show is that the threshold for granting the orders under **Order 39 rule 5** of the ***Civil Procedure Rules*** is high and the court should grant the orders sparingly. At this point I would point out that in as much as I struck out the 1st and 2nd Defendants' affidavit, the burden still rests on the Plaintiff to establish her case. It is not disputed that the parties entered into agreements. The Plaintiff claims that the Defendants breached the agreement and that they fraudulently obtained from her USD 240,740.12 which she now claims. Those are contentious issues that may have to be resolved at the trial of the action.

18. I agree with Counsel for the Plaintiff that a prima facie case of fraud may lead the court to infer that the Defendants intend to dispose of assets and leave the court's jurisdiction but the Plaintiff must provide evidence that the Defendants intend to dissipate their assets as provided for under **Order 39 rule 5** of the ***Civil Procedure Rules***. Taking a holistic view of the evidence, I find that the parties entered into agreements in November 2018, the transactions in issue took place in 2019 as evidenced in documents presented on both sides while the first demand letter from the Plaintiff's advocate was written on 10th March 2020. Even if I accept that the Defendants engaged in fraudulent conduct, it is clear that even after perpetrating the fraud, the Defendants did not take off from the country or do anything to show that they were in the process of leaving the country with a view to obstructing any decree that may be passed by the court in favour of the Plaintiff.

19. I also hold that merely because the 2nd and 3rd Defendants may be incorporated outside Kenya is not, of itself, a ground to issue a *mareva* injunction. There must be intention of intention to defeat the cause of justice contemplated under **Order 39** of the ***Civil Procedure Rules***. In this case, the account sought to be attached belongs to the 1st Defendant, which by the Plaintiff's own admission is incorporated in Kenya. The Plaintiff bears the legal and evidential burden of showing that the Defendants are dissipating their property with the intention of defeating the Plaintiff's claims. It is only when there is sufficient evidence, that the Defendants can be expected to discharge the evidential burden to show that they are not acting in the manner complained of by the Plaintiff.

20. I have read the Plaintiff's depositions in support of the application and there is nothing in the evidence that suggests that the Defendants may abscond from the court's jurisdiction. I therefore find and hold that the Plaintiff has not shown or proved that the Defendants are in the process of disposing properties or money with the intention of defeating the Plaintiff's claim. While there is evidence of breach of agreements, the Plaintiff's allegations do not disclose facts upon which the court can conclude that the Defendants' actions support an application under **Order 39 rule 5** of the ***Civil Procedure Rules***.

21. The Notice of Motion dated 23rd July 2020 is dismissed with costs to the Defendants. The interim orders in force are hereby discharged forthwith.

DATED and DELIVERED at NAIROBI this 22nd day of SEPTEMBER 2020.

D. S. MAJANJA

JUDGE

Mr Otieno instructed by Otieno and Amisi Advocates for the Plaintiff.

Mr Kori instructed by H. Kago and Company Advocates for the 1st and 2nd Defendants.

Mr Karanja instructed by K. Mberia and Partners Advocates for the 3rd and 4th Defendants.



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