



REPUBLIC OF KENYA



KENYA LAW

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

Victoria Commercial Bank Plc v Comform Foam Investment Ltd & another (Civil Suit E538 of 2023) [2025] KEHC 2098 (KLR) (Commercial and Tax) (6 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2098 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E538 OF 2023
A MABEYA, J
FEBRUARY 6, 2025**

BETWEEN

VICTORIA COMMERCIAL BANK PLC PLAINTIFF

AND

COMFORM FOAM INVESTMENT LTD 1ST DEFENDANT

VINOD KUMAR VERMA 2ND DEFENDANT

RULING

1. This ruling determines two applications by the plaintiff. They are dated 15/11/2023 and 5/2/2024, respectively.

Application dated 15/11/2023

2. This application was brought under sections 1, 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Order 39 rules 5,6 and 7 of the Civil procedure Rules 2010. The applicant sought to restrain the respondents from selling or disposing off the land which the factory is contained in Kisaju Kajiado and all the assets owned by the 1st defendant/respondent.
3. It also to restrain the defendants from transferring the assets in annexure three pursuant to the Movable Property Securities Rights Act (MPRS) in order to secure Kshs 20,000,000 under facility 2. That the defendants be ordered to deposit Kshs 283,141,297 in Court. It further sought that the defendants do place at the disposal of the Court their moveable assets as security for satisfaction of the decretal amount. That in the alternative the defendants be ordered to appear before court to show cause why they should not furnish security.
4. The application was based on the grounds set out on the face of it and the affidavit sworn by Clement Gitau on even date. It was the applicants position that it advanced three credit facilities of Kshs



- 185,000,000/-, Kshs. 20,000,000/- and a letter of credit for USD 500,000. The 1st defendant was obligated by the contracts to make monthly instalments of Kshs. 2,632,868/- in facility one and Kshs 284,635/- with respect to security two. Further a security agreement for facility 2 was entered into and the same was registered under the MPSR.
5. It was contended that the 1st defendant had not honoured the terms of the loan agreement by paying the installments as and when they fell due. That the 1st defendant had overdrawn its current account by Kshs 76,600,078/- and failed to regularize the overdrawn account. That the total accrued debt owed by the 1st defendant was Kshs 283,141,297/= and demands to settle the same had not been met.
 6. The application was opposed by the respondent vide a replying affidavit dated 16/2/2024 sworn by Vinod Kumar Verma. It was stated that the 1st defendant did not receive the facility of Kshs 185,000,000/- as the said amount was credited to the 1st respondents bank account and on the same day debited to Simba Foam Limited account.
 7. That on 2/4/2020, the applicant advanced a loan facility of Kshs 150,000,000/- to Simba Foam Limited to finance the purchase of Foam Plant machinery. That the liability which continued to accrue interest was credited to the 1st respondents bank account and later debited on the same day back to Simba Foam Limited.
 8. That the same applied to the hire purchase agreement which was credited to the 1st respondent and debited to Simba Foam Limited account. The 1st respondent stated that facility 3 was not denied save that it was only able to utilize the facility to a tune of USD 300,000 instead of USD500,000.
 9. It was averred that the 1st respondent was under no obligation of paying the 1st facility since the liability belonged to a different company. That the 1st respondent made an admission to the agreed monthly installments and had been paying them promptly until a dispute arose when the applicant failed to offset Kshs 1,508,620.69.
 10. That the said amount was with respect to a machinery that was collected with the approval of the applicant. The 1st respondent contended that the security agreement and security right in favour of facility two were not assets of the 1st respondent but they belonged to Simba Foam Limited. The 1st respondent denied receiving the 1st and 3rd facility but admitted facility number 2 and stated that it would make payments if certain adjustments were made.
 11. The applicant filed a further affidavit sworn by Clement Gitau on 13/6/2024. It was contended that the respondents did not challenge the existence of the letter of offer dated 18/7/2022. That the amount of Kshs 185,000,000/- was credited to the 1st defendant's account and it had not been repaid by the 1st respondent.
 12. That 1st defendant utilized the two credit facilities without the control of the applicant. That on 29/7/2022, the 1st defendant instructed the plaintiff to transfer the money constituting the facility to the 1st defendant's general account and later to Simba Foam Limited account.

Application dated 5/2/2024

13. The application was brought under sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 13 rule 2 of the Civil Procedure Rules 2010. It sought for judgment on admission on the amounts owed in the sums of Kshs.186,390,862/= on facility one and Kshs. 20,000,000/- being facility two together with interest.



14. The application was premised on the grounds set out on the face of the Motion and the affidavit sworn by Clement Gitau on 5/2/2024. He deposed that the statement of defence contained an admission to the effect that the 1st defendant received the amounts comprising of facilities 1 and 2.
15. That in the defence, the 1st defendant admitted that facility 1 of Kshs 185,000,000/- and facility 2 of Kshs 20,000,000/- was credited to its account. That based on the above the defendants had unequivocally admitted to being indebted to the plaintiff.
16. The 1st defendant opposed the application vide a replying affidavit sworn by Vinod Kumar Verma on 14/3/2024. He stated that the defence did not contain any admission as the 1st defendant never received the facilities as the same were credited to Simba Foam Limited Account. That there was no letter of offer between the plaintiff and the 1st defendant to take up the bad debt or a personal guarantee undertaking to pay the bad debt.
17. Parties filed their rival submissions which I have carefully considered. The plaintiff submitted that it had a prima facie case with probability of success and it had proven that it advanced two credit facilities to the 1st defendant which had not been repaid.
18. That there was a risk that the defendants may dispose off the properties and transfer them to third parties. That the 1st defendant had utilized the funds in facility 1 and 2 by transferring the funds to Simba Foam Limited. It was additionally submitted that the 1st defendant had not challenged the payment of the facilities. On the issue of judgment on admission, counsel submitted that the 1st defendant in its statement of defence admitted to receiving the amounts comprising facility 1 and 2.
19. The 1st defendant submitted that it did not utilize the amounts advanced to it by the plaintiff since the same was transferred to Simba Form Limited's bank account. That the plaintiff had failed to make full disclosure of the material facts. Further, that the 1st defendant did not have any intention of selling the equipment or machinery and for that reason, there was no evidence of a prima facie case.
20. It was the 1st defendant's submission that the plaintiff will not suffer a loss that cannot be compensated by way of damages.
21. I have considered the pleadings and the submissions filed by the parties. There are two issues for determination. The first issue is whether the plaintiff has made a sufficient case to justify the restraining orders and secondly, whether judgment on admission should be entered against the defendants.
22. The plaintiff moved the Court under order 39 rules 5,6 and 7 of the Civil Procedure rules 2010 seeking to have the defendant's properties attached and placed under the disposal of the Court. Further, it prayed for restraining orders against the defendants from disposing its assets and orders directing the defendants to furnish security in the sum of Kshs 283,141,297/=
23. Order 39 rules 5, 6 and 7 provides as follows: -
 - “(5)(1) Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him—
 - a. is about to dispose of the whole or any part of his property;
 - b. is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of



the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

2. The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.
3. The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

...”

24. The plaintiff's case was that on diverse dates it advanced three securities to the 1st defendant whereby facility 1 was for Kshs 185,000,000 security two Kshs. 20,000,000/- and the third facility was a letter of credit of USD 500,000. According to the plaintiff the 1st defendant had defaulted in making payments to a tune of Kshs 283,141,297/- and the plaintiff was apprehensive that the defendants would sell off the equipment/machinery with the aim of frustrating the execution of the decree.
25. On its part, the 1st defendant contended that it did not receive the funds in the two facilities as the plaintiff credited the amount in the 1st defendants account and shortly thereafter the same was sent to Simba Form Limited account. The 1st defendant however admitted to receiving the 2nd facility but the plaintiff for refusing to offset Kshs 1,508,620.69.
26. In *Beta Healthcare International Limited v Grace Mumbi Githaiga & 2 others* [2016] eKLR, the Court set out the principles to be considered when granting freezing orders under Order 39 as hereunder: -
 - 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.”
27. In *Kanduyi Holdings Limited V Balm Kenya Foundation & Another* [2013] EKLR, the court held: -

“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 Bulkcarriers 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”



28. Having considered the averments of both parties, it is undisputed that they entered into an agreement dated 18/07/2022, under which the plaintiff agreed to provide three financial facilities to the 1st defendant. The agreement was duly executed and the collateral registered in accordance with the terms agreed upon.
29. The record indicates that on 29/07/2022, the sum of Kshs 185,000,000/- was credited into the 1st defendant's account, followed by an additional Kshs 20,000,000/- on the same date. From the statement of account produced by the 1st defendant, it is evident that once these funds were credited to its account, they were subsequently transferred to Simba Foam Limited.
30. In response, the plaintiff presented a funds transfer/remittance form dated 29/07/2022 to show that the 1st defendant had issued instructions for the said transfer.
31. In light of this evidence, the court does not agree with the 1st defendant's contention that the funds from the facility were not utilized by it. The documentation clearly shows that the funds secured under the facility were disbursed and transferred at the request of the 1st defendant.
32. On the issue of whether the court can grant the orders sought under Order 39 of the Civil Procedure Rules, it is necessary to establish whether there is a risk that the properties in question are at risk of being transferred. Based on the evidence presented, the plaintiff has not demonstrated any attempt by the 1st defendant to dispose of the listed properties. Instead, it appears that the defendant is seeking to impose additional security requirements, a step it failed to take at the time of executing the agreement.
33. The terms of the agreement between the parties explicitly provided that the assets were to be registered with the Moveable Properties Security Registry, a requirement that was duly met. Additionally, the facilities in question are further secured by a personal guarantee from the 2nd defendant.
34. On whether an injunction should be granted to preserve the assets listed in annexure three of the applicants supporting affidavit, the Court finds that this may have been a proper case to grant an injunction. Having found that the 1st respondent is indebted to the applicant, there is need to protect the assets that form the collateral registered under the Movable Properties Security Registry. Based on the foregoing the application partially succeeds.
35. Order 13 Rule 2 of the Civil Procedure Rules which deals with judgment on admission provides as follows: -

“Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court may upon such application make such order, or give such judgment, as the Court may think just.”

36. In *Guardian Bank Limited vs. Jambo Biscuits Kenya Limited* [2014] eKLR, it was held that: -

“The principle applicable in judgment on admission is that the admission must be very clear and unequivocal on a plain perusal of the admission. The admission in the sense of Order 13 Rule 2 of the Civil Procedure Rules is not one which requires copious interpretations or material to discern. It must be plainly and readily discernible. In such clear admission, like J.B. Havelock J stated in the case of 747 *Freighter Conversion LLC v One Jet One Airways Kenya Ltd & 3 Others HCCC No. 445 of 2012*, there is no point in letting a matter go for a trial for there is nothing to be gained in a trial. See the case of *Botanics Kenya Ltd Ensign*



Food (K) Ltd Hccc No. 99 of 2012, where Ogola J gave a catalogue of other cases which amplified this principle. These cases are: Choitram v Nazari (1984) KLE 327 that:-

‘... admissions have to be plain and obvious as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning.’ Chesoni Ag. JA went on to add that:-

‘... an admission is clear if the answer by a bystander to the question whether there was an admission of facts would be ‘of course there was’. Cassam v Sachania (1982) KLR 191 –

“The judge’s discretion to grant judgment on admission of fact under the order is to be exercised only in plain cases where the admissions of fact are so clear and unequivocal that they amount to an admission of liability entitling the plaintiff to judgment”

37. The plaintiff contended that the defendants had in their statement of defence, admitted the debt. Specifically, the plaintiff points at paragraph 5, which it claimed showed that the 1st defendant acknowledged receipt of facility 1 and 2.
38. I have looked at the said paragraph 5 of the defence. It clearly admits that the facility was credited into its account and debited on the same day to an account a another company known as Simba Foam Limited. The plaintiff produced documentation to show that the transfer of the funds from the 1st defendant’s account to the said company was courtesy of the 1st defendant’s instructions.
39. Once the money was credited into the 1st defendant’s account on the 29/7/2022, it became its money and it could deal with the same as it wished, including having the same transferred to 3rd parties. The credit was made pursuant to the facilities entered into with the plaintiff. To this Court’s mind, the admission was unequivocal and does not require explanation.
40. In any event, in their response to the application, the defendants did not contest the fact that the transfer of the funds to the aforesaid Simba Foam Limited was at their instructions. Further, if the transfer had been without instructions, nothing would have been easier than to show that they immediately protested that fact at the time.
41. Accordingly, I find that the application dated 15/11/2023 is partially successful in terms of prayer 4. As regards the application dated 5/2/2024, the same is meritorious and I allow the same as prayed.

It is so ordered.

SIGNED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2025.

A. MABEYA, FCI Arb

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF FEBRUARY, 2025.

F. GIKONYO

JUDGE

