



Kimani v Kamau (Civil Suit E009 of 2021) [2023] KEHC 951 (KLR) (16 February 2023) (Ruling)

Neutral citation: [2023] KEHC 951 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL SUIT E009 OF 2021
RB NGETICH, J
FEBRUARY 16, 2023**

BETWEEN

JECINTA WAMBUI KIMANI PLAINTIFF

AND

DICKSON KIMANI KAMAU DEFENDANT

RULING

1. The application before the court for determination dated February 1, 2022 seeks the following orders:
 - a. Spent
 - b. That pending the hearing and determination of the application and the suit the court do issue an injunction restraining the Respondent herein whether by himself and/or through his family members to wit his mother Hannanh Njeri Mesopotamia and wife Christine Awino Onyango, agents assigns, proxies, servants, and/or whosoever from taking possession of Motor Vehicles Registration Numbers KCK 033D Silver Toyota Axio and KCQ 006BBlack Toyota Harrier and that the said Motor Vehicles continue being detained in the safe custody at the Directorate of Criminal Investigations (DCI) Headquarters.
 - c. That leave be granted to the applicant to serve the plaint dated May 31, 2021 and the application dated February 1, 2022 through substituted service to wit an advertisement on a newspaper of National wide circulation.
 - d. The DCI to oversee the enforcement of the orders herein and to ensure peace and tranquility.
 - e. Any other or further orders the court deems fit.
2. The application is premised on the grounds that the Respondent is a mastermind of highly sophisticated criminal enterprises and has defrauded the applicant Kshs 25,447,262/= and used the money to purchase several properties which he registered in his name and the names of the family



members. The Motor Vehicles KCK 033D Silver Toyota Axio and KCQ 006BBlack Toyota Harrier in question are proceeds of crime.

3. The Applicant averred that the Respondent through his mother and wife filed two different applications in Milimani High Court in an attempt to have the Motor Vehicles released to them aimed at stealing a match against the Applicant. The Respondent was charged in Criminal Case No 1023 of 2020 at Kiambu Law Courts with the offence of obtaining by false pretense.
4. The application is supported by the annexed affidavit of Jecinta Wambui Kimani sworn on the even date. She reiterates the grounds of the application.
5. In her further affidavit, the Applicant stated that the allegation that the Respondent is of unsound mind is aimed at misleading the court as the latest medical report from Mathari Hospital indicates that the respondent is of stable mental status.
6. She further disposes that the Motor Vehicles in question being KCK 033D Silver Toyota Axio and KCQ 006BBlack Toyota Harrier were not released but they were advised on how to lawfully seek detention orders and it is based on the said advice that the instant application was filed.
7. In response to the application, the Respondent filed replying affidavit sworn by Kanyoko Lewis counsel for the Respondent on June 15, 2022 who disposes that the criminal case against the Respondent was withdrawn under Section 87 (a) of the Criminal Procedure Code and there is therefore no case pending against the Respondent.
8. Counsel further disposes that the Respondent is a person of unsound mind and a court of competent jurisdiction has already granted a release of the Motor Vehicles KCK 033D Silver Toyota Axio and KCQ 006B Black Toyota Harrier and the Vehicles in question are registered in the name of the names of Hannah Mesopotamia and Christine Awino and the Applicant has not shown any connection with the Respondent.
9. He further deposes the value of the two Motor Vehicles KCK 033DSilver Toyota Axio and KCQ 006BBlack Toyota Harrier is Kshs 1,500,000/= which cannot be used as collateral for the amount of Kshs 25,000,000/= which the applicant claims to have been defrauded.
10. The respondent urged this court to release the Motor Vehicles to the registered owners as they suffer prejudice with the continued detention of the Motor Vehicles and the registered owners are not parties to the suit and any adverse orders against them will be prejudicial to them.
11. The application proceeded by way of written submissions.

Applicant's Submissions

12. Counsel for the Applicant filed submissions on August 26, 2022 and submitted that the applicant has met the threshold for granting injunctive reliefs as stipulated in the *Giella v Cassman Brown* case.
13. That the Respondent is in the process of disposing off the assets acquired using the defrauded money in an attempt to defeat justice; and that the Respondent has not explained on what basis the money was sent to his account by the Applicant. That the applicant has established a *prima facie* case.
14. Counsel further submitted that the applicant had already lost Kshs 25,000,000/= to the Respondent and her attempt to recover the said amount is being frustrated by the Respondent.
15. In conclusion counsel submitted that no prejudice will be suffered by the Respondent if the status quo of the Motor Vehicles KCK 033D Silver Toyota Axio and KCQ 006BBlack Toyota Harrier is



maintained until the hearing and determination of the suit and urged this court to allow the application as prayed.

Respondent's Submissions

16. Counsel for the Respondent filed submissions on September 20, 2022 and submitted that the Respondent is a person of unsound mind and should therefore be sued through a legal representative and next of kin; and the continued detention of the Motor Vehicles KCK 033D Silver Toyota Axio and KCQ 006BBlack Toyota Harrier amounts to an injustice to the owners.
17. Counsel further submitted that there is no case pending against the Respondent to warrant the continued detention of the Motor Vehicles KCK 033D Silver Toyota Axio and KCQ 006BBlack Toyota Harrier and the remedies being sought by the applicant can be adequately compensated through an award of damages and urged this court to dismiss the application as the applicant has failed to meet the threshold for granting injunctive reliefs.

Analysis And Determination

18. I have considered grounds of the application herein, averments in affidavit and submissions filed and wish to consider whether the Applicant has demonstrated prerequisites for grant the injunctive reliefs sought as set out hereunder: -
 - a. Whether a *prima facie* case has been established.
 - b. Irreparable injury or loss will be suffered which cannot be compensated by way of damages if the injunction is not granted.
 - c. The balance of convenience should be in favour of the applicant.
19. The court has to satisfy itself that the above three conditions have been established for the injunctive relief to issue. It is not enough to demonstrate one condition.
20. On the issue of *prima facie* case, the applicant submitted that it is not disputed that the Respondent defrauded the applicant Kshs 25,447,262/=and the Respondent is determined to circumvent the justice system and dispose off all the properties acquired through the monies obtained from the fraud.
21. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) eKLR a *prima facie* case was defined as follows: -

“A case in which on the material presented to the court or a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”
22. The allegation of fraud by the Defendant has not been rebutted by the Respondent and in view of the said allegations, *prima facie* has been established by the applicant.
23. On whether the applicant is likely to suffer irreparable loss the court had this to state in the case of *Nguruman limited vs Jan Bonde Nielsen & 2 others* (2014) eKLR: -

“On the second factor, that the applicant must establish that he might otherwise” suffer an 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 face*, the nature and extent of the injury. The 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 a temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; an 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.”

24. From the pleadings herein, there is no doubt that the applicant can be compensated in monetary terms as the claim herein is quantifiable; the applicant has not established that she will suffer irreparable harm which cannot be compensated by way of damages.

25. On the balance of Convenience, the detained Motor Vehicles Registration Number 033D Silver Toyota Axio and KCQ 006B Black Toyota Harrier are in the names of third parties who are not parties to this suit. Any adverse orders made towards the vehicles will greatly affect the owners of the vehicles. Whereas it is submitted that the registered owners of the motor vehicles in dispute are the wife and mother to the Respondent, the linkage has not been availed to court by the applicant as required under Sections 107, 108, and 109 of the Evidence Act which provide as follows: -

"Section 107

- i. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

"Section 108

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

"Section 109

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

26. There is no doubt that the continued detention of the Motor Vehicles occasions great prejudice to the registered owners of the Motor Vehicles in question. The applicant has failed to discharge the burden of showing the connection between the registered owners and the respondent; the applicant has also not demonstrated that the Motor Vehicles were purchased using the proceeds of the alleged defrauded amount.

27. This court has to balance between the interest of the applicant, the respondent and the registered owners of the two vehicles. In my view, the balance of convenience tilts in favour of the registered owners of the Motor Vehicles who are not parties to the suit and continue to suffer prejudice due to the detention of the motor vehicles as opposed to the applicant.

28. From the foregoing, I find that prerequisites for grant of relief of injunction has not been demonstrated.

29. Final orders: -

1. The application dated February 1, 2022 is hereby dismissed.



2. Costs in the cause.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 16TH DAY OF FEBRUARY, 2023.

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RACHEL NGETICH

JUDGE

In the presence of:

Martin – Court Assistant

Mr. Omulanya for Plaintiff/Applicant

Mr. Kanyonko for Respondent

