



**Akshar Industries Limited v Mayfair-CIB Bank Limited & another (Civil Suit E003 of 2023) [2024] KEHC 12143 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12143 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL SUIT E003 OF 2023  
RN NYAKUNDI, J  
OCTOBER 11, 2024**

**BETWEEN**

**AKSHAR INDUSTRIES LIMITED ..... PLAINTIFF**

**AND**

**MAYFAIR-CIB BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**LEGACY AUCTIONEERING SERVICES ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. I am called to determine a notice of motion application dated 15<sup>th</sup> February, 2024 expressed to be brought under the provisions of Articles 40, 45(1), 46, 48, 47, 50(1) and 159 of *the Constitution* of Kenya, Sections 90, 96, 97, 103 and 104 of the *Land Act*, Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*, Orders 40 Rule 1 and 4 and Order 50 Rule 1 of the Civil Procedure Rules, 2010. The applicant has sought orders to wit: -
  - a. Spent
  - b. The Defendants/Respondents and their agents to release motor vehicle registration number KCP 882U to the Plaintiff/Applicant and restore the same to the status quo ante pending hearing and determination of this application.
  - c. The Defendants/Respondent, their servants and agents are hereby restrained from attaching, selling, alienating, leasing, taking possession, appointing a receiver or in any other way dealing or interfering with the Plaintiff's/Applicants' properties are restrained from attaching, selling alienating or in any way interfering with the Plaintiff's/Applicant's ownership, possession and use of Motor Vehicles registration number KCR 957J, KCP 882U, KCN 709 A, KCR 268W, KCS 008J, ZD 6452 and ZE 6140 pending interparty hearing and determination of the instant application.



- d. The defendants/Respondents and their servants/agents are hereby restrained from attaching, selling, alienating or in any way interfering with the Plaintiffs' Guarantors' ownership, possession, occupation and use land parcels numbers Eldoret Municipality/Block 4/328 and Pioneer/Langas/Block 1/91 pending interparty hearing and determination of this application.
  - e. The Defendants/Respondent, their servants and agents are hereby restrained from attaching, selling, alienating, leasing, taking possession, appointing a receiver or in any other way dealing or interfering with the Plaintiffs'/Applicants' properties are restrained from attaching, selling, alienating or in any way interfering with the Plaintiff's/Applicant's ownership, possession and use of Motor Vehicles registration number KCR 957J, KCP 882U, KCN 709 A, KCR 268W, KCS 008J, ZD 6452 and ZE 6140 pending further directions by this honorable court.
  - f. The defendants/Respondents and their servants/agents are hereby restrained from attaching, selling, alienating or in any way interfering with the Plaintiffs' Guarantors' ownership, possession, occupation and use land parcels number Eldoret Municipality/Block 4/328 and Pioneer/Langas/Block 1/91 pending further directions by this Honorable Court.
  - g. Costs of the Application are granted to the Plaintiff/Applicant.
2. The application is supported by the affidavit of Dillip Panda and anchored on 14 grounds which have been briefly captured as follows:
- a. That the Honorable court heard the Application under a Certificate of Urgency on 25<sup>th</sup> January, 2023 and gave an interim order restraining the Defendant/Respondent from carrying out the recovery process against the Plaintiff/Applicant pending hearing and determination of the Notice of Motion.
  - b. That the parties have maintained the status quo since the date of the orders but surprisingly the 1<sup>st</sup> Defendant/Respondent has now instructed two auctioneers to attach the assets the Plaintiff's/Applicant's motor vehicles in a blatant disregard of the court orders in place.
  - c. That one of the Auctioneers, M/s Igare Auctioneers, proceeded to seize the Plaintiff's/Applicant's motor vehicle registration number KCP 882U and have since taken the same into their possession depriving the Plaintiff/Applicant of its use.
  - d. The above-mentioned attachment/seizure of the Plaintiff's motor vehicle is irregular and illegal for being in breach of an express order of the Honorable Court.
  - e. That it is unfair and unjust for the 1<sup>st</sup> defendant/respondent to negotiate with the Plaintiff while holding a dagger behind its back.
  - f. The Plaintiff/Applicant has tried to impress upon the 1<sup>st</sup> defendant/applicant and auctioneers to return the motor vehicle but its pleas have been futile necessitating filing of this application to stop the forceful retention and to avert a sale of the Motor vehicle and any further recovery process.
  - g. That the illegal recovery process will lead to injustice that will not be adequately remedied since the sale will ultimately bring the Plaintiff's/Applicant's business to a complete halt noting the centrality of the motor vehicle in the running of the business.
  - h. There is an imminent risk that the Defendant/Respondents will proceed with the irregular recovery process leading to attachment and sale of the properties subject of the instant proceedings.



- i. That the properties subject of the suit forms the backbone of the Plaintiff's/Applicant's business hence any interference will greatly impair its ability to carry on its business and meet its financial obligations including repayment of the subject facility.
  - j. The Plaintiff/Applicant, its shareholders, its suppliers and employees will suffer irreparably if the recovery process is allowed to progress thereby leading to a collapse of the business.
  - k. The defendants/Respondents will not suffer in anyway if the orders sought are garneted noting that its claim is monetary and easily quantifiable and the same be adequately provided for noting that the assets will remain available for foreclosure should it succeed in the instant suit.
3. The Respondents vehemently opposed the application vide a replying affidavit sworn by one Maurine Wambui Kahiro dated 18<sup>th</sup> June, 2024. The parties also filed their written submission as relates to the application.

### **Applicant's submissions**

4. Learned Counsel Mr. Ndalila filed written submissions dated 26<sup>th</sup> September, 2024 the highlights being that the applicant is entitled to the relief sought. Counsel argued that there were interim orders issued which are still operative and therefore the defendants ought not to have commenced the process of recover. Better still, Mr. Ndalila argued that the parties entered into a mutual agreement which culminated into the applicant making a payment of Kshs. 140,000,000/= being part payment of the loan amount secured by the Applicant.
5. According to counsel, the remaining properties are at the risk of being repossessed and therefore there is need for the court to intervene and restrain the 1<sup>st</sup> defendant from doing so. That The Applicant has been working diligently in a bid to repay the outstanding loan amount, but the 1<sup>st</sup> Defendant has created a hostile environment for the Applicant.
6. In support of his arguments, learned counsel relied on the decisions in Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR, Mrao v First American Bank Of Kenya Limited & 2 Others [2003] KLR 125 and Giella v Cassman Brown [1973] EA 358. He prayed that the costs of the application may be awarded to the Applicant.

### **Respondents' submissions.**

7. The Respondents through learned counsel Mr. Kiruki filed written submissions dated 25<sup>th</sup> September, 2024 in which he advanced arguments as relates to the law on injunctions. The highlights of the submissions are that the interim orders as issued on 25<sup>th</sup> of January, 2024 lapsed by operation of law since one year had lapsed and therefore they cannot come to the rescue of the applicant. He argued that it is on that basis the Respondents commenced the process of recovery. In support of this argument he cited the case of Maxam Limited & 2 others v Heineken East Africa Import Co. Limited & 2 other [2017] eKLR and the case of David Wambua Ngii v Abed Sila Alembi & 6 others [2014] eKLR.
8. On the next issue, counsel argued that the applicant has not made out a prima facie with the probability of success and therefore the 1<sup>st</sup> defendant should be allowed to proceed and repossess and dispose the suit motor vehicles and the suit property. Mr. Kiruki cited the decision in Palmy Company Limited v Consolidated Bank of Kenya Limited [2019] eKLR among other decisions together with the provisions of Section 67 of the *Movable Property Security Rights Act*, 2017.
9. It was counsel's argument that the Plaintiff would not suffer any prejudice if the injunctive reliefs are not issued for reasons that the 1<sup>st</sup> defendant is capable of taking care of any damages that may arise.



On this counsel cited the decision in *Vivo Energy Limited v Maloba Petrol Station Limited & 3 others* [2015] eKLR.

10. Finally, counsel submitted that the Plaintiff having defaulted in its monthly loan repayments, it is only fair and just that the 1<sup>st</sup> defendant be allowed to sell the suit property to recover the outstanding loan facilities due and owing to it. Thus the balance of convenience tilts in the favor of the defendants. Counsel relied on the case of *Jim Kennedy Kiriro Njeru v Equity Bank (k) Limited* [2019] eKLR and *Joseph Kairuki Kinyuigwa v Mwananchi Credit Limited & Mary Rita Wanjiku t/a Mitsan Auctioneers* [2019] eKLR.

### **Determination**

11. The central question in these applications revolve around the issue whether the applicant has satisfied the criteria for this court to restrain the first 1<sup>st</sup> defendant bank and the 2<sup>nd</sup> defendant from exercising the powers vested in the law which accrue from the statutory power of sale arising out of the loan agreement between the Plaintiff and the 1<sup>st</sup> defendant. The Injunction sought is to restrain and prevent the respondents by themselves, or the agents, servant, or any other person procedurally assigned such duties from attaching, selling, alienating or in any way interfering with the Plaintiff/Applicant's ownership, possession and use of motor vehicles registration Number KCR 957J, KCP 882U, KCN 709A, KCR 268W, KCS 008J, ZD 6452 and ZE 6140.
12. The law governing the granting of interlocutory injunction is set out under order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides that: -

“Where in any suit it is proved by affidavit or otherwise—

- (a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;
  - (b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further.”
13. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in *East African Industries v Trufoods* [1972] EA 420 and *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358. In *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court restated the law as follows:

“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. See Kenya Commercial Finance Co. Ltd v Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted."

14. In Mrao Ltd v First American Bank of Kenya and 2 others, [2003] KLR 125 which was cited with approval in Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others, [2014] eKLR, the Court of Appeal defined a prima facie case as: -

"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".

15. Procedurally and substantively, any civil courts in Kenya clothed with jurisdiction has unqualified discretion to determine the application for an interlocutory injunction for purposes of preserving the rem pending the determination of the suit filed by the Plaintiff/Applicant.
16. Applying the three-pronged test in the Cassman case, for this court to award an injunction has laid down in our jurisprudential decisions, first and foremost there must be serious issues to be tried which is generally clustered under the rubric of a prima facie case. What then constitutes a prima facie case? it is as defined in the Mrao case.
17. I find the above cases more authoritative and most helpful where the function of the court in relation to the grant or refusal or refusal of interlocutory injunctions pending the hearing and determination of a suit so that the substantial issues between the parties can be resolved on the merits. The case at hand turns on the legal consequences of the Loan agreement between the Plaintiff and 1<sup>st</sup> defendant bank and the extent to which it has been breached by either of the parties.
18. I take note of the applicant's averment that on 25<sup>th</sup> January, 2023, the court issued interim orders restraining the Defendant/Respondent from carrying out the recovery process against the applicant. That soon thereafter the parties mutually agreed to enter negotiations, which made some positive progress and led to the payment of Kshs. 140,000,000/= by the applicant within a year and for that reason, the applicant dated 25<sup>th</sup> January, 2023 was never determined conclusively. That the parties have maintained the status quo but surprisingly, the Respondent has since commenced the recovery process



and to that end, the 2<sup>nd</sup> defendant/respondent has seized the Applicant's motor vehicle registration number KCP 882U and taken it into its possession to the detriment of the applicant. The applicant in its affidavit further stated that it is in the business of supply of building material hence the subject motor vehicles are required for the day to day operations. That there is an imminent risk of the Defendants/ Respondents proceeding to seize the remaining vehicles to the detriment of the Applicant.

19. Given this background, from the factual matrix, can one say that the applicant's case is frivolous or vexatious? Which boils down as to whether there are issues to be tried by this court between the Plaintiff and the Defendant. If the answer to the above is no then the interim injunction whose principles are the same like in the permanent restraining order, ought not be granted by the court. If the answer is yes, the court is at liberty to consider the next question, whether or not damages will be an adequate remedy. If there is no clear answer to the question of whether or not damages will be an adequate remedy to compensate the Plaintiff or the defendants, then the court is called upon to examine the balance of convenience generally. If after considering the balance of convenience generally as one of the guiding test in granting an interim injunction, and the court is still unable to come to a definitive conclusion, and in absence of any exceptional circumstances, it is plausible that the injunction is denied.
20. The Applicant in its submissions argued that it is very conscious of the obligation it faces of repaying the loan and is working to repay the amount, but it can only do so with a healthy business environment going for it. For the Applicant to successfully repay the outstanding amount, its business has to make profit through a healthy relationship with its creditors, who are its suppliers; otherwise, the Applicant's efforts shall continue to be in vain.
21. It is on this strength that the applicant has approached this court to intervene and prevent any prejudice that may be suffered. The defendants on the other hand have argued in their submissions that the interim orders that had been issued have since become inoperative since more than a year has lapsed and as such the 1<sup>st</sup> defendant was at liberty to proceed and recover, which it did after acquiring a proclamation notice.
22. The Respondents further argued in their submissions that in seeking to dispose of the suit motor vehicles, the 1<sup>st</sup> defendant has fully complied with the provisions of Section 67 of the *Movable Property Security Rights Act*, 2017. I have however not seen the Respondent's comment on the mutual agreement that led to the payment of Kshs. 140,000,000/= . It is not in dispute that the applicant engages in the business of supplying building materials. There is also no dispute that the Plaintiff has admitted to owing the loan amount but seeks a favorable business environment to be able to pay his debt. As stated in the *American Cyanamid Co. v Ethicom Limited* [1975] AER 504 It is not part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed arguments and mature considerations. These are matters to be dealt with at the main trial on the merits. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. That means if damages will be an adequate remedy for the Plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the Plaintiff could be prejudiced by the acts or omissions of the defendant pending trial, and the cross-undertaking damages will provide the defendants with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should be ordinarily be granted. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. Among the matters which the court may take into account are the prejudice the Plaintiff may suffer if no injunction is granted or the defendants may suffer if it is granted. The likelihood of such prejudice actually occurring, the extent to which it may



be compensated by an award of damages of enforcement of the cross-undertaking, the likelihood of either party being able to satisfy such an award and the likelihood that if the injunction will turn out to have been wrongly granted or withheld that is to say the court's opinion of the relative strengths of the parties' cases. The court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either parties' case

23. It is to be noted that the claim for injunction by the Plaintiff is to restrain the 1<sup>st</sup> defendant bank and its agents from proceeding to recover the very articles that enable the Applicant repay its loan. In considering to grant the orders sought by the Applicant it is important to highlight that an interim injunction is not a *cate blanche* remedy for the Plaintiff to rely on it *ad infinitum* without prosecuting the suit or making good of its debt.
24. I am persuaded therefore from the above narrative in the various affidavits and submissions that at this stage, the issue of indebtedness is not a very contentious matter but the applicant has demonstrated that in the prevailing economic environment, it is addressing the issue of meeting his obligations in the repayment of the loan amount. The averment of sustaining the good will of the defendant bank by the applicant can be deduced from the payment of a part payment of Kshs. 140,000,000/=. It is the view of the court that the applicant in this case stands to suffer irreparable harm in this circumstances if the injunction is not granted. In this regard, the applicant has made out a *prima facie* case with a high degree of success at the trial deserving a restraining order in the circumstances of this case. This is one case where an applicant should not be denied an injunction just because it is experiencing some temporary financial inflow that has not rendered the respondent irremediable financial loss which cannot be compensated by way of damages or repayment conditioned on interest chargeable on the extended period.
25. The purpose of an interlocutory injunction in any matters of this nature is to preserve the status quo pending trial of the main suit on the merits. Meaning that such an order is also conditioned under Art. 50 on rights to a fair hearing to facilitate the court to be able to do justice on the dispute based on a determination of the whole case at the trial. The Principle of equality of arms is part of a fair trial concept entrenched in Art. 50 of *the Constitution* which encompasses several guarantees linked to each party appearing before an independent court or tribunal duly established under Art. 50(1) of *the Constitution* to be given an opportunity to present his/her case. fairness is an essential element of any system of justice and without it justice cannot be done or be perceived to have been done. Though the principle of equality of arms as an essential element of the fair trial is more pronounced in the realm of criminal law but it does apply *mutatis mutandis* as a minimum threshold for impartial and consistent proceedings in the adjudication of civil disputes. It is a constitutional imperative under Art. 27 of *the Constitution* that the right to equality before the law and effective access to the court under Art. 48 of *the Constitution* are protected and guaranteed. By dint of these provisions a session judge should hear both sides of a case more fundamentally on the merits of the claim or suit as pleaded by the Plaintiff and countermand by the defendant, because it is unfair for a claimant or a Plaintiff to have his/her case struck out at the interlocutory stage unless it is one which is a sham, frivolous, vexatious and with no justiciable issue known in law. The main dilemma for the court at the interlocutory stage as illustrative of the principles in the American Cyanamid case, the essential questions of the dispute is never delved into on the merits and there are high chances for a risk of injustice or prejudice to one or both parties in drawing inferences in pronouncing a final judgment in absence of a full trial on the merits.
26. I think it is worth mentioning that on an application for interlocutory injunction in either the applicants, claimants or Plaintiff's alleged right, the court ought in appropriate cases to evaluate the relative strength of the affidavit evidence, the prior conduct of the parties, equitable grounds, the nugatory doctrine, to preserve the subject matter without waiting for the right to be fully established at



the main trial. As Lord Diplock put it in the American Cyanamid Co. v Ethicon Limited the remedy of an interlocutory injunction more so in commercial case like in the instant one is so usefully that he should be kept flexible, discretionary and must not be made the subject of Rules. Thus in my view, one of the issues is the effect that the attachment of the motor vehicle Registration No. KCP 882U against the Plaintiff's economic operations to sustain the financial inflows which will form part of the basic quantum to make good the loan repayment as set out in the contract pending the determination of the suit filed herein against the Defendant/Respondent. Generally speaking, this chattel can be better described as a tool of trade in this commercial transaction which gave rise to the borrowings made by the applicant/plaintiff from the defendant respondent in this case. In my view, the nature of the injury which the applicant/plaintiff on the other hand might suffer if the Defendant/Respondent continues to detain the subject motor vehicle during the pendency of the suit might ultimately turn out to have dissipated, wasted or depreciated the assets to the point of occasioning financial ruin. I respectfully endorse the view in the face of these findings that the subject motor vehicle be temporarily released to the Applicant/Plaintiff to appropriately have it used in actualizing its operations towards realizing the necessary cash-flow, in the circumstances of the case, as disclosed in the affidavit evidence before the court.

- a. The upshot of it all, and given the above reasons, the applicant is granted an order of interlocutory injunction restraining the Defendant/Respondent either by itself, their agents, servants and or privies from disturbing or further interfering with the running of the Plaintiff's business in any manner whatsoever pending the determination of the substantive suit.
- b. In the interim, period pending the inter parties hearing of the main suit, the applicant is under duty to fulfill his obligations on the repayments of the outstanding loan amount due and owing to the defendant/respondent in accordance with the terms of the loan agreement.
- c. The Plaintiff/Applicant be at liberty to give an undertaking for damages during the subsistence of the interim injunction which has been conditioned by this court in exercising this discretion to grant this application.
- d. Given the court's decision on grant of the injunction, to the extent that the status quo be maintained until determination of the suit, an order is hereby made to have the motor vehicle released on a temporary basis as the defendant/respondent retains beneficial rights in default of the loan repayment to facilitate the economic investment of the applicant/plaintiff while the suit is pending determination.
- e. In furtherance of these proceedings, I hereby make an order that a pre-trial conference be held on the 8<sup>th</sup> of November, 2024 to set out the schedule of prioritizing the hearing and determination of the main suit.
- f. The Costs shall abide the outcome of the main cause.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 11TH DAY OF OCTOBER 2024**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

Ms. Jematia, Advocate for the Plaintiff/Applicant

Ms. Abobo, Advocate for the Defendant/Respondent

