



**Runka Services Co-operative Sacco Limited v Mbaya (Commercial Civil Case E646 of 2021) [2022] KEHC 56 (KLR) (Commercial and Tax) (31 January 2022) (Ruling)**

Neutral citation: [2022] KEHC 56 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CIVIL CASE E646 OF 2021**

**DAS MAJANJA, J  
JANUARY 31, 2022**

**BETWEEN**

**RUNKA SERVICES CO-OPERATIVE SACCO LIMITED ..... PLAINTIFF**

**AND**

**LAWRENCE KATHURIMA MBAYA ..... DEFENDANT**

**RULING**

1. The application before the court is the Plaintiff's Notice of Motion dated 31<sup>st</sup> May 2021 made, inter alia, under Order 40 Rules 1, 2, 3 and 4 of the *Civil Procedure Rules* seeking an injunction restraining the Defendant from selling, transferring, charging or in any other manner alienating or interfering with the following properties; KIIRUA/KIIRUA/2013 and and 2099 and motor vehicles registration number KAN 938L, KBW 312C and KCE 006S (collectively referred to as the "Suit properties").
2. The application is supported by the affidavit and supplementary affidavit of Samuel Mugo Wanjema, the Plaintiff's director, sworn on 31<sup>st</sup> May 2021 and 13<sup>th</sup> September 2021 respectively. It is opposed by the Plaintiff through his affidavit sworn on 10<sup>th</sup> August 2021.
3. The facts upon which the application is grounded are set out in the Plaintiff's pleadings in support of the application and are as follows. At the time material to this suit, the Defendant was a member and employee of the Plaintiff ("the Co-operative"). The Co-operative, in its Plaintiff dated 31<sup>st</sup> May 2021, claims that on diverse dates between January 2016 and December 2020, while its employee and member Co-operative, obtained through fraud and conversion for his benefit the sum of KES. 22,618,611.00 belonging to it causing it to suffer loss and damage which it now claims.
4. The Co-operative states the Plaintiff was employed in 2005 as an accountant and joined it as a member in 2006 where he holds shares and savings amounting to KES. 344,410.00. The Co-operative receives its daily income from public service vehicles under its management. The daily collections are handed



- over to the accountant at the head office who then records the member's account and issues a receipt. The accountant also fills a manual ledger book on daily payments received and expenditure.
5. Mr Wanjema depones that as Treasurer he would receive from all accountants including the Defendant printouts of all payments received in order to prepare the Co-operative's accounts. He further depones that on or about 14<sup>th</sup> January 2021 as he was going through the printouts and cross checking them with the computer records and ledger books, he noticed variances with some entities and whereupon he commenced an audit of entries for the years 2016 to 2019.
  6. When the matter was escalated to the Co-operative Management Committee, it was resolved that an auditor would be appointed to audit the financial records and prepare a report. The appointed auditor submitted his report to the Management Committee on 19<sup>th</sup> February 2021 and it showed that though the Defendant made entries on account of monies received by him, it has lost KES. 22,618,611.00. Mr Wanjema depones that the Management Committee summoned the Defendant and explained the contents of the report to him. The Defendant admitted the discrepancies and prepared a letter authorizing recovery from his savings as a member and the balance be recovered from his salary.
  7. The Co-operative states it reported the fraud and conversion to the Directorate of Criminal Investigations resulting in the Plaintiff's arrest on 26<sup>th</sup> February 2021. He was charged with the offence of stealing by servant contrary to section 281 of the [Penal Code](#) (Chapter 63 of the Laws of Kenya) and fraudulent accounting by officer contrary to section 328(b)(ii) of the Penal Code in Milimani Criminal Case No. E331 of 2021.
  8. The Co-operative avers that that in the course of investigations it discovered that the Plaintiff used the proceeds of its fraudulent conduct to purchase land and motor vehicles namely; KIIRUA/KIIRUA/2013, 2023 and 2099 and motor vehicles registration number KAN 938L, KBW 312C and KCE 006S. The Co-operative avers that upon his arrest, the Plaintiff proceeded to sell KIIRUA/KIIRUA/2013 and it is apprehensive that if an injunction is not granted it may not be in a position to recover the amount it now claims from the Plaintiff.
  9. The Defendant denies the Co-operative's claim against him. He admits that he was an accountant at the time material to this suit and that during that time he followed all the protocols required in his duties. In that regard he states that when he received contributions/collections from members he made the relevant entries in accounts and issued receipts. Further, that he handed over printouts to the Treasurer which were counterchecked to confirm that they were correct and upon confirmation, he signed the ledger book every day.
  10. He denies stealing the sum of KES. 22,618,611.00. He depones that when he was arrested by the DCI, he was coerced into writing a letter admitting liability and authorizing the Co-operative to recover the missing money from his savings and his salary.
  11. As regards the Suit properties, the Defendant depones that he acquired the same through his own efforts as a commercial farmer and businessman and from savings and loans which he took and is still repaying. He further depones that some of the vehicles are jointly owned with the financial institutions.
  12. The Defendant states that he acquired sufficient money to purchase a vehicle after selling produce. He further states that while working with the Co-operative, he applied for several loans of between KES. 300,000.00 and KES. 500,000.00 which he paid off. Further that he also, borrowed money from Centenary Sacco where he also saved and borrowed KES. 1,000,000.00 in 2018 for the purchase of KIIRUA/KIIRUA/2013 which he had to sell off following the economic downturn occasioned by the COVID 19 pandemic in order to service the pay of the loan and support his family as he was suspended from employment.



13. The Defendant depones that after selling his farm produce, he applied for another loan of KES. 3,500,000.00 from Centenary Co-operative on 13<sup>th</sup> March 2019 which he used to buy a lorry and expand his business including building rental houses. He also states that in December of the same year, he also took a loan from Co-operative Bank for KES. 500,000.00.
14. The Defendant contends that the Plaintiff's application violates his right to property protected under Article 40 of the Constitution. He argues that the pending criminal case cannot be a basis for the application as he is innocent until proven guilty. He also expresses disbelief that discrepancies involving a huge amount of money from the Co-operative's accounts that occurred in 2016 would only be discovered in 2021. He urges that the court should not grant the injunction.
15. As I understand, the Co-operative's case is that it is apprehensive that it is unlikely to recover KES. 22,618,611.00 allegedly misappropriated by the Defendant in the course of employment in the event it is successful should the Defendant dispose of the Suit Properties. This falls within the province of Order 40 rule 1(b) of the Civil Procedure Rules which states as follows:

1. Where in any suit it is proved by affidavit or otherwise -
  - (a) -----
  - (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders. [Emphasis mine]

16. The principles governing the grant of an interlocutory injunction are well settled. The Court of Appeal in *Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR* reiterated the settled principles set out in *Giella v Cassman Brown [1973] EA 358* as follows:

In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate 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 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.

17. As to what constitutes a prima facie case, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 Others [2003] eKLR* explained that it 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." In this case therefore the Co-operative must demonstrate on a prima facie basis that the



Suit Properties were purchased by the proceeds of the monies alleged to be misappropriated by the Defendant and that he, “threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit.”

18. I am of course aware that at this stage I am not required to conduct a mini trial as that is matter for the trial court. Looking at the facts, it is true that the Defendant has been charged with an offence but that is not ipso facto proof of guilt. On the other hand, he had admitted that he took the money from the Co-operative which he has agreed to pay and although he contends that the agreement was not voluntary, his offer to pay back the money and his position is in my view prima facie evidence of his complicity in the loss of the Co-operative money.
19. I am however not convinced that the entirety of the properties claimed were sourced from the stolen funds or that the Co-operative has established that the Defendant is disposing of properties with the intent of obstructing or delaying execution of any decree that may ultimately be passed against the Defendant. The sale of one property, explained by the need to settle liabilities owed to another entity is not conclusive or evidence of the intent necessary to support an injunction.
20. The injunction order sought is akin to attachment before judgment and the principle governing the grant of such orders was stated by the Court of Appeal in *Kuria Kanyoko t/a Amigos Bar and Restaurant vs. Francis Kinuthia Nderu, Helen Njeru Nderu and Andrew Kinuthia Nderu [1982-88] KAR 1287-1334* as follows:

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

21. The law sets a high bar before the court can proceed to restrain a person from using or disposing of his property. Intent to defeat justice must be established. Having reached the aforesaid conclusions, I dismiss the Notice of Motion dated 31<sup>st</sup> May 2021 with costs to the Defendant. The interim orders in force are hereby discharged forthwith.

**DATED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JANUARY 2022.**

**D. S. MAJANJA**

**JUDGE**

Court of Assistant: Mr M. Onyango

Mr Juma instructed by Mugo Githinji and Company Advocates for the Plaintiff.

Mr Senteu instructed by Senteu and Ndung’u Advocates for the Defendant.

