



REPUBLIC OF KENYA



**Maeri v Onduso & another (Civil Case E004 of 2023)  
[2023] KEHC 21492 (KLR) (Civ) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21492 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL CASE E004 OF 2023**

**AA VISRAM, J  
JULY 27, 2023**

**BETWEEN**

**MICHAEL MAERI ..... PLAINTIFF**

**AND**

**DOUGLAS JUMA ONDUSO ..... 1<sup>ST</sup> DEFENDANT**

**GEOSPOTHE CONCEPTS LTD ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling relates to the Applicant's Notice of Motion dated January 23, 2023 ('the Application') seeking the following orders: -
  - i. Spent
  - ii. Spent
  - iii. That a Mareva Injunction to freeze all assets movable and immovable assets of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Defendants whether held in accounts numbers xxxx and xxxx respectively at Cooperative Bank of Kenya and any bank in Kenya or safe boxes and CDSC accounts pending determination of the application and suit.
  - iv. That a Mareva Injunction be issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, their agents, servants, employees or whatsoever name called from selling and or disposing off any of their assets pending the hearing and determination of this application and suit.



- v. That a Mareva Injunction be issued restraining the 2<sup>nd</sup> Respondent its agents, servants, employees or whatsoever name called from selling and or disposing off of its assets pending the hearing and determination of the main suit.
  - vi. That in the alternative of prayers 3,4 and 5 and order of status quo be maintained pending hearing and determination of the suit.
  - vii. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be ordered to deposit/furnish security to this Honourable Court in the sum of Kshs 17,209,317.42/=, the same being the amount claimed by the Applicant pending the hearing and determination of the suit.
  - viii. That mandatory injunction compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/ Defendants to pay monies in amount of Kshs 17,209,317.42/= pending the hearing and determination of this application and suit.
  - ix. That a conditional attachment of land TITLE NUMBERS;NAIROBI/ BLOCK 136/15835 and 136/15825 each measuring approximately 0.1296 Hectares in the name of Doulas Juma Onduso and Onduso Juma Douglas respectively before judgment pending determination of this suit.
  - x. That the costs of this Application be in cause.
2. The Application is premised on the grounds on the face of the Notice of Motion application, and the further grounds set out in the supporting affidavit of Mr Michael Maeri, the Applicant herein, sworn on January 23, 2023.
  3. The Applicant deposed that he is at risk of losing Kshs 11,503,652.06/= advanced by him to the Respondents for the purpose of financing various tenders that the Respondents allegedly won, or were involved in financing. He averred that after advancing various sums of money, he later discovered that the said tenders were fake, and suspected that the Respondents were defrauding him. Accordingly, he requested the Respondents to return his investment but was told that the same could no longer be availed.
  4. He averred that the parties thereafter agreed to enter into a friendly collateral agreement dated March 11, 2022 ('the Agreement'), the terms of which provided that the 1<sup>st</sup> Respondent would pay the Applicant Kshs 17,209,317.42/= plus interest over a period of time culminating on May 1, 2022.
  5. In opposition to the Application, the Respondents filed a joint replying affidavit sworn by Mr Douglas Juma Onduso, on March 8, 2023 in his personal capacity and on behalf of the 2<sup>nd</sup> Respondent, which is a company.
  6. Mr Onduso deposed that the parties had entered into a joint agreement with a view to financing various tenders and sharing in the profits upon completion of the projects.
  7. He averred that over the course of his dealing with several companies involved in the tenders, he learned that some of the tenders were fake, and found that he would not be able to recover the money the parties had invested in the tenders. He stated that he had filed a complaint at the Central Police Station reporting the situation.
  8. He averred that some of the tenders the parties had invested in were in fact genuine, and contended that a tender relating to KRA had been earning periodic payments, with a substantial amount still due to him and the parties.



9. He deposed that as a sign of good faith, he issued the Applicant with three properties, intended to act as a guarantee for payment of the outstanding amounts due the Applicant namely, NAIROBI/BLOCK/136/15835, NAIROBI/BLOCK 136/15825, and NAIROBI BLOCK 105/6733.
10. He deposed that he has no intention of leaving the country, and stated that freezing his assets would only inconvenience him, and cause him great difficulty in paying back his loan advanced by the bank.
11. He contended that his, and the parties' financial predicament was the result of their collective misfortune and their inability to get payments for the various tenders. In short, he had been tricked.

### **Applicant's submissions**

12. The Applicant submitted that the 1<sup>st</sup> Respondent had acknowledged receiving a total advance of Kshs 11, 503,652.06/= and had also acknowledged the existence of the Agreement.
13. He submitted that the Applicant had met all the conditions required for the grant of a Mareva injunction, which were based on the English case of *Mareva Campania Naviera SA v International Bulk carriers SA (1980) 1 ALL ER 213*. He further submitted that the remedy sought was also available in Kenya based on Order 39, Rules 5 and 6 of the *Civil Procedure Rules*.
14. The Applicant submitted that the purpose of a Mareva injunction was to prevent the Defendant or would be judgment debtor, from dissipating his assets with effect of obstructing the execution of any decree against him. In support of the above argument, he relied on the above case in the following terms:-
 

' In my opinion that principle applies to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting judgment for it. If it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets.'
15. The Applicant further relied on the decision of the High Court in *Beta Healthcare International Limited v Grace Mumbi Gitbaiga & 2 Others [2016] eKLR* in relation to the applicable criteria to warrant a freezing injunction. He submitted that the criteria had been met because the Respondents have assets within the jurisdiction of the court; and that the assets were at risk of being dissipated.
16. Finally, the Applicant submitted that the court ought to attach the various properties of the Respondents (cited above) as security for the eventual judgment of the court, on the basis that the 1<sup>st</sup> Respondent had already been arrested and charged for various offences, including obtaining money by false pretense.

### **Respondent Submissions**

17. The Respondent submitted that the Applicant had failed the test for a grant of a freezing order because he had not submitted any evidence to prove that the Respondents were in the process of disposing property, or leaving the jurisdiction of the court.
18. He relied on the decision of the Court of Appeal in *Kuria Kanyoko t/a Amigos Bar and Restaurant v Francis Kinuthia Nderu & Others (1985) 2 KAR 126* p.126 where the court stated as follows:-

' The power to attach before judgment 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 the intent to obstruct or delay any decree that may be passed against him.'

19. He submitted that the Respondents were experiencing financial difficulty, and even if granted, it would not be possible for them to comply with the orders sought because they did not have the means. In support of the above argument, he relied on the decision of the Court of Appeal case [Eric VJ Makokha & Others v Lawrence Sagini & 2 Others Civil Application No 20 of 1994 \(12/94 UR\)](#), where the court stated:-

' An application for injunction under Rule 5(2)(b) is an invocation of the equitable jurisdiction of the Court. So its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, 'Equity, like nature, will do nothing in vain'. On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the Court will decline to grant it.'

20. Finally, the Respondent submitted the grounds in *Giella v Cassman Brown (1973) EA 358* had not been met, and the court ought not grant the injunction.

### **Analysis and Determination**

21. I have considered the grounds set out on the face of the Application together with the further grounds set out in the supporting and supplementary affidavits of the Applicant. I have also considered the opposition to the same as contained in the replying affidavit of the Respondents and the rival submissions of the parties, as briefly summarized above.

22. To my mind, the starting point in relation to criteria applicable to all injunctions, including the present one, are found in *Giella vs Cassman Brown Company Limited [1973] EA*. The Applicant must therefore demonstrate that all the following have been met:-

- a. The Applicant must have shown a prima facie case with a probability of success.
- b. The Applicant must show that it will suffer irreparable injury that cannot be compensated by way of damages if the injunction was not granted.
- c. If the court was in doubt, then it would decide the application on a balance of convenience.

23. In *Central Bank of Kenya vs Giro Commercial Bank Limited & Another [2007] 2 EA. 93*, the court affirmed that the above criteria is also applicable to Mareva injunctions, despite the unique nature of a Mareva injunction.

24. Looking at the second limb of *Giella* (supra), as set out above, I am guided by the decision of the Court of Appeal in [Mureithi v City Council of Nairobi \[1979\] eKLR](#), where the court stated the following:-

' The object of the interlocutory injunction is to protect the Plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the Plaintiff's claim appeared to be at that stage.'



25. On this limb, the Respondent submitted, and I am in agreement, that in the present matter, the damages are quantifiable in monetary terms and may be compensated by way of damages. I therefore, do not think that this is a situation where damages are not an adequate remedy.
26. In the event I am wrong for any reason, in *Mareva Compania Naviera SA vs International Bulk Carriers SA* [1975] 2 Lloyd dis Rep 509, which was referred to by both the Plaintiff and the Defendant, Lord Denning MR stated as follows:-
- ' In my opinion, that principle applies to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting judgment for it. If it appears that the debt is due and owing and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment (emphasis court), the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him from disposing of those assets.'
27. The key point underlined above is that it is imperative, prior to the grant of a Mareva injunction, for the Applicant to produce evidence of a real and actual threat that assets will be disposed. Further, a successful Applicant must also demonstrate that the disposal of those assets are intended to defeat any judgment that would be entered in his favour.
28. I do not think that the criteria above has been satisfied on a balance of probability. Beyond his submissions, the Applicant has not produced any evidence to that effect before this court. To my mind, mere submissions are not adequate. Submissions are not evidence and cannot take the place of evidence.
29. Further, in the case of *Fourie vs Le Roux & Ors* [2007] UKHL 1 at Para 2, [2007] 1 All ER 1087, Lord Bingham declared thus:-
- ' Mareva (or freezing) injunctions were from the very beginning, and continue to be, granted for an important but limited purpose: to prevent a Defendant dissipating his assets with the intention or effect of frustrating enforcement of a prospective judgment. They are not a proprietary remedy. They are not granted to give a claimant advance security for his claim, although they may have that effect. They are not an end in themselves. They are a supplementary remedy, granted to protect the efficacy of court proceedings, domestic or foreign.'
30. For the foregoing reasons, I find that the prayers relating to attachment of the various properties are without merit.
31. Finally, I take note that part of the amount in dispute has been admitted by the Respondents, and the Respondents have offered various forms of security to the Applicant at the time of making the present application. It is not lost on me that some of the parties happen to be family members, namely, brothers, and cousins, who began this venture presumably with the intention of making money together, and with trust for one another. In the circumstances, I am of the view that mediation may provide an appropriate forum for the parties to engage in a meaningful discussion relating to the available and relevant securities and possible modes of repayment, as may be appropriate in the circumstances. Indeed, I note that this process of repayment had already begun, and I am of the view that the parties ought to, in the first instance, attempt to complete the same amicably, and outside of the litigation process.
32. Accordingly, I direct the parties to pursue court annexed mediation in the first instance, and further direct that this matter be allocated for mediation by the Deputy Registrar.



33. Based on the reasons set out above, the Application is dismissed with costs.

Dated and delivered virtually via Microsoft Teams this 27<sup>th</sup> *day of July 2023*

**ALEEM VISRAM**

**JUDGE**

**In the presence of;**

..... **for the Plaintiff**

..... **for the 1<sup>st</sup> Defendant**

..... **for the 2<sup>nd</sup> Defendant**

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