



Kiruthi v Kiome (Civil Case E026 of 2024) [2025] KEHC 4601 (KLR) (10 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4601 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL CASE E026 OF 2024
BK NJOROGE, J
APRIL 10, 2025**

BETWEEN

MOSES RUORO KIRUTHI PLAINTIFF

AND

ERICK KIMATHI KIOME RESPONDENT

RULING

1. This Ruling is in respect of the Plaintiff's Application dated 15th August, 2024. It is presented to Court under a Certificate of Urgency by way of a Notice of Motion dated 15th August, 2024.
2. It seeks the following orders;
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of this application, the Honourable Court be pleased to order for the attachment of the Defendant's properties within the area commonly known as Salvation Army Quarry, Muranga County, or wherever else it may be situated within the jurisdiction of this court.
 - d. That pending the hearing and determination of this suit, the Defendant/Respondent be restrained, whether by himself, his employees, servants, agents or howsoever from using, operating, making utility of or in any way whatsoever dealing with the Locenet Sone Cutting Machine being the property of the Applicant currently in the exclusive custody, control and care of the respondent.
 - e. That the Defendant does provide security sufficient to satisfy any decree that may be passed against him herein, conservatively assessed at Ksh.70,000,000 pending the hearing and determination of this suit, failing which the Respondent's property be attached to the tune of the estimated decretal sum of Ksh.70,000,000/=.



- f. That such further or other orders as are appropriate for the effective administration of justice be issued.
 - g. That the costs of this application be met by the Defendant.
3. The Application is supported by the Affidavit of Moses Ruoro Kiriithi the Plaintiff sworn on 15th August, 2024 with annexures.
 4. The Application is opposed through a Replying Affidavit of the Defendant Erick Kimathi Kiome sworn on 4th December, 2024 with annexures.
 5. The Application was certified as urgent but no interim orders were granted. Directions were issued by the Court that the Motion be disposed of by way of written submissions.
 6. The Court has seen and read the Plaintiff's Supporting Affidavit sworn on 5th December, 2024 as well as the Plaintiff's written submissions dated 3rd October, 2024. The Court has equally seen and read the Defendant's written submissions dated 4th December, 2024.

Issues for Determination

7. The Court frames three (3) issues for determination.
 - a. Whether the injunction should issue as prayed.
 - b. Whether orders for attachment before judgment should issue as prayed for.
 - c. Whether security for a sum of Ksh.70,000,000 should issue.

Analysis

8. The principles that should guide this court in granting an injunction are laid out in the case of Giella - vs- Cassman Brown & Company Limited EA 358. A prima facie case with a probability of success has to be demonstrated by the Applicant. Irreparable loss or damages that cannot be compensated for by way of general damages has to be proved. Finally, if in doubt, the Court has to determine the case on a balance of convenience.
9. The Court also refers to the case of Mrao Ltd v First American Bank of Kenya Ltd & 2 others (Civil Appeal 39 of 2002) [2003] KECA 175 (KLR) (7 March 2003) (Judgment) which stated the following; -

“The principles for granting an interlocutory injunction are that: -

The applicant must show a prima facie case with a probability of success;

an interlocutory injunction would not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages;

if the court was in doubt, it would decide an application on the balance of convenience.

A prima facie case in a civil application included but was not confined to a genuine and arguable case. It was a case which, on the material presented to the court, a tribunal properly directing itself would conclude that there existed a right which had apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”



10. The Court also refers to the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] KECA 606 (KLR) which states the following; -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- a. establish his case only at a prima facie level,
- b. demonstrate irreparable injury if a temporary injunction is not granted, and
- c. allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.”

- a. Whether an Injunction should Issue as prayed

11. The Court notes that this dispute is principally concerning the sale of a stone cutting machine. It was sold for Kshs.4 million. There is a dispute as to whether the Defendant has paid the balance of the purchase price of Ksh.2,000,000. The Plaintiff maintains that failure by the Defendant to pay the balance of the purchase price within the agreed time period of ninety (90) days has rendered the agreement null and void. For that reason, he is entitled to a return of the equipment and the deposit paid be forfeited.
12. The courts have defined a prima facie case in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (Civil Appeal 39 of 2002) [2003] KECA 175 (KLR) (7 March 2003) (Judgment) above.
13. On the face of it the Court holds that a prima facie case has been made out.
14. On the second limb, the Applicant has to prove an irreparable loss. To this Court an irreparable loss means a loss or damage that money cannot remedy by way of general damages.
15. Looking at the Plaintiff filed herein, save for the order for a mandatory injunction sought, the rest of the reliefs sought are money claims. The Plaintiff seeks payment of the contractual sum (value of the machine) of Ksh.4 million plus interest at commercial rates of 14% per annum from 30th June, 2022. The Plaintiff also seeks mesne profits of Ksh.80,000/= daily from 30th June, 2022 until the equipment is either returned or the contractual value of Ksh.4 million paid.
16. To this Court, the losses or damages that the Plaintiff is allegedly suffering are well known, well pleaded, and calculable in monetary terms. They cannot be said to be irreparable.
17. The Court of Appeal has pronounced itself as follows on the issue of irreparable losses in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] KECA 606 (KLR); -

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be



compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

18. In the event the Court is in any doubt, it has to determine the Application on a balance of convenience.
19. The Court notes that the Plaintiff relies on a sale agreement dated 30th March, 2022. The purchase price is stated as Ksh.4 million. A deposit of Ksh.2million was to be paid upfront upon delivery of the equipment. The balance payable was Ksh.2million within ninety (90) days. To the Plaintiff the dispute is about the balance of Ksh.2 million. There is also a claim for Ksh.2/= per stone cut using the machine. This does not appear in the sale agreement and is an issue that would be the subject of proof through a trial.
20. The Defendant relies on a sale agreement also dated 30th May, 2022. It provides that the purchaser was to pay the entire purchase price upon signing the sale agreement. He relies on Mpesa statements as proof that he has paid the entire sum of Ksh.4million.
21. The Supplementary Affidavit sworn by the Plaintiff on 5th December, 2024 confirms that parties executed 2 separate sale agreements, one was for a cash transaction, the second one was for sale by instalments. The Mpesa transactions are said to relate to separate business transactions involving a company known as Smart Choice Shelters Limited. That Smart Choice Shelters Limited had separate Directors. That some of the Mpesa payments were for payment for spare parts for the machine sold.
22. At this interlocutory stage, the Court is unable to state with certainty which of the two signed agreements is valid and enforceable against either of the parties. That is an issue the parties will have to advance and prove through a trial.
23. Looking at the length of time that has passed since the agreement was entered into, the period of default said to be 30th June 2022 and the conflicting claims by the parties, the Court is not persuaded that it should grant any injunction at this stage. The balance of convenience does not tilt in favour of the Plaintiff.

b. Whether Orders for Attachment Before Judgement Should Issue

24. The Court refers to Order 39 Rule 5 of the Civil Procedure Rule which states as follows;

Order 39 – Arrest And Attachment Before Judgment

1. Where defendant may be called upon to furnish security for appearance [Order 39, rule 1.]

Where at any stage of a suit, other than a suit of the nature referred to in paragraphs (a) to (d) of section 12 of the Act, the court is satisfied by affidavit or otherwise—

- a. that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him—
 - i. has absconded or left the local limits of the jurisdiction of the court; or
 - ii. is about to abscond or leave the local limits of the jurisdiction of the court; or
 - iii. has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof; or
- b. that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of



any decree that may be passed against the defendant in the suit, the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance:

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the court until the suit is disposed of or until the further order of the court.

25. The Court has been referred to the decision in *Kuria Kanyoko T/A Amigos Bar and Restaurant -vs- Francis Kinuthia Nderu & 2 others* (1988) 2 KAR 12871334. The Court of Appeal stated as follows;

“that the power to attach before judgment must not be exercised lightly and only upon clear proof of the mischief aimed at by Order 38 rule 5 of the Civil Procedure Rules, namely, that the defendant is about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him.”

26. From the averments by the Plaintiff, the Defendant is a police officer who is in active duty. There are no allegations that he is about to flee the country. That he is about to remove the equipment from the jurisdiction of the Court.

27. The Court is not persuaded that sufficient basis has been laid out to warrant the grant of the order for attachment before judgment. This is a drastic order with far reaching consequences. It should be granted in the clearest of cases.

c. Whether Security for the Sum of Ksh.70,000,000/- Should Issue

28. The Court is confronted by two separate narratives. A Plaintiff who claims that he has not been paid the balance of the purchase price of Kshs2 million and a sum of the 2/= per every stone cut. The Defendant claims he has paid the entire purchase price and taken full possession of the machine.

29. The Court is not privy to the agreement for Ksh.2/= for every stone cut, using the machine. The Court is not persuaded that it should impose such a hefty liability on a party, when the claim is hotly contested. There is no admission to this claim.

30. The Court has also not been persuaded that the Defendant is unable to settle any decree that this Court may ultimately issue against him.

31. This is a matter that parties need to expedite through a hearing, so that they can get a reasoned decision from this Court. This is only after the Court is fully seized of all the facts. On costs, the same will be in the cause.

Determination

32. The Plaintiff's Notice of Motion dated August 15, 2024 is dismissed in its entirety.

33. The costs to be in the cause.

34. It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF APRIL, 2025

NJOROGE BENJAMIN K

JUDGE



In the presence of;

Mr. Mutuku for the Plaintiff

Mr. Kamunda for the Defendant

Mr. Luyai – Court Assistant

