



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO.410 OF 2014**

**PETER KOENECKE.....1<sup>st</sup> PLAINTIFF**

**CHRISTANE KOENECKE.....2<sup>nd</sup> PLAINTIFF**

**Versus**

**C. MEHTA & COMPANY LTD.....DEFENDANT**

**RULING**

**Furnishing security or attachment before judgment**

[1] The Application before me is in the nature of *Mareva Injunction*. The Applicants have asked the court to call upon and direct the Respondent to furnish security and produce any property belonging to it and place it at the disposal of the court. Alternatively, the Applicants request the court to order attachment of the property of the Respondent which would be sufficient to cover the amount of the suit herein. The Applicants have also proposed that an order to place caveat on the properties of the Respondent to prohibit disposal of such properties would be quite in order. They have also sought for such other interlocutory order as the court may deem necessary to issue in the circumstances of this case. The application is expressed to be brought under section 1A, 1B and 3A Civil Procedure Act, Order 39 of the Civil Procedure Rules and all other enabling laws. It is supported by the affidavit of PETER KOENECKE.

[2] The parties filed submissions as ordered by the court. I will analyze the respective positions taken by each side in great detail below.

**The Applicants' gravamen**

[3] The Applicants claim is on a Deed of Assignment dated 2<sup>nd</sup> May 2000 executed between the Applicants as assignors and the Respondent as the assignee, on the one hand and Trust bank limited on the other wherein the Applicants agreed to assignee their deposit of Kshs. 27,000,000/= held at Trust Bank Limited to the Respondent herein. A further sum of Kshs.1,350,000/= less Kshs.202,500 withholding tax charged on the deposit making the net credit advanced to the Respondent to be Kshs.28,147,500/=. The said sum of money was credited to the loan account of the Respondent as agreed. According to the agreements between the parties, the sum of Kshs.28, 147,500/= was to be repaid by the Respondent in monthly installments of Kshs.750, 000/= plus interest at 10% with effect from November 2000 until payment in full. The Respondent did not, however, repay the sum herein as agreed. They defaulted and refused to pay; instead the Directors

of the Respondent Company engaged a scheme to wind-up the operations of and liquidate the assets of the Respondent. These happenings caused the Applicants to file this suit together with the instant application.

[4] The Applicants averred that, when this application came up for hearing ex parte on 22<sup>nd</sup> September 2014, the court was satisfied it raised sufficient grounds and ordered the Respondent to appear before court on 26<sup>th</sup> September 2014 at 9.00 a.m to show cause why he should not furnish Security. Except, on 26<sup>th</sup> September, 2014, the Applicants had not served the Notice to show cause we had not served the Respondent for reasons that the Respondent's officials could not be traced in the addresses given. And in all the purported places of operation for the Respondent there was no activity or any person in the premises. They only managed to contact the security guard who informed the process server that the Applicant was no longer operating and was in advanced stages of phasing out its operations.

[5] The Applicants wrote the Respondent on 28<sup>th</sup> January 2009 demanding payment of the balance which by then was Kshs. 30 million. On 13<sup>th</sup> February 2009 the Respondent replied acknowledging owing the Applicants Kshs. 30 million and as a demonstration of their commitment they paid the Applicants Kshs. 5 million as a lump sum payment to reduce the outstanding balance. The Respondent further committed to be sending monthly cheques of Kshs.750, 000 to clear the outstanding balance. But since then, despite making numerous commitments to pay, the Respondent has refused and or evaded honouring any of the commitments. The Respondent had previously in 2004 issued post-dated cheques to the Applicants but recalled all of them and no any efforts to clear the outstanding balance. In the letter dated 7<sup>th</sup> September 2004, the Respondent wrote;

***Dear Christiana & Peter,***

***We thank you for your confidence and assistance to our Company. This letter is to consolidate our status with you.***

***All previous letters and cheques given to you until today are to be disregarded and returned to us cancelled by you. This letter will replace all outstanding confirmations.***

***We confirm that we have a balance of Kshs. 39,000,000 (Kshs Thirty Million) in your favour in our books as of 7<sup>th</sup> September 2004. We undertake to pay either of you Kshs.750, 000 (Kshs Seven Hundred and Fifty Thousand) on 15<sup>th</sup> of every month until the loan is fully paid***

***We hope the above is in order and look forward to your continued support***

[7] The Respondent's Director one Mr. A. C Doshi who represented the Respondent at the time of the assignment is now in the process of winding up the Respondent and has refused to reply and or respond to the letters and phone calls by the Applicant herein. The Applicants have attempted but in vain to trace the Respondent's Registered Offices. The Applicants have severally been told that the Respondent no longer operates and has sold some of its premises and other assets. There is evidence in the fact that the Applicants have not been able to trace the directors or registered offices of the Respondent for purposes of service. They went to great length of serving the wife of one of the Directors Mrs. Doshi at her home at Pine Wood Grove Estate House Number.13 lower Kabete Road. The said individual confirmed that indeed the Respondent was no longer operating. Subsequently thereto the defendant entered appearance on 13<sup>th</sup> October 2014 through the law firm of Henia Anzala Associates.

[8] The Applicants cited the case of ***Absolomo Jayuga Ngiliman & 22 Others vs. Rift Valley Textiles Limited (In Receivership)*** where, faced with a similar situation, Honourable Mr. Justice Ibrahim observed that where the defendant has sold off its premises and or is in a process of

disposing of its assets an order for attachment should issue to protect the interest of the other party. There is a danger that the Respondent will dispose of all its assets so as to defeat any Judgment that may entered in favour of the Applicants. From the record, the Respondent has no defence whatsoever against this claim. The Respondent`s directors are a flight risk and after they have disposed of the assets of the company they intend to leave the Jurisdiction of the this Honourable Court thus defeating any decree that may be issued in favour of the Applicants. There is every attempt to obstruct or delay the execution of any decree that may be issued against the Respondent and is in the process of disposing of all the properties owned by it. No reason has been given by the Respondent for its failure to pay the debt. The Applicants have suffered tremendous financial hardships and missed a lot of commercial opportunities and continue to suffer all due to the Respondent`s willful failure to repay. .

[9] The Applicants submitted that the Respondent herein was awarded Kshs.3 million in damages by this court in **Civil Case Number 586 of 2009(C. Mehta vs. Standard Bank Limited)**. The said Kshs. 3,000,000 should be attached forthwith to prevent them from receiving it and keeping beyond reach of the court. The orders sought should be granted.

### **The Respondent returned fire**

[10] The Respondent opposed the Motion through its submissions. It also filed judicial decisions. Their major point is that the burden of showing that the Respondent is disposing of or about to dispose of its assets or is about to abscond from the jurisdiction of the court under order 39 of the Civil Procedure Rules in on the Applicants. The Applicants have only acted on rumors and apprehensions without concrete evidence that the Respondent is disposing of or about to dispose of its assets or is about to abscond from the jurisdiction of the court. To support thae said position, they cited the cases of: 1) **Kuria Kanyoko t/a Amigos Bar & Restaurant vs Moses Kinuthia Nderu & Others (1988) 2 KAR 126** which was quoted with approval in **Ftg Holland vs Afapack Enterprise Limited & Another (2013) eKLR**; 2) **Samuel Mtakai vs Kenya Shell Limited (2011) eKLR**; and 3) **Priscilla Nyambura vs Marathon Corporation (K) Limited & 3 Others (2007)**. In any case, the Respondent argued, the Applicants have not specified the property to be attached as required under order 39(5) (2) of the Civil Procedure Rules. On this they relied on the case of **Freight Forwarders Kenya Limited vs Aya Investment Uganda Limited (2013) eKLR**

[12] In the absence of proof that the Respondent is disposing of or about to dispose of its assets or is about to abscond from the jurisdiction of the court, the application should just fail. They so prayed.

### **THE DETERMINATION**

[13] I have considered all the arguments of the parties and affidavit evidence before the court. I should state here, and I have stated this in other cases, that the type of orders prescribed under order 39 of the Civil Procedure Rules are in the nature of Mareva Injunctions. 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 defined dimensions of law drawing from the now familiar case of **Mareva Compania Naviera SA v International Bulkcarriers SA [1975] 2 Lloyd dis Rep 509** and the subsequent refinement by the principles of justice enshrined in the Constitution to cover areas not foreseen before. But, 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.

[14] Having said that, no doubt the burden of proof that the Respondent is disposing of or is about to dispose of its assets or is about to abscond from the jurisdiction of the court lies on the

Applicant and I am content to cite the case of *Kuria Kanyoko t/a Amigos Bar & Restaurant vs Moses Kinuthia Nderu & Others (1988) 2 KAR 126* which was quoted with approval in *Ftg Holland vs Afapack Enterprise Limited & Another (2013) eKLR*, where the Court stated that:-

***“The burden of showing the appellant had disposed of his property or moved 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.”***

[15] The Applicants have stated that they have a legitimate claim against the Respondent and their truly concerned that the Respondent is winding-up its operations and also selling its properties. They have provided evidence that the Respondent is no longer in operation-a fact they say they established when they visited the stated place of operations and office of the Respondent. They had to serve the wife of Mr. A. C. Doshi at his home at Pine Wood Grove Estate House Number.13 lower Kabete Road. Indeed after the said service the Respondent filed appearance. When the physical location of the registered office of a registered company and its operations are put to doubt, it is a matter which goes to the root of the status of the company under the Companies Act. None of the allegations by the Applicants especially on winding-up of the operations of the Respondent was controverted by the Respondent. The Respondent merely stated that the Applicants are peddling rumors and apprehensions without proof. The conduct of the Respondent herein in relation to the debt claimed and non-availability of the Directors at the stated registered offices of the company are relevant matters in such applications. After weighing the matters before the court, there is a case made out that the Respondent may be winding-up its operations, which is a genuine basis to call upon the Respondent through its Directors and specifically Mr. A.C. Doshi to appear before this court to show-cause why the Respondent should not give security sufficient to cover the sum claimed herein. The Applicants have identified the award of Kshs. 3 Million in *Civil Case Number 586 of 2009(C. Mehta vs. Standard Bank Limited)* as one property of the Respondent to be attached. But, I will hesitate to issue an order of attachment until the Respondent through its Directors as ordered herein have appeared before me to show cause why they should not furnish security sufficient to cover the sum claimed herein. The upshot is that I hereby direct and call upon the Respondent through its Directors and specifically Mr. A.C. Doshi to appear before this court on a date to be fixed by the court, and show-cause why the Respondent should not give security sufficient to cover the sum claimed herein. I will determine the request for costs after the appearance or upon further orders of the court. It is so ordered.

**Dated, signed and delivered in court at Nairobi this 27<sup>th</sup> day of January 2015**

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**F. GIKONYO**

**JUDGE**