Njoroge Regeru t/a Njoroge Regeru & Co. Advocates v Eastern Bypass Estate Ltd (Civil Suit E254 of 2022) [2023] KEHC 26740 (KLR) (Civ) (20 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26740 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT E254 OF 2022

CW MEOLI, J

DECEMBER 20, 2023

BETWEEN

NJOROGE REGERU T/A NJOROGE REGERU & CO. ADVOCATES ..... APPLICANT

AND

EASTERN BYPASS ESTATE LTD ..... RESPONDENT

RULING

1. Njoroge Regeru t/a Njoroge Regeru & Co. Advocates (hereafter the Plaintiff/Applicant) filed this suit and a contemporaneous motion dated 19.12.2022. The motion seeking inter alia that pending hearing of the suit the court be pleased to issue an interim freezing order restraining Eastern Bypass Estate Ltd (hereafter the Defendant/Respondent) either by itself, its servants/agents or any person whomsoever from selling, disposing of exchanging, charging, transferring or in any other way whatsoever dissipating all that property known as LR. No. 30393/1585 IR 217300 (hereafter the suit property) situated in Nairobi County; costs of the motion; and any other order the court may deem just and fit to grant. The motion is expressed to be brought under Section 1A, 1B & 3A of the *Civil Procedure Act* (CPA), order 39 rule 5 of the *Civil Procedure Rules* (CPR).

2. The grounds on the face of the motion are amplified in the supporting affidavit sworn by the Applicant. He deposes that at all material times relevant, his firm acted as counsel on the instruction of the Respondent and provided it with a range of legal services. That pursuant to an Agreement dated 08.05.2021 duly executed by the directors of the Respondent and himself, the former re-confirmed its commitment to settle his firm's outstanding legal costs of Kshs.54,931,000/- as had been mutually agreed upon on 14.11.2020. He further deposes that the said agreement stipulated that the Respondent would in addition pay Kshs. 6,866,375/- being 12.5% interest accrued on the agreed costs raising the

total settlement amount payable to Kshs. 61,797,375/- which outstanding amount was to be paid not later than 07.08.2021.

3. That having executed the agreement in good faith with the unequivocal intention to be bound by the terms thereof, his firm held in abeyance any legal action against the Respondent pending full settlement of the amount payable, but the Respondent failed and or refused to honor its part of the bargain and resorted to evasive, unlawful and dishonest tactics aimed at frustrating the agreement. Counsel stated that through various correspondence the Respondent undertook to settle the outstanding legal fees the Plaintiff indulging extensions sought to settle the same including granting a waiver on interest. That despite the foregoing, the Respondent failed to honor its commitments while seeking a further indulgence to enable it allegedly negotiate the sale of advertised plots for the stated purpose of raising funds to settle the debt in respect of which, only a sum of Kshs. 5,000,000/- had been paid by the Respondent.

4. Counsel averred that he was privy to the Respondent's attempts running over a year in that regard, adding that he reasonably believed the suit property to be the only property still owned by the Respondent, and that despite requests to the Respondent to issue an unconditional and irrevocable undertaking to settle the principle amount, the Respondent had ignored and or refused to settle or respond to to his letters since May 2022.That given the foregoing, he had established from his own investigations that the Respondent is the registered proprietor of the suit property measuring 1.992 hectares and that the same is the only known asset of the Respondent within the jurisdiction of the court , capable of satisfying the entire claim. In conclusion he asserts that given the Respondent's conduct there is a real risk that the suit property will be dissipated if the orders sought herein are not granted.

5. The Respondent opposes the motion through a replying affidavit sworn by one Muthumbi Waweru, a director of the Respondent. He takes issue with the Applicant's motion for targeting the entire suit property valued at Kshs. 128,000,000/- as of 06.12.2022. He averred that the Applicant is aware of the Respondent's financial situation and that the Respondent has not refused to settle the Applicant's claim, and that if the motion is allowed it will prevent the Respondent from offering the land at its real value and in addition render it impossible for the Respondent to settle the debt. In conclusion he urges the court to dismiss the motion with costs to the Respondent.

6. The motion was canvassed by way of written submissions. Counsel for the Applicant pointing out that the subject debt and default are admitted, asserted that the suit property being the property of the Respondent, there is a real and imminent risk that it will be dissipated thereby defeating the eventual decree herein. Counsel relied on the provisions of order 39 rule 5 of the *Civil Procedure Rules* and the decisions in *Kanduyi Holdings Limited v Balm Kenya Foundation & Another* [2013] eKLR and *International Air Transport Association & Another v Akarim Agencies Company Limited & 2 others* [2014] eKLR on the requirements to be met in the instant motion. Contending further that the motion satisfies the requisite requirements for the grant of the freezing order sought in respect of the suit property.

7. Concerning whether an arguable case had been presented, it was contended that, the debt is admitted; the jurisdiction of the court is not disputed; the suit property belongs to the Respondent and is within the jurisdiction of the court; and there is real risk of the asset being dissipated given the fact that the Respondent has been advertising and selling plots within the suit property; and therefore the balance of convenience is in favour of the Applicant. In conclusion counsel called to aid the English decision in *Mareva Compania Naiverra SA v International Bulk carriers SA* [1975] 2 Lloyd dis Rep. 509 as cited by the court in *Guaranty Trust Bank (K) Limited v ES Solo Holdings Limited* [2021] eKLR to submit that it is in the interest of justice to grant the interim freezing order with costs to the Applicant.

8. Counsel for the Respondent on his part submitted that the Applicant's motion lacks merit and ought not be granted. He argued that, while the debt is not disputed, allowing the motion the Respondent will render it impossible to meet its obligations to the Applicant. Here reiterating that the suit property has a value of Kshs. 128,000,000/- and a forced sale value is Kshs. 96,000,000/- which values exceed the debt owed. That by preserving the suit property the Respondent will be at risk of suffering irreparable harm by way of lost opportunity to sell the property pending litigation.

9. Counsel further contended that despite the intent of Order 39 Rule 5 of the CPR, the Respondent has demonstrated willingness to meet its obligations to the Applicant and that the latter has not proved the Respondent will waste the suit property and or proceeds of the sale thereof. It was equally posited that the court ought to consider whether it ought to preserve the entire suit property or only the portion thereof that is equivalent to the amount claimed by the Applicant. In conclusion the court was urged to disallow the Applicant's motion because granting it will result in the Respondent being unable to meet its obligations to the Applicant.

10. The court has considered the material canvassed in respect of the motion and must determine whether the Applicant has made out a case for the granting of the prayers in the motion. The motion saliently invokes the provisions of order 39 rule 5 of the *Civil Procedure Rules.* It provides that;

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> "(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—
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> (a) is about to dispose of the whole or any part of his property;
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> (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court,
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> 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.
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> (2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.
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> (3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified."

11. The Court of Appeal in *Mcdouglas Kagwa v Weekly Review Ltd*. [1992] eKLR while addressing itself to nature of an injunction such as sought in the instant matter observed that:-

> "What the Judge granted was not an ordinary injunction. It is a form of injunction of a recent development known as a mareva injunction taking its name from a case in England where it was first made. It was defined by Lord Denning MR in his judgment in the case of Owners of Cargo Lately Laden on Board the Vessel Siskina and Others v Distos Compania Naviera SA [1977] 3 All ER 803 at page 809:
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> "During the last two years the Courts of this Country have rediscovered a very useful procedure which used to be known as foreign attachment. It is now called the 'mareva

injunction'. It is a procedure by which the Courts can come to the aid of a creditor when the debtor has absconded or is overseas, but has assets in this Country. The Courts are ready now to issue an injunction so as to prevent the debtor from disposing of those assets or removing them from this Country, thus defeating the creditor of his claims. It is a procedure familiar to all the countries of the Continent of Europe and to the United States of America, and to the province of Quebec. If you read the facts in Mareva Compania Niera SA v International Bulcarriers Ltd [1975] 2 Lloyd's Rep 509, you will see how desirable and important it is that the Courts should have jurisdiction to issue such an injunction. It was challenged before us recently in Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) and Government of Indonesia (as interveners) [1977] 3 ALL ER 324, but the challenge failed. The procedure is now established beyond question. It has been used repeatedly in the Commercial Court to the satisfaction of all concerned.

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. Where the Court grants a "mareva" injunction, it should also order a speedy trial of the action in order to avoid any possible injustice that may be caused to the defendant by delay. But a "mareva" injunction cannot be issued against defendants who were permanently settled in Kenya and have their assets here."

12. This court associates itself with the reasoning of Gikonyo. J in *Kanduyi Holdings Limited v Balm Kenya Foundation & another* (supra), to the effect that:-

> " The application before me is founded on Order 39 rules 5 and 6 of the CPR. Our Order 39 rule 5 and 6 could be said and is a statutory codification of an interlocutory relief commonly known as Mareva Injunction or freezing order in the UK. The principle was laid down in the case of Mareva Compania Navierra SA v International Bulkcarriers SA [1975] 2 Lloyd dis Rep 509.
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> (22) Accordingly, Order 39 Rules 5 and 6 of the CPR should operate within known dimensions of law drawing from the above case and other judicial precedents on the subject. Order 39 rule 5 and 6 of the CPR is not to be used: 1) to pressure a defendant; or 2) as a type of asset stripping (forfeiture); or 3) as a conferment of some proprietary rights on the Plaintiff upon the assets of the Defendant. The purposes of any order that should be issued under Order 39 Rules 5 and 6 of the CPR is to prevent the Defendants or would be judgment-debtor from dissipating his assets as to have the effect of obstructing or delaying the execution of any decree that may be passed against him.
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> (23) Given the scope and tenor of the relief under Order 39 Rule 5 and 6 of the CPR, the Plaintiff has the onus of proving that the Defendants:
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> a) Is about to dispose of the whole or any part of his property; or
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> b) Is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court.
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> Courts have held that the Plaintiff must establish a prima facie case on the above elements within the thresholds for grant of interlocutory injunction in Giella v. Cassman Brown. The

Court of Appeal in the case of *Kuria Kanyoko t/a Amigos Bar and Restaurant v. Francis Kinuthia Nderu & Others* [1985] 2 KAR 126 p. 126 had the following to say on the Order 38 Rule 5 of the previous CPR (equivalent of current Order 39 rule 5 and 6) that:

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." (sic)

13. As to what constitutes a prima facie case, the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR expressed itself as follows: -

> " Recently, this court in Mrao Ltd. v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125 fashioned a definition for "prima facie case" in civil cases in the following words:
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> "In civil cases, a prima facie case is 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 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 but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed." (sic)

14. From the Applicant's affidavit material and pleadings before the court, it can be inferred that the Respondent is a Limited Liability Company registered in the Republic of Kenya and carrying out business within the court's jurisdiction. Further, it is undisputed that the Respondent is indebted to the Applicant by dint of Annexure NR-1 as the same is duly acknowledged in the Respondent's response to the motion. Patently, a prima facie case as to indebtedness has been established by the Applicant.

15. As to the question of mischief by way of delay or obstruction of execution, the Applicant has relied on a raft of correspondences between himself and Respondent Annexure NR-2, NR-3, NR-4, NR-5, NR-7, NR-8, NR-9, NR-10, NR-11, NR-12. Given the contents of NR-1, parties had tentatively agreed on settlement of sums owed and upon a reading of the foregoing annexures, the Respondent appears to be prevaricating and or dithering from the position, at the expense of the Applicant without any security or undertaking proffered by the Respondent that the sums owed will be settled.

16. Which brings the court to the question whether there is likelihood of dissipation of the suit property. The Applicant has contended that to best of his knowledge, and upon investigation, he believes that the

suit property is the only known asset owned by the Respondent, and that the Respondent has evinced every intention to sell it. The former position has not been controverted by the Respondent which indeed confirms its intention to sell the property as attested by the newspaper excerpt Annexure NR-6 which shows that the Respondent is intent on selling parts of the suit property. To the detriment of the Applicant due to possible obstruction or delay in the satisfaction of any decree that may eventually be passed against the Respondent.

17. The Respondent countered by arguing that the indebtedness is not disputed and that granting a freezing order as to the entirety of the suit property would ultimately prejudice and or curtail its efforts to settle sums owed. Consequently, the Respondent posits that what the court ought to consider is whether it ought to preserve the entire suit property or preserve only a portion thereof that is equivalent to the amount being claimed by the Applicant.

18. From the foregoing, the Applicant's apprehensions concerning the likely dissipation of the suit property appear well founded. While the Respondent asserts that funds derived from the said sale will ultimately be utilized towards settling the entirety of the debt owed to the Applicant, given the conduct of the Respondent as gleaned from the Annexures relied on by the Applicant, there seems to be no guarantee in that regard. With the attendant possibility of prejudice upon the Applicant in tracing an alternative asset for execution should the suit succeed. The Applicant was required to identify the specific property for attachment and its value thereof, but only complied with the former, while the estimated value of the suit property was tendered by the Respondent.

19. Applying the dicta in *Mcdouglas Kagwa* (supra) and the provisions of order 39 rule 5 of the CPR to the facts of this case, the court is not hamstrung, as the latter provision empowers it, where a prima facie case is made in respect of "disposal of whole or any part of the property in question ...or.... removal of the whole or any part of property in question from the local limits of the jurisdiction of the court" to direct the defendant, within a time to be fixed by it, inter alia to furnish security, in such sum as may be specified in the order. This power is fundamentally intended inter alia for the balancing of the scales of justice between the respective parties during the pendency of litigation. Here, the court is alive to the pleas by the Respondent that a freezing of the suit property order will incapacitate it to the extent of being unable to perform its obligation to the Applicant. On the other hand, the Applicant has no security to hold on to.

20. Consequently, the court is persuaded that the justice of the matter lies in granting the motion dated 19.12.2022, initially, in terms that that the Applicant shall by close of business on 20th January 2024, furnish a bank guarantee that is acceptable to the Applicant, and from a reputable bank, for the sum of Kshs. 61,797,375/-. In default, an interim freezing order restraining Respondent either by itself, its servants/agents or any person whomsoever from selling, disposing of exchanging, charging, transferring or in any other way whatsoever dissipating all that property known as LR. No. 30393/1585 IR 217300 shall issue. The costs of the motion are awarded to the Applicant.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 20TH DAY OF DECEMBER 2023.

C.MEOLI

JUDGE

In the presence of

For the Applicant: N/A

For the Respondent: Mr. Kabuthi