



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
HCC. CIVIL CASE 1 OF 2021
EQUITY BANK(KENYA) LTD.....PLAINTIFF
VERSUS
DORIS MAKENA.....DEFENDANT

Coram: Hon. Justice R. Nyakundi

Kioko, Munyithya, Ngugi & Co. Advocates

Doris Makena the Respondent

RULING

On a notice of motion filed on 5th March 2021, the applicant expressed itself under Section 1 (A), 3 (A), 63 (B) and (E) of the Civil Procedure Act and Order 39 Rule 5, Order 40 Rule 1 and 2 of the Civil Procedure Rules seeking the following orders:

- 1. Pending hearing of this Application a Mareva injunction do issue freezing and attaching the Defendant/ Respondent's money in the Accounts with the Plaintiff/Applicant being Account Numbers [...] Malindi Branch holding Kshs. 153,247.85 and [...] Malindi Branch holding Ksh 1,064,300.35/=.**
- 2. In the alternative, pending the hearing of this Application an interim injunction do issue restraining the Defendant/Respondent, or by her servants, or agents or otherwise howsoever from selling, transferring, or in any manner dealing with:**
 - a. Motor vehicle Registration number KCW 611D;**
 - b. Money in the Accounts with the Plaintiff/Applicant being Account Numbers [...] Malindi Branch holding Kshs. 153, 247.85 and [...] Malindi Branch holding Kshs. 1,064,300.35/=.**
- 3. Pending hearing of the main suit, a warrant of attachment do issue against the Defendant/Respondent's movable property to wit Motor Vehicle Registration Number KCW 611D and the same e released to the Plaintiff/Applicant's yard.**
- 4. Pending hearing of the main suit, a Mareva injunction do issue freezing and attaching the Defendant/ Respondent's money in the Accounts with the Plaintiff/Applicant being Account Numbers [...] Malindi Branch holding Kshs. 153,247.85 and [...] Malindi Branch holding Kshs. 1,064,300.35/=.**
- 5. In the alternative, a temporary induction do issue restraining the Defendant/Respondent, or by her servants, or agents or otherwise howsoever from selling, transferring, or in any manner dealing with :-**
 - a. Motor vehicle Registration number KCW 611D;**
 - i. Money in the Accounts with the Plaintiff/Applicant being Account Numbers [...] Malindi Branch holding Kshs. 153, 247. 85 and [...] Malindi Branch holding Kshs. 1,064,300.35/=.**
- 6. Any other relief that this Honourable Court deems fit in the interest of justice.**

7. Cost of this application be provided for.

Additionally, the application was supported by reasons on the face of the motion and corresponding affidavit of Moses Muacharu. The respondent apparently was served but as at the time of preparing this ruling, there was no rejoinder filed in opposition to the application. Having considered the motion and annexed material, I commit to dispose of the application in the following manner;

Determination

What I gather from Order 40 Rule 1 and 2 of the Civil Procedure Rules is that the intention of the reliefs applied for under this Rule is for an aggrieved party to the Suit seeking the Court's power for a preservation order, allegedly to restrain the adverse party from intermeddling, interfering or wasting the suit property in any way pending the hearing and determination of the claim on the merits. To give effect to the following Rule, the courts have advanced the following principles. In the case of **American cyanamid V Ethicon (1975) AC396** in which the court observed that in dealing with equitable reliefs of injunction, it is being called upon to be satisfied the application meets the following criteria; First, the applicant must show a serious issue to be tried on the merits, second is the balance of convenience in favour of granting injunctive reliefs and Third, the applicant will suffer irreparable injury not capable of being compensated by way of damages.

In line with the test outlined in the American Cyanamid Case,

“Lord Diplock in the Siskina Case (ICYG) AC 210 held that the general proposition that an injunction cannot exist in isolation and must be linked to an underlying cause of action. That subsection speaking as it does of interlocutory orders presupposes the existence of an action, actual or potential, claiming substantive relief which the High Court has jurisdiction to grant and to which the interlocutory orders referred to are but ancillary. This factor has been present in the previous cases in which Mareva injunctions have been granted, A right to obtain an interlocutory injunction is not a cause of action, it cannot stand on its own, it is dependent upon there being a preexisting cause of action against the defendant arising out of an invasion actual or threatened by him, over legal or equitable right of the Plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the preexisting course of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the Plaintiff of the Relief to which his cause of action entitles him, hence may or may not include a final injunction”.

I take note that the basic principles in the American Cyanamid and Siskina Cases have been adopted by our courts in **Giella V Cassman Brown Company Ltd (1973) EA**, **Central Bank of Kenya V Giro Commercial Bank Ltd (2007) 2EA 93**, **MRAO LTD v First American Bank of Kenya Ltd (2003) EKL.R**. Thus in the case of **Pius Kipchirchir Kogo versus Frank Kimeli Teani (2018) Eklr** in which the court stated;

“irreparable injury means the injury must be the one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not in itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of apprehended injury. The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiff's to show that the inconvenience caused to them be greater than that which may be caused to the defendant's inconvenience be equal, it is the plaintiff who suffer. In other words, the plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater which is likely to arise from granting”. Further, in **Kenleb Cons Ltd vs New Gatitu Service Station Ltd another, (1990) eKLR where the court stated that “to succeed in an application of injunction an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction”.**

Giving due weight to the above principles, under the Civil Procedure Rules, the court is naturally looked upon by the parties to a dispute to balance the competing interests in one way or another to take charge and exercise discretion in the best interest of both parties. The court's position is a precarious one largely at an introductory stage when the issues are yet to be streamlined in the discourse which constitute legal right or interest to the claim. In the present case, the applicant is seeking leave of the court to attach property, in which case it is before judgement is obtained on the merits. This is what is emphasized in the case of **Mareva Naviera SA Vs International Bulk Carriers SA (1975) Lloyds Rep 509** where Lord Denning again was at it where he held 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 judgement for it, if it appears that the debt is due and owing and there is a danger that the debtor might dispose of his assets as to defeat it before judgement. The court has jurisdiction in a proper case to grant an interlocutory judgement so as to prevent him from disposing of those assets”. The court also in **Fourie V Roux & ors (2007) UKHL declared “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 over prospective judgement. They are not a proprietary remedy. They are not granted to give a claimant advanced 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”.**

In the case before court, the applicant filed a claim against the respondent seeking a declaration in general and exemplary damages, special damages as pleaded with interest and costs. In order to guarantee the enforceability of any judgement obtained at the end of the trial, the plaintiff has applied for a freezing injunction to restrain the defendant from dealing with the identified movable property and any asset in the

bank accounts. It is clear from the applicant's affidavit that he has shown that there exists a good, arguable prima facie case in respect of the substantive claim against the respondent. On the other hand, the averments disclose that there is a real risk by the respondent to dissipate or intermeddle with the assets other than in the ordinary course of business so as to frustrate the judgement that might be obtained at the conclusion of the trial.

In the circumstances of this case, there is sufficient unchallenged evidence which calls for the court to exercise discretion to issue a freezing order against the respondent's assets pending the hearing and termination of the suit as premised in the notice of motion dated 5th March 2021. It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 29TH DAY OF APRIL, 2021

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R. NYAKUNDI

JUDGE

NB:

In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules. (kiokomunyithyangugifirm@gmail.com)