



**Almasi Bottlers Limited v M’Mbijwe & 3 others (Civil Case  
E012 of 2022) [2023] KEHC 27274 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27274 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL CASE E012 OF 2022  
M MUYA, J  
DECEMBER 19, 2023**

**BETWEEN**

**ALMASI BOTTLERS LIMITED ..... PLAINTIFF**

**AND**

**CAROLYNE KANANA M’MBIJIWE ..... 1<sup>ST</sup> DEFENDANT**

**DANIEL MANEGENE GITARI ..... 2<sup>ND</sup> DEFENDANT**

**JOHN MARK NGUNGO NDET’TO ..... 3<sup>RD</sup> DEFENDANT**

**GRACE WANGECI MUGO ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. In respect of this case, there are two applications filed and which are subject of this ruling.
2. The first one is dated 11th October, 2022 and the second one is dated 16th December 2022.
3. In the application dated 11<sup>th</sup> October 2022 the applicant seeks an injunction to restrain the 1<sup>st</sup> Defendant/Respondent (one Carolyne Kanana M. Mbijiwe)
4. From disposing or in any other way dealing with the movable and immovable assets listed under prayers 5 and 7 of the application, also sought is an order of attachment of the said properties as identified under prayer 5 and 7 plus the funds in the accounts stated under prayer 6 of the application pending hearing and final determination of the suit.
5. In the second application which is the one dated 16<sup>th</sup> December 2022, the plaintiff/applicants seeks to restrain, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants/Respondents (namely, Daniel Manegene Gitari, John mark Ndungo Ndetto and Grace Wangeci Mugo) from disposing or in any way dealing with the respective movable and immovable assets listed under prayers number 5, 6 and 7 of the said application, pending hearing and determination of the suit.



6. Prayer 3 and 4 of the Application seeks an order requiring all the defendants/Respondents to furnish Security for the performance of the decree that may be passed in respect to the applicant/plaintiff's claim as pleaded in the plaint dated 12<sup>th</sup> August 2022 for the liquidated sum of Kshs 215,848,550/= both applications are supported by affidavits sworn by the applicants chief finance officer.
7. In the supporting affidavit sworn on 11<sup>th</sup> October, 2022 which is in support of orders against the 1<sup>st</sup> Defendant/Respondent it is deponed:-
 

That the 1<sup>st</sup> Defendant/Respondent was a distributor of the plaintiff's products, who working in cahoots with the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants obtained products without paying for them during the period between December 2020 to June 2022.
8. Although the 1<sup>st</sup> Defendant ran her separate distributorship account, she was also in charge of her late husband's distributorship account and continued to run it after his death in the year 2021.
9. During that period the applicant has established that through machination of its accounts and with assistance from the 2<sup>nd</sup> to 4<sup>th</sup> Defendants, the 1<sup>st</sup> Defendant was able to obtain soda products valued at an excess of Kshs 214,848,500/= which she never paid for.
10. That using proceeds from the sale of such products she purchased the properties disclosed under paragraphs 8 and 10 of the supporting affidavit sworn on 11<sup>th</sup> October 2022 some of which she had registered jointly in her name and her minor children in order to shield them from attachment as is disposed under paragraph 9 of the affidavit.
11. Further that on the supporting affidavit sworn on 16<sup>th</sup> December 2022 is in support of the application of same date for orders against the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants/Respondents. The chief finance officer deposed to the effect that:-
12. The said 2<sup>nd</sup> – 4<sup>th</sup> Defendants worked in Cahoots with the 1<sup>st</sup> Defendant and her late husband to perpetrate financial sabotage by helping them obtain products/goods without paying for the same in excess of Kshs 214,848,550/=
13. That under paragraph 10 of the supporting affidavit sworn on 16<sup>th</sup> December 2022 it is deponed that some of the properties were acquired by the 2<sup>nd</sup> -4<sup>th</sup> Defendants using the proceeds related to the transactions the subject of the suit. The said 2<sup>nd</sup> – 4<sup>th</sup> Defendants/Respondents had every reason to dispose the properties registered in their names in order to avoid execution proceedings in the event the court were to make an award of the lost sums of money against them.
14. The applicant submits that the Respondents replying affidavits have not dislodged the plaintiff Justifiable reasons for seeking the courts intervention that in the affidavit of Carolyne Kanana Mbijiwe she deposes that the application is an infringement of her right to privacy. That she is a resident of this country and the orders sought do not lie. That the attachment before Judgment would affect the rights of third parties in this case her children.
15. In respect of 2<sup>nd</sup> defendant Daniel Manegene Gitari in his affidavit he deposes that it does not meet the bar set out under order 39 rule 5 of *Civil Procedure Act* in that he is a Kenyan resident and the properties mentioned are jointly registered in his name and other parties.
16. That in respect of John Mark Ndungo Ndetto he deposes in his affidavit that the application does not meet that threshold of order 39 rule 5 of the Civil Procedure Rules on account of him being a Kenyan and is only a tenant in the property named under paragraph 10 (b) and a co-owner of the property under para 10 (b) (ii) of the supporting affidavit.



17. In the Affidavit of Grace Wangeci Mugo (4<sup>th</sup> Respondent) also contends that the application does to meet the threshold of the provisions of order 39 rule 5. That she had already purchased the property in question before the cause of action pleaded by the plaintiff.
18. What is before the court is a Mareva injunction which is anchored on order 39 rule 5 of the Civil Procedure Rules as follows:-
  - i. 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, or
    - 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 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 the plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.
19. The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.
20. The applicant submits that the common law jurisdiction of the High court was appreciated in Mulla, the code of civil Procedure (16<sup>th</sup> Edition) where the Indian provisions of order 38 rule 5 which is in pari material to our order 39 rule 5 were considered thus:-
 

The Main object of an attachment before Judgment is to enable the plaintiff to realize the amount of the decree, if one is eventually passed from the Defendants property, The object of attachment before Judgment is to prevent a decree from being infructuous?
21. The applicants contends that the affidavit sworn on 11<sup>th</sup> October 2022 discloses the cause of action against the Defendants as one in the nature of fraud and dishonesty. The applicants rely on Bullen and Leake and Jacob's precedents of pleadings (17<sup>th</sup> Edition) Authority No.2 where it is posited:- "often in claims based in fraud the claimant will seek injunctive relief before or at the outset of the action. The relief is likely to take the form of claims to preserve the assets pending Judgment and enforcement to preserve evidence or for information and evidence required to formulate properly the claim against the prospective defendant. The most common forms of injunctions, obtained are freezing orders (formerly called mareva injunctions, search orders (Anton pillars, orders) and orders to produce information and evidence...."
22. It is the applicant's contention that the provision of order 39 rule 5 have been properly invoked.
23. This application is opposed on the grounds that it has no merit.
24. That it is founded on illegality and is an infringement of 1<sup>st</sup> Respondents privacy.
25. That order 3 and 4 can only be granted where it is show that the Respondent intends to leave the Jurisdiction of the court.
26. That prayer 7 can only be granted where it is established that a party intends to obstruct or delay the execution of a decree.



27. It is further contended that the 1<sup>st</sup> Respondent has since filed a counter claim in the suit and that the averments by the plaintiffs that they have filed a suit against her is not good ground for attachment.
28. That the application by the plaintiff is based on mere apprehensions and does not disclose sufficient grounds to warrant the orders sought. That prayer 8 seeks for valuation of the properties to be at the cost of the 1<sup>st</sup> Respondent which valuation ought to be done by the applicant.
29. The 2<sup>nd</sup> Respondent submits that it has not been established that he intends to leave the local limits of Jurisdiction of this court and or that he has removed his property from the Jurisdiction of the court.
30. It is submitted that the second respondent was investigated by police and was cleared of the allegations and was later treated as a witness in a criminal case related to this suit.
31. Further that he was not privy to the distributorship agreements between the plaintiff and the 1<sup>st</sup> Defendant. The other Respondents have denied the allegations made against them.

### **Analysis and Determination Issues**

32. Whether an order of attachment pending Judgment should issue?

Order 39 rule 5 of the Civil Procedure rules provides thus:-

“Where at any stage of the 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 the 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 with 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 appeal 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 specified”

33. In the court of appeal case of Kuria Kanyoko t/a Amigos Kinuthia Nderu and 6 others (1988) 2 KAR 126 held :- “On the material presented to this court It cannot be gainsaid that the appellant deponed to facts which constitute more than plausible answer to the Respondents plea for attachment before Judgment. The burden of showing that the appellant has disposed of his property or removed them from the court’s Jurisdiction or was about to abscond in either case with the object of defeating any decree that may be passed against him, lay on the Respondents and it seems clear that on the state of the pleadings and in view of the conflicting affidavits, that burden can only properly be discharged by evidence in the conventional way.
34. They Respondents averments only rested on information given to him by testing the rival averments parties whom the court did not see or listen to our order which sanctions this practice was borrowed from the Indian code of Civil Procedure.



35. The learned Author Mulla in his treatise on the Indian Code (15<sup>th</sup> End) page 1502 inter alia of order 38 rule 5 deposes:- “the object of this rule is to prevent the decree that may be passed from being rendered infructuous... The order that is not unconditional one directing attachment of property, but one calling upon the defendant to furnish security should not be furnished. Where the defendant offers to give security, the court should go into the question of its sufficiency before issuing a final order of attachment.”
36. In the present suit the applicants contend that the Respondents' properties are in danger of being disposed of and that the Respondents are on flight risk and may leave the country at any time and that there are valid grounds to persuade the court to order for the security to be deposited in court.

Order 39 rule 1 provides:-

where at any stage of a suit other than a suit of the nature referred to in Paragraphs (a) to (d) of section 12 of the Act, affidavit or otherwise

- a. That the Defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be posed against him.
    - i. Has absconded or left the local limits of the jurisdiction of the court or
    - ii. Is about to abscond or leave the limits of the jurisdiction of the court or
    - iii. Has disposed of or ... removed from the local limits of the jurisdiction of the court his property or any part thereof or
  - b. That the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim and such sum shall be held in deposit by the court until the suit is disposed of or until the further order of the court.”
37. A perusal of the affidavits filed by the plaintiff does not reveal clearly how the Respondents have absconded or are about to abscond. They also do not show how the Respondents have disposed or removed their properties within the Jurisdiction of the court.
38. It is trite law for attachment before judgment as provided in order 39 rule 5 to be granted the applicant/Plaintiff must show by affidavit or otherwise that there is sufficient reason or reasons for the Respondents to abscond or dispose of their properties.
39. What is patently clear is that there was an agreement between the applicant and the 1<sup>st</sup> Respondent on distributorship Applicant supplied goods for payments. In time the applicant suspected fraud on the part of the Respondents and hence the filing of this suit.



- 4 From the evidence on record the plaintiff has not made a full and frank disclosure of all matters within its knowledge.
40. There is no evidence to the effect that the Respondents used the proceeds of the alleged fraud to shore up property for themselves and other third parties. There is no evidence to the effect that the Respondents liquidated the assets of the applicant and directed them to other parties.
41. There are no grounds tendered by the plaintiff as to why it believes that there is a risk of the assets for the Defendants being removed from the court's Jurisdiction. I am not satisfied that the application has attained the threshold for the grant of a mareva injunction as prayed
42. The two applications one dated 11<sup>th</sup> Oct 2022 and the 2<sup>nd</sup> one dated 16<sup>th</sup> December 2022 are both found to be without merit and are dismissed with costs to be Respondents.

**Ruling read and delivered this 19<sup>th</sup> December 2023.**

**HON JUSTICE M. MUYA**

**JUDGE**

In the presence of:

Mugambi for the plaintiff

Modi for the 3<sup>rd</sup> Defendant

Kiminda for the 4<sup>th</sup> Defendant

Musyoka for the 1<sup>st</sup> defendant

Court Assistant: Kinyua

30 days R/A

**HON JUSTICE M. MUYA**

**JUDGE**

