



**Rotich & 2 others v Magereza Sacco (Civil Suit 434 of 2022)
[2023] KEHC 22909 (KLR) (Commercial and Tax) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22909 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 434 OF 2022
FG MUGAMBI, J
SEPTEMBER 29, 2023**

BETWEEN

**DAVID ROTICH 1ST PLAINTIFF
WASHINGTON OBUNDE 2ND PLAINTIFF
DICKSON ODHIAMBO 3RD PLAINTIFF**

AND

MAGEREZA SACCO DEFENDANT

RULING

Brief Facts

1. This ruling determines the application dated November 4, 2022. It is brought under Order 40 and Order 51 of the [Civil Procedure Rules](#) 2010; Sections 1A,1B and 3A of the [Civil Procedure Act](#) Cap 21 Laws of Kenya and all other enabling provisions of the law.
2. The application seeks the following orders:
 - i. Spent
 - ii. That pending hearing and determination of this application, this Honourable Court be pleased to issue an order restraining the respondent from denying applicants' access to their accounts for purposes of withdrawing funds, depositing funds or in any other way transacting through their accounts.
 - iii. That pending hearing and determination of this application, this Honourable Court be pleased to issue an order preventing the respondent from placing any restrictions on the accounts of the applicants domiciled at the respondent.



- iv. Pending hearing and determination of this application, this Honourable Court be pleased to issue an order granting the applicants unlimited access to their account's statements.
 - v. Spent
 - vi. Pending hearing and determination of this suit, this Honourable Court be pleased to issue an order restraining the respondent from denying the applicants access to their accounts for purposes of withdrawing funds, depositing funds or in any other way transacting through their accounts
 - vii. Pending hearing and determination of this suit, this Honourable Court be pleased to issue an order preventing the respondent from placing any restrictions on the accounts of the applicants domiciled at the respondent.
 - viii. That pending hearing and determination of this suit, this Honourable Court be pleased to issue an order granting the applicants unlimited access to their account's statements.
3. The application is premised on the grounds on the face of it and supported by the affidavit sworn by Dickson Odhiambo on behalf of the applicants, in November 2022 and submissions dated June 16, 2023.
 4. The applicants are Kenya Prisons officers stationed at Nairobi Remand and Allocation Maximum Remand prison and also members of Mageeza Sacco, the respondent herein, through whom their salaries are paid. The dispute before the Court arises from the failure of the respondent to remit the applicants salaries since March 2021 on allegations of fraudulent transactions in the applicants' accounts.
 5. Counsel contends that the applicants have met the threshold for the grant of the interim injunctive prayers as laid out in *Giella v Cassman Brown & Co Ltd*, (1973) EA 385.
 6. Relying on case law that was cited by way of submission, Counsel states that the applicants have a *prima facie* case with a high probability of success. This point was buttressed by the fact that the applicants have not been charged in a criminal court and no action had been taken by the Directorate of Criminal Investigations in spite of summons which they honoured. The applicants also submit that there is on record a written confession by the alleged mastermind, one Yusuf Ali, who is yet to be arraigned in court, but yet their accounts remain frozen.
 7. The applicants further note that there are no Court orders justifying the continued freezing of the accounts belonging to the applicants. They term the act as illegal, unjustified and the height of impunity. They have asked that the Court also notes that the respondent has not been keen in prosecuting this matter and despite the fact that it was served with the application on November 9, 2022, it never did put in its response until May 2, 2023 yet the application was filed under certificate of urgency.
 8. Secondly, the applicants aver that they stand to suffer irreparable harm which would not be adequately compensated by an award of damages. The dispute before Court relates to monies that they have been restricted from accessing by the respondent for the last twenty-one (21) months but the ripple effect is unquantifiable.
 9. They state that their children have had to stay home for lack of school fees, they are unable to provide shelter and food for their children, their marital and family relationship have suffered strain and that



- they have suffered mental anguish out of this state of affairs and had to look for alternative sources of funds. It is submitted that the amount of inconvenience cannot be repaid by damages.
10. Finally, the applicants aver that the balance of convenience lies in granting the application and costs.
 11. The respondent opposed the application through a replying affidavit sworn by its Chief Executive, one Augustine Mutisya on May 2, 2023 and further buttressed through its written submissions dated June 20, 2023.
 12. The respondent confirms that indeed the applicants are members of the respondent sacco and had directed their employer, the Kenya Prison Services to pay their salaries through the respondent's account. The respondent further confirms details of fraudulent transactions allegedly unearthed by the respondent, on or about March 13, 2021, involving the accounts of the applicants.
 13. As a result of the unexplained loss of Kshs 4,583,300/=, the respondent opted to restrict access to the accounts for purposes of audit and filing of a formal criminal complaint. The respondent also states that the applicants had been summoned in the course of investigations and that the prayers sought would tamper with the evidence in the criminal proceedings.
 14. It was submitted by the respondent that the threshold for grant of interim injunctive orders had not been met. The applicants did not prove that they had a prima facie case since they have not denied that in fact the said fraud was perpetrated through their accounts, with their knowledge. The respondents warn that the court cannot be called upon to interrogate the extent of liability of the parties at an interim stage or hold a mini trial and must not examine the merits of the case closely.
 15. The respondent argues that in any case, the applicants have been at liberty to have their salaries processed in another bank and not necessarily FOSA.
 16. The respondent noted that the applicants had not demonstrated that they stand to suffer irreparable harm. The loss alleged by the applicants was for monies allegedly withheld illegally. The salaries are of a known and ascertainable amount and could be quantified in monetary terms. In the event that the suit is decided favor of the applicants they can be adequately compensated in form of damages.
 17. Finally, it was the respondent's submission that the balance of convenience tilts in its favor based on the fact that the applicants had not denied that they facilitated fraudulent transactions leading to the loss of Kshs 4,538,000/=. It is the respondent's case that a prima facie case had been established as against the applicants.

Analysis

18. I have carefully considered the pleadings, evidence and the rival submissions and authorities cited by counsel. The main issue for determination is whether the prayers which are in the nature of interim injunctive relief, ought to be granted.
19. The law on granting of interlocutory injunctions is set out under Order 40(1) (a) and (b) of the [Civil Procedure Rules](#) 2010. The conditions for the grant of a temporary injunction were laid out in the celebrated case of *Giella V Cassman*, [*supra*] which parties have referred to. It was held in that case that:

“The conditions for the grant of an interlocutory injunction are well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of



damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

20. Parties have made their submissions and cited authorities each to credit or discredit the threshold of the laid down test. In *Mrao Ltd V First American Bank of Kenya Ltd & 2 Others*, [2003] KLR 125, Bosire, JA defined a prima facie case as a case in which:

“On the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

21. I concur with the submission by the respondent that in an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law. Without getting into the substance of the dispute, just by looking at the evidence produced before the court, I note that the dispute relating to the freezing of the monies arose in March 2021. This is uncontroverted.
22. I further note that the applicants were summoned on June 2, 2021 to record statements on the incidence. It is also apparent that no charges have been preferred against the applicants todate, over 24 months later! No explanation has been given for this by the respondent either in their replying affidavit or submissions.
23. Instead, the respondent insists that the applicant was subjected to fair administrative action. I am constrained to lay out the Constitutional interdicts of article 47(1) which provides that: Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. It would appear to me that the actions of the respondent were not in compliance with article 47(1).
24. The respondent submits that the applicants are not entitled to the injunctive reliefs because the alleged fraud was committed in their full knowledge. The respondent further alludes to the possibility of the applicants even being involved. Again, I remain completely focused that it is not in my space to decide on the fraud or lack of it. At this point I may only ask myself again, if indeed such alleged fraud was committed, why are the applicants still walking scotch free? Why have the Institutions that are required to act not taken any action 24 months later?
25. Based on the material presented to this Court, I find that there exists a right which may have been infringed by the respondent and which calls for an explanation or rebuttal and, in my view, the applicants have established a *prima facie* case with a probability of success.
26. The second consideration for grant of an injunction is whether the applicants have shown that they might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. The court in *Paul Gitonga Wanjau V Gatbuti Tea Factory Company Ltd & 2 Others*, [2016] eKLR referred to the Halsbury’s laws of England on what irreparable loss is and stated that:

“By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages.”



27. I note the respondent's claims that the amount of the money due to the applicants is quantifiable, as this can be ascertained from the salary due to the applicants. While the respondent states that the applicants are at liberty to have their salaries forwarded to any other institution, I am persuaded that the withholding of the applicants' salaries for 24 months is certainly a situation that had caused great financial inconvenience and social instability to the applicants.
28. The ripple effect is unquantifiable in damages and as such, I find no difficulty in holding that this ground has been satisfied in favour of the applicants. From the foregoing, I am convinced that the balance of convenience tilts in favour of allowing the application.

Determination and orders

29. For the reasons that I have stated, I find merit in the application dated November 4, 2022. The same is granted in the following terms:
- i. An order restraining the respondents from denying the applicants access to their accounts for purposes of withdrawing funds, depositing funds or in any other way transacting through their accounts pending hearing and determination of this suit, be and is hereby issued;
 - ii. An order preventing the respondent from placing any restrictions on the accounts of the applicants domiciled at the respondent, pending hearing and determination of this suit be and is hereby issued;
 - iii. An order granting the applicants unlimited access to their account's statements pending hearing and determination of this suit be and is hereby issued;
 - iv. The costs of this application shall be in the cause.
 - v. I direct that parties fix the matter for pre-trials at the earliest available date for purposes of having the matter ready for hearing.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 29TH DAY OF SEPTEMBER 2023.

F. MUGAMBI

JUDGE

