



REPUBLIC OF KENYA



Kingdom Bank Limited v Vazom Limited & another (Civil Suit E007 of 2024) [2024] KEHC 10077 (KLR) (25 June 2024) (Ruling)

Neutral citation: [2024] KEHC 10077 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL SUIT E007 OF 2024
SN MUTUKU, J
JUNE 25, 2024**

BETWEEN

KINGDOM BANK LIMITED PLAINTIFF

AND

VAZOM LIMITED 1ST DEFENDANT

EDWARD NYANG'AU MAUTI 2ND DEFENDANT

RULING

1. The Applicants have filed Notice of Motion (the Application) dated 22nd March, 2024 anchored on Sections 1A & B, and 63 of the *Civil Procedure Act*, Order 39 Rule 5, Order 40 Rule 2 and Order 51 Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law, for orders that:
 - i. Spent.
 - ii. The 1st Defendant be and is hereby ordered to produce motor vehicle registration numbers KDN xxxF, KDN xxxF and KDN xxxF and trailer registration numbers ZH xxx7, ZH xxx1, ZH xxx8 before this Honourable Court for confirmation by an independent certified tracking company of the presence and functioning of the trackers installed therein.
 - iii. That the motor vehicle registration numbers KDN xxxF, KDN xxxF and KDN xxxF and trailer registration numbers ZH xxx7, ZH xxx1, ZH xxx8 be and are hereby retained in the court's jurisdiction with the tracking devices in place and functioning pending the hearing and determination of this suit.
 - iv. In the alternative, the Defendants be directed to furnish security in the sum of Kshs. 26,069,460.88 for satisfaction of the decree that may be issued in this case.
 - v. Any other orders that this Honourable Court may deem just and fair to grant.



- vi. Cost of this application be in the cause.
2. The Applicant has backed the Application with the grounds that sometimes in 2023 the 1st Defendants applied for an asset financing facility of Kshs. 23,893,800/- to purchase two prime movers and three trailers. That the 1st Defendant executed a letter of offer on 27th July, 2023 with the terms that the loan facility would be repaid in 48 consecutive monthly installments of Kshs. 664,982.33 at an interest rate of 15% per annum variable, plus a margin of 2% per annum. The 2nd Defendant executed a deed of guarantee and indemnity to secure payment of the said asset-based financing facility. In November 2023 the 1st Defendant's application was approved and the amount of Kshs. 23,893,800 disbursed.
 3. The 1st Defendant purchased motor vehicles registration numbers KDN xxxF, KDN xxxF and KDN xxxF and trailer registration numbers ZH xxx7, ZH xxx1, ZH xxx8 and registered them in the joint names of the Plaintiff and the 1st Defendant and fitted them with trackers.
 4. The Plaintiff claims that Defendants have tampered with the tracking devices installed in the motor vehicles and attached a tracking report marked 'JK-4'. He claims that it is not possible to confirm the location of the motor vehicles; that the Defendants have no known assets, other than the motor vehicles, and that the Plaintiff may not be able to recover from the Defendants if this suit is successful.
 5. It is further deposed that the 1st Defendant has defaulted on the loan repayment and that at 15th February, 2024 the loan amount stood at Kshs. 26,069, 460.88 and continues to accrue interest and penalties. That they wrote letters dated 13th December, 2023, 29th January, 2024 and 28th February, 2024 demanding for the outstanding payment but the same did not bear fruit.
 6. They stated that they have reliable information that the Defendants intend to take the motor vehicles out of the jurisdiction of this Honourable Court. That the actions of the Defendants are in bad faith; that the Plaintiff is likely to suffer substantial loss unless the orders sought are granted and that this application has been brought without undue delay.

Replying Affidavit

7. The Application was opposed vide a Replying Affidavit dated 2nd April, 2024 sworn by Edward Nyang'au Mauti, who has described himself as the Director of the 1st Defendant. He has deposed that Defendants do not dispute that they took an asset-based facility of Kshs. 23,893,800/- and a letter of offer executed on 27th July, 2023; that the said amount was used to purchase the motor vehicles stated in these proceedings and that a deed of guarantee and indemnity was executed to secure payment of the asset-based facility.
8. He denied the averments that the said motor vehicles were fitted with trackers as alleged by the Applicant; that there is no proof advanced that the trackers of the said motor vehicles and trailers have been tampered with and that there was no condition for the Respondent to provide additional security in form of other assets prior to the advancement of the facility other than the registration of the motor vehicles in both names of the Applicant and Respondent.
9. It is deposed that it is not factual that the Respondents have defaulted in payment as they made payment of Kshs. 300,760/- on 20th January, 2024; that the 1st Defendant has fallen into arrears but the same was not intentional; that the Applicant has failed to give the Respondents the insurance policies of the said motor vehicles which has made it impossible for the Respondents to fully utilize the vehicles to realize income; that the Applicant has not provided any particulars of fraud to show that they have been involved in fraudulent dealings and that the motor vehicles were already on work assignment outside Kenya prior to the inception of this suit.



10. It is deposed that the 1st Defendant is ready and willing to remit its share of the loan repayment amounts as soon as it is supplied with the requisite insurance policies by the Applicant which they have not received to date despite several requests on the same; that the Applicant will not suffer any prejudice if the orders are not granted as both parties are jointly registered as owners of the motor vehicles. That the Applicant's right to foreclosure is still available as the 1st Defendant cannot interfere with the joint ownership without the express consent of the Applicant.

Applicant's submissions

11. This application was argued through oral submissions. Mr. Maloba, learned counsel representing the Applicant, submitted that the facts are largely undisputed. He reiterated the contents of their Supporting Affidavit stated that the 1st Defendant has defaulted in the repayment of the loan facility and the debt stood at Kshs 24,806,883.60 on 26th February 2024. He stated that according to the letter of offer dated 22nd July, 2023, the 1st Defendant was supposed to take insurance cover for the motor vehicles and fit tracking devices of a tracking company authorized by the Applicant's Panel.
12. Counsel submitted that annexure marked 'JK-2' in their Further Affidavit shows that the motor vehicles were fitted with tracking devices and annexure marked 'JK-3' shows that the motor vehicles were insured and annexure marked 'JK-4' showing a confirmation form confirming that the motor vehicles were fully insured until October 2024. It was submitted that the tracking device has stopped transmitting; that the tracking company had tried reaching out to the defendant to conduct service of the tracking device and maintenance but the defendants have been evasive. He submitted that all the devices in all the three motor vehicles cannot fail to function at the same time.
13. It is submitted that it is a deliberate action to tamper with the tracking devices with the intention of removing them from the jurisdiction of this court for purposes of defeating any decree issued against them and defeat justice. The Applicant relied on *Kuria Kanyoko t/a Amigos Bar & Restaurant v Francis Kinuthia Nderu, Kenya Breweries Ltd & another v Washington Okeyo* [2002] eKLR and *Moses Koech Rotich v Kenya Highways Authority* [2017] eKLR and urged court to grant the prayers sought or in the alternative, the Respondents to deposit security in the sum of Kshs 26,690,460.88 which is the pleaded amount.
14. It was submitted that the motor vehicles are within this court's jurisdiction because there was no proof that they crossed borders. It was their case that even if the motor vehicles have crossed borders, this court has jurisdiction to prayers sought. The Applicant relied on *Iko Solutions Ltd v Mobile Positioning Africa Ltd* [2021] eKLR paragraph 23. Counsel urged that the Application be allowed as prayed.

Respondent's Submissions

15. Mr. Matwere, learned counsel, submitted for the Respondents. It is his submission that the Respondents is opposed to the application. He relied on the Replying Affidavit. It was submitted that the application is not merited and is not deserving of the orders sought. It was submitted that the Respondent has communicated to the Applicant that the motor vehicles had been to Zambia where the Respondent thought would yield good returns by operating between Zambia and Dar es Salaam and therefore the Applicant knew that the Respondents removed the motor vehicle from Kenya not for purposes of disposing of them.
16. It was submitted that the Applicant did not contest the email nor file an affidavit denying the knowledge of this information about the whereabouts of the motor vehicles. It was submitted that the Applicant bears the onus of proving that the motor vehicles were moved for purposes of disposing of them. Counsel relied on *Kanduyi Holdings Ltd v Barma Kenya Foundation and another* on that issue.



17. It was submitted that no special circumstances have been pleaded to warrant mandatory injunction and that the orders sought are of a determinative nature and if granted they will summarily dispose of the case leaving nothing for the trial. Counsel cited *Nation Media Group Ltd & 2 others v John Harun Mwanu* [2014] eKLR.
18. It was submitted that the orders sought are conservatory orders but no basis has been laid whatsoever necessitating the orders sought and no material has been placed before the court to demonstrate that the case has high chances of success and that unless the orders sought are granted the Applicants will suffer prejudice. Counsel cited *Martin Nyaga Wambora v County Assembly of Embu & 2 others*.
19. It was submitted that no trackers were fitted on the motor vehicles and that if this was done, the Respondents were not notified; that the issue of trackers was introduced after the Respondent filed their Replying Affidavit and that the issue of trackers can only be resolved after full hearing where evidence tested through cross examination.
20. On the issue of the insurance policy, it was submitted that, the issue arose as an afterthought after the Replying Affidavit was filed; that there is no evidence to show that the alleged insurance certificates were transmitted and reached the Respondents and that the application has not met the threshold and ought to be dismissed with costs.

Analysis and Determination

21. Before proceeding with the determination of this matter, I wish to point out that I have noted the submissions by Mr. Maloba for the Applicant. He has referred to a document marked JK-2 in the Further Affidavit by the Applicant showing that the motor vehicles had been fitted with tracking devices. He referred to a document in the Further Affidavit of the Applicants marked JK-3 as Certificates of Insurance and JK-4 attached to the Further Affidavit showing an Insurance confirmation form confirming that the motor vehicles were fully insured until October 2024.
22. I wish to point out that I was not able to find the Further Affidavit mentioned in the documents filed in Court. I have checked in the Court online portal and CTS and did not find any Further Affidavit filed by the Applicant.
23. It has come to my attention that on 4th April 2023, when Ms Abobo appeared on behalf of the Applicant, she informed the court that they had filed a Further Affidavit and served the Respondent. She sought prayer 2 of the Notice of Motion under determination pending inter partes hearing of the same. However, at this time, this court had issued directions when this matter through Certificate of Urgency was placed before the Court on 25th March 2024. The court had issued an order that the motor vehicles in questions should not leave the jurisdiction of this court pending inter partes hearing. This order was issued in vain. The court was to learn that the motor vehicles were no longer within the Kenyan borders and that the Applicant and counsel were aware of this fact.
24. I have taken time to read and understand all the issues arising from this Application. It is not disputed that the parties entered into an agreement for an asset financing facility of Kshs. 23,893,800/- which funds were used to buy the motor vehicles and trailers subject of this case which were registered in joint names of the Applicant and the 1st Defendant. It is not in dispute that the Defendants are in default of the loan facility. The Applicant claims that the Defendants' intentions is to dispose of the motor vehicles by taking them out of the jurisdiction of this court so as to defeat the ends of justice.



25. The Application under determination is brought under Order 39 Rule 5 of the [Civil Procedure Rules](#), which provides as follows:

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

26. The Court in [Beta Healthcare International Limited v Grace Mumbi Gitbaiga & 2 others](#) [2016] eKLR, relied on [Goode on Commercial Law](#), 4th Edition at Page 1287 and observed that:

“The grant of a freezing injunction is governed by principles quite distinct from those laid down for ordinary interim injunctions. ... Before granting a freezing injunction the court will usually require to be satisfied that;

- (a) The claimant has ‘a good arguable case’ based on a pre-existing cause of action;
- (b) The claim is one over which the court has jurisdiction;
- (c) The defendant appears to have assets within the jurisdiction;
- (d) There is a real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted; and
- (e) There is a balance of convenience in favour of granting the injunction;
- (f) The Court can also order disclosure of documents or the administration of requests for further information to assist the claimant in ascertaining the location of the defendant’s assets”

27. Similarly in the case of [International Air Transport Association & Another v Akarim Agencies Company Limited & 2 Others](#) (2014) eKLR the court held that:

“Order 39 Rule 1 and 5 of the *CPR* is about giving security for appearance or satisfaction of a decree which may be passed against the Respondent. The Respondent may be called upon to show-cause why he should not give security for satisfaction of the decree which may be passed against him. Rule 1 is more draconian and may result into the arrest of the Respondent....Rule 5 on the other hand is milder and deals with situations where the Respondent is about to dispose of or remove property from the jurisdiction of the courtboth of these rules share two common things, namely: 1) both serve the purpose of preventing the Respondent from doing any act that will obstruct or delay execution of the



decree that may be issued against the Respondent; and 2) the standard of proof is that set out in the case of *Giella v Cassman* i.e. establish prima facie case of the conditions set out in the particular rule.”

28. The Applicant has also anchored his application on Order 40 Rule 2 of the [Civil Procedure Rules](#) which provides that:

2. Injunction to restrain breach of contract or other injury [Order 40, rule 2.]

(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right

29. The guiding principles for the grant of orders of injunctions, whether temporary or permanent, are well settled in numerous authorities, such as *Giella v Cassman Brown* (1973) EA 358 and [Nguruman Limited v Jan Bonde Nielsen & 2 others](#) CA No.77 of 2012 (2014) eKLR. In the latter case, the Court of Appeal held that:

“In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to (a) establishes his case only at a prima facie level, (b) demonstrates irreparable injury if a temporary injunction is not granted and (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.

30. What amounts to a prima facie case was defined by the Court in [Mrao Ltd v First American Bank of Kenya Ltd](#) (2003) eKLR as follows:

“... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

31. To address the issues before the court, I have to determine whether the Applicant has met the threshold for a grant of the orders it is seeking. Counsel for the Applicant submitted that this court is clothed with the jurisdiction to grant the prayers sought and cited [Iko Solutions Limited v Mobile Decisioning Africa Limited](#) [2021] eKLR, paragraph 23, which states as follows:

23. What is in issue is whether the court has jurisdiction to issue an injunction. An injunction is an equitable remedy and it is well settled that an injunction is a remedy in personam. This means as long as the person is within the court’s jurisdiction, the court can compel the person to do a thing or restrain that person from doing something (*Penn v Lord Baltimore* 27 ER 1132 and *Orr Ewing and Others v Orr Ewing’s Trustees* [1883] UKHL 911). In this case, the Defendant is within the court’s jurisdiction and therefore subject to the court’s orders. If it fails to obey such orders, it is liable for contempt and other enforcement action.



32. I believe the Respondents are within this court's jurisdiction and on the strength of that authority, this court is properly guided that it is clothed with the requisite jurisdiction to grant orders sought upon satisfaction that the Applicant has met the threshold required.
33. Has the Applicant met the threshold for a grant of an injunction? The Applicant has presented a case that the Respondents have defaulted in repayment of the loan facility and that they intend to remove the motor vehicles from this court's jurisdiction. The response is an admissions of default and acknowledgement that indeed the motor vehicles have crossed borders to Zambia, but with knowledge of the Applicant after the Applicant had been notified through an email sent to them before the Application was filed.
34. I have seen a copy of the email sent by the 2nd Respondent on behalf of the 1st Defendant. This email was sent on 7th October 2023. It is marked 'ENM1' and is attached to Replying Affidavit of the 2nd Respondent. That email and the submissions by Mr. Matwere, counsel for the Respondent, in reference to the evidence that the Applicant was aware that the motor vehicles had crossed borders even before filing this application, have not been controverted.
35. There is controversy as to whether the motor vehicles have been fitted with tracking devices and whether they have been insured. To ensure that this court does not make pronouncements that may jeopardize or prejudice the main suit, which is yet to be argued, I restrain myself from making a determination on the two issues at this interlocutory stage.
36. I have given the issues before me careful consideration. It is not denied that the Respondents were advanced a facility for the purchase of the motor vehicles in issue. It is not denied that the said motor vehicles were registered jointly between the two parties. It is not denied that the Respondent has defaulted in repayments. It is not denied that the said motor vehicles have crossed borders. The dispute is whether the Respondents' intention is to remove the said motor vehicles from this court's jurisdiction or to evade justice.
37. I am satisfied that the Applicant has established a prima facie case as defined above. However, that alone is not sufficient to obtain the orders they are seeking, at least not at this stage of the proceedings. The Applicant must satisfy the other conditions for the grant of injunction in order to obtain the orders it is seeking.
38. In *Nguruman Limited case*, cited above, the Court was of the view in respect to the conditions for grant of injunctions:

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd v Afraba Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”



39. The Applicant has failed to satisfy the court that the injury the Applicant will suffer, in the event the injunction is not granted, will be irreparable. The Applicant has failed to demonstrate that the damages recoverable in law is not an adequate remedy and that the respondent is not capable of paying.
40. I hasten to state that this is a matter that will benefit from full hearing so that the evidence can be subjected to and tested in cross examination.
41. I therefore decline to grant the prayers sought in the Notice of Motion dated 22nd March 2024 and direct parties to comply with Order 11 to pave the way for the hearing of the main suit.
42. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 25TH JUNE 2024.

S. N. MUTUKU

JUDGE

In the presence of:

Ms. Abobo for Applicant

Mr. Matwere for Respondent

