



Cotton Roots Fashions Ltd v Shah & another ((Sued as the administrators of the Estate of the Late Ramesh Kumar Gupta)) (Environment & Land Case E033 of 2020) [2023] KEELC 21970 (KLR) (30 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21970 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E033 OF 2020
MD MWANGI, J
NOVEMBER 30, 2023**

BETWEEN

COTTON ROOTS FASHIONS LTD PLAINTIFF

AND

VEERAL SHAH 1ST DEFENDANT

ROMA WADHWA 2ND DEFENDANT

(SUED AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE RAMESH KUMAR GUPTA)

(In respect of the Decree-Holders' Application dated the 7th June, 2023 for a Mareva Injunction)

RULING

Background

1. The application for consideration is the Defendants' Notice of Motion dated 7th June, 2023 seeking for the following orders: -
 - a. The Honourable Court be pleased to issue a freeze order restraining the Plaintiff whether by their servants or agents or employees or advocates or otherwise howsoever from removing, transferring or disposing in any manner the monies held in Diamond Trust Bank (Account No. 0274356001) Nation Centre Branch pending the outcome of the execution proceedings in this matter.
 - b. The Honourable Court be pleased to issue ex-parte at first instance, a freezing order restraining the Plaintiff whether by their servants or agents' employees or otherwise howsoever from removing, trespassing or disposing in any manner the Plaintiff's assets pending the outcome of the execution proceedings in this matter.



- c. The Plaintiff bear the costs of this Application.
2. The application is premised on the grounds on its face and the affidavit sworn on 7th June, 2023 (supporting affidavit) by Veeral Shah.
3. As can be discerned from the grounds on the face of the application what the Applicants seek is a Mareva Injunction. The Applicants assert that the Plaintiff is truly indebted to them and is likely to move away assets from the jurisdiction of this court to evade execution, rendering the Judgement a paper Judgement. Pursuant to the Judgement delivered by this Court on 31st January, 2022, the Plaintiff owes the Defendants a sum of Kshs.25,462,650.40 as at 28th February, 2022, plus costs. The Applicants further allege that the outstanding rent arrears owing from the Plaintiff are currently at the sum of Kshs.44, 524,366.80.
4. The deponent avers that the Plaintiff has since the delivery of Judgement, vacated the suit premises by removing its assets therefrom. The Applicants are apprehensive that the Plaintiff is likely to dispose of and transfer its assets within the country and abscond to a different jurisdiction depriving the Applicants the opportunity to recover the Judgement debt. Other than the bank account, there are no other known assets of the Plaintiff within the court's jurisdiction.
5. The Applicants state that the Plaintiffs' Directors, Mohammed Farooq and Yasmin Farooq are Pakistani Nationals who operate from Pakistan remotely managing their business interests in Kenya.
6. The Applicants state that the only way to stop the Plaintiff's bid to scuttle the execution of the Judgement-debt herein can only be blocked or averted if the orders sought are granted as this court is obligated to aid execution.

Plaintiff/Respondent's Replying Affidavit

7. The application is opposed by the Plaintiff through the undated affidavit sworn by the Plaintiff's Director, Farooq Muhammad. The Director confirms that he has been out the country from the onset of Covid-19 to date and through-out the pendency of the suit herein. He avers that the equipment that were removed from the suit premises belonged to a sub-tenant. The Plaintiff's assets however remain in the suit premises by virtue of a proclamation order. They are therefore under the control of the Applicants herein.
8. The deponent asserts that the Respondent Company is based within the jurisdiction of this court. He further asserts that the suit is still on-going at the Appellate Court and neither of the Plaintiff's Directors has in any way depicted their lack of involvement in the Company.

Court's Directions

9. The Court directed that the application be dispensed with by way of written submissions. Both parties complied. The Defendant/Applicants filed their submissions dated 9th August, 2023 whereas the Plaintiff/Respondent's submissions are dated 9th October, 2023. The Court has an opportunity to read the submissions and will consider them in its decision herein.

Issues For Determination

10. Having considered the Defendants' application, the response by the Plaintiff and the rival submissions by the parties, the sole issue for determination is whether a Mareva Injunction should be granted.



Analysis and Determination

11. This is an application for a Mareva Injunction post judgement to preserve the assets of the judgment-debtor pending execution. *Halsbury Laws of England* 3rd Edition Vol. 3 [1] page 329 to 331 defines a Mareva injunction as follows: -

“A Mareva injunction is an order of the court restraining a party to proceedings from removing from the jurisdiction of the court, or otherwise dealing with assets, located within that jurisdiction and in more limited circumstances from dealing with assets located outside, the jurisdiction. The foundation of the court’s jurisdiction is the need to prevent judgements of the court from being rendered ineffective, whether by the removal of the defendant’s assets from the jurisdiction, or by dissipation.”

12. The statutory basis for granting a Mareva Injunction in Kenya is provided for under Order 39 of the *Civil Procedure Rules* as observed in the case of *Kanduyi Holdings Limited v Balm Kenya Foundation & Another* [2013] eKLR, the court held that:-

“Our Order 39 Rules 5 and 6 could be said and is a statutory codification of an interlocutory relief known as Mareva Injunction or freezing order in the UK. ... Accordingly, Order 39 Rules 5 and 6 of the CPR should operate within known dimensions of law drawing from the above case [Mareva Compania Naviera SA v International Bulk carriers SA [1975] 2 Lloyd dis Rep 509] and other judicial precedents on the subject. Order 39 rule 5 and 6 of the CPR is not to be used to: 1) 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”

13. In *Beta Healthcare International Limited v Grace Mumbi Gitthaiga & 2 others* [2016] eKLR, the court relied on *Goode On Commercial Law*, 4th Edition at Page 1287 in determining the threshold of granting a freezing injunction and stated that:-

“The grant of a freezing injunction is governed by principles quite distinct from those laid down for ordinary interim injunctions. ... Before granting a freezing injunction the court will usually require to be satisfied that;

- (a) The claimant has ‘a good arguable case’ based on a pre-existing cause of action;
- (b) The claim is one over which the court has jurisdiction;
- (c) The defendant appears to have assets within the jurisdiction;
- (d) There is a real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted; and
- (e) There is a balance of convenience in favour of granting the injunction;
- (f) The Court can also order disclosure of documents or the administration of requests for further information to assist the claimant in ascertaining the location of the defendant’s assets.”



14. In the case of *Central Bank of Kenya vs Giro Commercial Bank Limited & Another* [2007] 2 EA 93 the court stated:-

“However, the power of a court to grant of Mareva Injunction is a discretionary one and is only used in limited circumstances.”

15. In this case, it is evident that there is a Judgement in favour of the Defendants/Applicants against the Plaintiff/Respondent. In order to guarantee the enforceability of the judgement obtained after a rigorous trial, the Defendant has applied for a freezing order/injunction to restrain the Plaintiff from dealing with from removing, transferring or disposing in any manner the identified monies in the targeted bank account. The applicants have submitted that they have already filed their Bill of Costs which is part of the execution process.

16. From the Applicant’s affidavit it is apparent that there is a real risk of the monies being removed from the jurisdiction of this court. The Applicants’ fear cannot be said to be without basis. The Plaintiff’s Directors are Pakistani nationals who are domiciled in Faisalabad, Pakistani from where they remotely operate their Kenyan businesses from. This is a fact that has been confirmed by the Plaintiff’s Director in his Replying Affidavit. The said Director confirmed that he has been out the country from the onset of Covid-19 to date.

17. In the circumstances of this case, there is sufficient evidence to warrant the court’s exercise of discretion to issue a Mareva injunction against the Plaintiff/Respondent pending the determination of the execution proceedings.

18. In conclusion therefore, I find merit in the application and I hereby allow it, giving rise to the following orders:

a. A mareva injunction is hereby issued restraining the Plaintiff whether by its servants or agents or employees or advocates or otherwise howsoever from removing, transferring or disposing in any manner the monies held in Diamond Trust Bank (Account No. 0274356001) Nation Centre Branch pending the outcome of the execution proceedings in this matter.

b. The Applicants are granted the costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF NOVEMBER 2023

M.D. MWANGI

JUDGE

In the virtual presence of:

Mrs. Shabana for the Plaintiff/Respondent.

Mr. Waigwa for the Defendants/Respondents

COURT ASSISTANT – YVETTE.

