



**Bindo v Stephen Kipkenda & Dorothy Kiprono t/a Kipkenda & Company Advocates Advocates; Runo (Interested Party) (Civil Suit E228 of 2021) [2025] KEHC 2100 (KLR) (Civ) (6 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2100 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL SUIT E228 OF 2021**

**JN MULWA, J  
FEBRUARY 6, 2025**

**BETWEEN**

**RAMA HAMISI BINDO ..... PLAINTIFF**

**AND**

**STEPHEN KIPKENDA & DOROTHY KIPRONO T/A KIPKENDA & COMPANY ADVOCATES ADVOCATES ..... RESPONDENT**

**AND**

**DAVID K RUNO ..... INTERESTED PARTY**

**RULING**

1. This ruling is in respect of the Notice of Motion dated 11<sup>th</sup> December 2023 filed by the Plaintiff. It is brought under Section 1A, 1B, 3A & 63 (a) (b) and (c) of the *Civil Procedure Act*; Order 39 Rule 5 and 6 of and Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law seeking ORDERS-
  - a. Spent.
  - b. That pending hearing and determination of this Application, an order be and is hereby issued to freeze bank account number 000200000010957 held and maintained in African Banking Corporation Limited under the account name Kipkenda & Co. Advocates or any other bank account within the jurisdiction of Central Bank of Kenya under the name of Kipkenda & Co. Advocates and/or its proprietors Stephen Kipkenda and Dorothy Kiprono to the extent of the sum of KES 40,000,000.00/= to protect the suit amount and to satisfy the decree that may be passed against the Defendant herein.



- c. That in the alternative to prayer (b) summons do issue to Stephen Kipkenda and Dorothy Kiprono, the Partners of the Defendant/Respondent to appear before the Honourable Court on such a date to be fixed to show cause why they should not furnish security in the sum of KES 40,000,000.00/= to satisfy the decree that may be passed against the Defendant herein and upon the appearance and hearing of the said Partners of the Defendant/Respondent, an order be and is hereby issued compelling Stephen Kipkenda and Dorothy Kiprono to forthwith furnish security by depositing to this Honourable Court the sum of KES 40,000,000.00/= to satisfy the decree that may be passed against the Defendant herein.
  - d. That the Honourable Court be pleased to grant any order that it may deem necessary in the interest of Justice.
  - e. That costs be provided for in favour of the Plaintiff/Applicant.
2. The application is supported by grounds on its face and the Supporting Affidavit of the Plaintiff, Rama Hamisi Bindo sworn on 11<sup>th</sup> December 2023, and a further affidavit he swore on 8<sup>th</sup> November 2021. It is his deposition that on 16<sup>th</sup> September 2016 a professional undertaking dated 16<sup>th</sup> September 2016 was issued to him by the Defendant law firm in the following terms under the hand of Dorothy Kiprono, Advocate who is a Partner of the said Law Firm:-
- We have been instructed by the above named David Runo Kamunya to address you as follows:
- That he is in the process of selling the above property and has instructed us to retain the sum of Kenya Shillings Fifty Million (KShs 50,000,000/=) from the sale proceeds and pay to you.
- ‘We therefore hereby undertake to pay you as directed by our Client the said money from the sale proceeds upon receipt by us of the same and conclusion of the sale.’
- Yours faithfully
- Dorothy Kiprono
- Kipkenda And Company Advocates
3. The Deponent stated that in addition to the Professional undertaking, the Defendant drew a Deed of Settlement dated 16th September 2016 regarding the settlement of the said sum of Kshs.50,000,000/= which was executed between him and the Interested Party (David K. Rono).
  4. Additionally the deponent states that he executed the deed of settlement dated 16<sup>th</sup> September, 2016 in full reliance on the strength of the Professional Undertaking issued to him by the Defendant law firm stating that the debt of Kshs.50,000,000/= owed to him by the Interested Party would be settled from the proceeds of the sale of property LR. No. 21935 immediately upon sale of the property; that the sale of the subject property was concluded but the Defendant only remitted to him a sum of Kshs.10,000,000.00/= out of the sum of Kshs.50,000,000/= stated in the professional undertaking and Deed of Settlement thereby in breach of the terms of the professional undertaking to pay to him from the proceeds of the sale of the property LR.No. 21935 (I.R No. 159433).
  5. Mr. Rama Hamisi Bindo further deponed that the sum of Kshs.40,000,000.00/= is undisputed, but both the Defendant and the Interested party herein have devised a mechanism to avoid and/or delay settling the undisputed debt by inducing the Plaintiff/Applicant to sign a purported Variation Deed of Settlement dated 17/9/2019, and trying to induce him to withdraw proceedings in Mombasa HCCC. No. 49 of 2019, Rama Hamisi Bindo vs David Kamunya Runo & Kipkenda & Co. Advocates and to



aid the Defendant/Respondent in avoiding fulfillment of their Professional Undertaking issued to the Plaintiff/Applicant on the 16<sup>th</sup> September 2016.

6. The Deponent further stated that he has since rescinded the purported variation of the deed of settlement upon realizing that it was a ploy by the Defendant and Interested Party to defeat the timeous settlement of the undisputed amounts due and owed to him.
7. The Application is opposed vide a Replying Affidavit sworn on 31st January 2024 by Stephen Kipkenda, the senior partner in the defendant's law firm, stating that since institution of the suit in 2021, and numerous court attendances, the Applicant has never raised any concern about the need to freeze the firm's bank account or the need to furnish security for satisfaction of a Decree that may be passed in his favour and that there has been no intervening factors or risks to date that warrant or justify the filing of the instant Application.
8. It is the Defendant's further argument that not a single ground cited on the face of the instant Application that meets the threshold for the grant of a freezing order or an order requiring his law firm to furnish security for the satisfaction of a decree that may be passed in his favour.
9. The Defendant stated that on 17/9/2019 the Applicant and the Interested Party entered into a Variation of Deed of Settlement, the Applicant was represented by the law firm of Marende Necheza & Co. Advocates while the firms of Kipkenda & Company represented the Interested Party and that the deed was witnessed by the Applicants Advocates in which the applicant does not dispute having willingly and voluntarily executed the Variation of Deed of Settlement of 17/9/2019 and it's surprising to see the Applicant commit perjury at paragraph 13 of his Supporting Affidavit where he states he has since rescinded the Variation of Deed of Settlement, further deponing that the firm of Kipkenda & Company Advocates has never received the any recession notice dated 15/2/2021 and only saw the same for the very first time as an annexure in the affidavit in support of the instant Applicant filed in January 2024.
10. It is further stated by the Defendant that curiously, the Applicant's Originating Summons dated 17/9/2021 and Amended on 15/12/2021 made no mention of the variation of deed of settlement of 17/9/2019 nor the fabricated rescission notice dated 15/2/2021.
11. The Defendant stated that by executing the Variation Deed of Settlement, the Applicant was alive to its contents and acknowledged that any dispute arising therefrom would be between him and the Interested Party only, and that the same would be resolved through Arbitration.

### **Analysis and Determination**

12. The only issue that the court flags for determination is:

Whether a Mareva injunction should be granted against the Defendant in the circumstances and/or, in the alternative, whether the Defendant should be compelled to furnish security sufficient to satisfy the decree the court may issue arising from enforcement of the professional undertaking.

13. A Mareva Injunction is defined in Goode on Commercial Law 4<sup>th</sup> Edition at Page 1287 in determining the threshold of granting a freezing injunction:

“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 preexisting 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. Scope of relief is codified under Order 39 Rule 5 & 6 of the Civil Procedure Rules, 2010

[21] Accordingly, Order 39 Rules 5 and 6 of the CPR should operate within known dimensions of law drawing from the above case and other judicial precedents on the subject. 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.

15. 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 jurisdiction 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 he location of the defendant’s assets”

16. In *Kanduyi Holdings Limited v. Balm Kenya Foundation & Another* [2013]eKLR the High Court (Gikonyo, J) held as follows on the purpose of the orders under Order 39 rule 5 and 6 of the Civil Procedure Rules as follows: .....

(21) ..... Our Order 39 Rule 5 and 6 could be said and is a statutory codification of an interlocutory relief commonly known as Mareva Injunction or freezing order in the UK. The principle was



laid down in the case of *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd dis Rep 509.

- (22) Accordingly, Order 39 Rules 5 and 6 of the CPR should operate within known dimensions of law drawing from the above case and other judicial precedents on the subject. 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.
17. The Defendant submitted that no special circumstances had been exhibited to warrant the grant of final orders at this stage and that the Applicant had not addressed his mind to the question of irreparable injury or the balance of convenience.
18. In the case of *Central Bank of Kenya vs Giro Commercial Bank Limited & Another* (2007) 2 E.A 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.’
- The Defendant’s cited the case of *Rafique Ebrahim vs William Ochanda T/A Ochanda & Advocates* (2013) eKLR (cited in the case of *Amelie Dere v Amina Madrere & 2 others* [2015] eKLR), the Court Ruled that: “A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstance and only in clear cases where the Court thinks that the matter ought to be decided at once or where the injunction is directed at simple and summary act which can easily be remedied; and a mandatory injunction at interlocutory stage is merely granted, only where the Applicant's case is clear and incontrovertible.”
19. In *Gusii Mwalimu Investment Company Ltd. & 2 Others v Mwalimu Hotel Kisii Ltd. Civil Appeal No. 160 of 1995* [1995-1998] 2 EA 100 cited in *HKM v DKO & another* [2019] eKLR, the Court of Appeal, (Lakha, JA) held that:
- “Whereas the court does have jurisdiction to grant mandatory injunction even on an interlocutory application, the granting of a mandatory injunction on interlocutory relief is a very exceptional form of relief to grant. A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff a mandatory injunction will be granted on an interlocutory application. On motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must inter alia feel a high degree of assurance that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction. Each case must depend on its own facts.”
20. In the case of *Central Bank of Kenya Ltd & Another* [2007] 2EA. 93, the court held that the power to grant the relief is discretionary and should be used in very clear and rare circumstances.



21. In the same breath, in the case of *Atieno Ogot V. Onsoko Ltd & 5 others* [2021] eKLR the court held that courts should be vigilant to ensure that parties assets are not frozen and their business lives impeded lightly and should not be used to give plaintiff security for satisfaction of their judgments.
22. Upon careful consideration, the court is not persuaded that the plaintiff/applicant has met the tests and threshold for grant of a Mareva Injunction there being no special circumstances demonstrated to persuade the court exercise its powers in his favour, at the interlocutory stage.
23. The court further notes that judgment in the main suit, the Amended Originating Summons dated 15/12/2021 would have been delivered by this time had the plaintiff not filed the instant application, which has taken considerable time to be determined.
24. The upshot is that the application dated 11/12/2023 is dismissed with costs to the defendant.  
Orders accordingly.

**DATED, SIGNED AND DELIVERED NAIROBI THIS 6<sup>TH</sup> DAY OF FEBRUARY 2025.**

.....  
**JANET MULWA.**  
**JUDGE**

