Shah v I&M Bank Limited & 2 others (Commercial Case 25 of 2020) [2023] KEHC 3183 (KLR) (3 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3183 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

COMMERCIAL CASE 25 OF 2020

OA SEWE, J

APRIL 3, 2023

BETWEEN

CHAMPAKLAL RAMJI RAISHI SHAH ..... PLAINTIFF

AND

I&M BANK LIMITED ..... 1ST DEFENDANT

MEHUL PATEL ..... 2ND DEFENDANT

PRAKSHA PATEL ..... 3RD DEFENDANT

RULING

1. This suit was brought by the plaintiff against the defendants *vide* the Plaint dated 18th March 2020. The plaintiff's cause of action was that he had furnished a guarantee to the 1st defendant on behalf of the 2nd and 3rd defendants on the basis of which they were granted certain financial facilities in the form of loans or overdraft by the 1st defendant. The plaintiff pointed out that the facilities were for the sole purpose of trading in securities listed at the Nairobi Securities Exchange and were reviewed from time to time until 2019 when he declined to be party to another review. He explained that this time round, the nature and purpose of the financial accommodation and the facilities granted had been materially altered from what had been envisaged by the parties, such that his rights of subrogation had been completely compromised.

2. The plaintiff further averred that, thereafter, it appeared to him that the 1st defendant, in collusion with the 2nd and 3rd defendants were intent on realizing the amounts owed by liquidating his shares in Equity Bank Limited, which the 1st defendant was continuing to hold unjustifiably. He consequently filed this suit seeking the following reliefs:

    (a) An injunction to restrain the 1st defendant whether by itself or through its employees, servants, agents or however else from realizing the security it holds in the form of a Charge and Further Charge over the plaintiff's property known as Subdivision No. 9560 (Original Number

9410/4) registered as C.R. No. 32224 at the Lands Registry, Mombasa or selling the said property to recover any monies owed by the 2nd and 3rd defendants;

(b) An injunction to restrain the 1st defendant whether by itself or through its employees, servants, agents or nominees, and in particular I & M Nominees Limited or I & M Custodial Services from liquidating and/or selling the plaintiff's 2,000,000 shares in Equity Bank Limited or any part thereof which the 1st defendant continues to wrongfully hold and/or detain despite this not being a security under the reviewed terms and conditions relating to the facilities and/or financial accommodation granted to the 2nd and 3rd defendants by the 1st defendant.

(c) A mandatory injunction to compel the 2nd and 3rd defendants to liquidate and pay to the 1st defendant the sum of Kshs. 134,807,083.14 or such other amount as they owe to the 1st defendant forthwith as they are obliged to do.

(d) A mareva injunction freezing all of the 2nd and 3rd defendants' assets whether held to their credit by any bank (including such assets as are held by the 2nd and 3rd defendants in lockers maintained by such bank) or by the Central Depository and Settlement Corporation (CDSC) in their individual or nominee accounts.

(e) A declaration that the plaintiff has been discharged of all his obligations under the guarantee dated 7th December 2016 and is not liable to pay to the 1st defendant the sum of Kshs. 134,807,083.14 or any part thereof.

(f) An order compelling the 1st defendant to unconditionally discharge the Charge dated 12th February 2018 and the Further Charge dated 9th August 2019 over the plaintiff's property forthwith.

(g) An order compelling the 1st defendant to immediately and unconditionally release to the plaintiff his 2,000,000 shares in Equity Bank Limited and issue the appropriate notification to the CDSC that these shares are unencumbered and the plaintiff is at liberty to deal with the same in whatever manner he deems appropriate.

(h) An order for an account to be taken in so far as the financial accommodation granted to the 2nd and 3rd defendants by the 1st defendant is concerned and of all purchases and sales made by the 2nd and 3rd defendants with the 1st defendant, all being required to produce all the bank statements, CDSC statements and Equity Trade confirmation and Contract Note Summaries for all the transactions carried out at the Nairobi Stock Exchange by the 2nd and 3rd defendants from 1st November 2015 to date.

(i) The sum of BP200,000.00 with interest against the 2nd and 3rd defendants.

(j) The sum of Kshs. 10,390,118/= with interest at court rates against the 2nd defendant.

(k) Costs of the suit.

3. Concomitantly, the plaintiff filed a Notice of Motion dated 18th March 2020 under Certificate of Urgency, seeking, *inter alia*, a mandatory injunction to compel the applicants to pay Kshs. 134,807,083.14 to the 1st defendant. The said application was heard and determined by Hon. Otieno, J. on 20th July 2020, whereupon the following orders were granted:

(a) An order that the 2nd and 3rd defendants shall attend court and show cause why they cannot be compelled to provide security for the sum claimed by the plaintiff;

(b) An order of temporary injunction against the 1st defendant restraining it, either by self, agents, employees or agents from liquidating or selling the plaintiff's 2,000,000 shares in Equity Bank Ltd pending the hearing and determination of the suit;

(c) An order of temporary injunction against the 1st defendant restraining it, either by self, agents, employees or agents from realizing by sale the security offered to it being the Charge and Further Charge over the property known as Subdivision No. 9560 (Original Number 9410/4 and registered at CR No. 32224) pending the hearing and determination of this suit;

(d) A mareva injunction to freeze all assets of the 2nd and 3rd defendant, held to their credit in any bank including those held by banks in safe/locker boxes and any by the Central Depository and Settlement Corporation in any CDSC accounts pending the hearing and determination of the suit;

(e) The suit be fast-tracked and any outstanding pleadings or documents be filed and served within 14 days for the matter to proceed to case conference on 28th September 2020.

4. Thereafter, the 2nd and 3rd defendants filed their respective affidavits for purposes of the show cause proceedings, which were set for 22nd October 2020, but could not be held as scheduled. The 2nd and 3rd defendants were ultimately cross-examined along with the interested party. The show cause proceedings took place between 28th January 2021 and 3rd October 2022, after which written submissions were invited from learned counsel for the parties. This ruling is therefore made pursuant to Order No. 1 of the orders issued on 20th July 2020. Needless to mention that the reasons for the decision and the orders are to be found in the ruling of Hon. Otieno, J. and need no revisiting, save to point out that, at paragraph 33 of the said ruling, the Court was satisfied thus:

> "In the instant matter, it is not disputed that within three months before the suit was filed the 2nd defendant sold and had two of his known assets and had the same transferred to the interested party. In his own Replying Affidavit, no explanation is offered for the decision to sell the said chattels nor was any glimpse offered as to what other property is owned by the two defendants but there is a forceful assertion that they do not intend to flee from Kenya but rather that both are keen to face the litigation and reveal the truth. Of note is the fact that the sale is not denied but conceded. With that common position and when one looks at the proximity of disposal with the dispute I am convinced that the plaintiff has discharged, on a prima facie basis even at this interlocutory stage, the burden of proving that the alienation is to defeat any decree that may issue against the defendant."

5. Accordingly, the only issue for determination is whether the 2nd and 3rd defendants have shown cause why they should not be compelled to provide security for the sums claimed herein by the plaintiff.

6. For purposes of the show cause proceedings, the 2nd defendant, Mr. Mehul Patel, swore an affidavit on 24th September 2020 on his own behalf and on behalf of the 3rd defendant. Their stance was that they should not be ordered to furnish security in this matter. One of the reasons proffered by Mr. Mehul was that since there is no prayer in the Plaint either for Kshs. 200,000,000/= or BP225,000, there is no basis for such an order. He further averred that the amount of Kshs. 134,807,083/= which is the subject of prayer (c) of the Plaint is not an amount due to the plaintiff and therefore there is no basis for calling for security for its payment, as there can never be a decree for the aforementioned sums. At paragraph 6 of the subject affidavit, Mr. Mehul explained that the only amounts sought by the plaintiff as against them (the 2nd and 3rd defendants) are BP 200,000 and Kshs. 10,390,118/= as per prayers (i) and (k) of the Plaint; and therefore, any decree that can issue against them would be limited to those amounts.

7. At paragraph 8 of the show cause affidavit, Mr. Mehul further averred that, in respect of the aforementioned sum of Kshs. 134,807,083/=, the plaintiff is equally liable to the 1st defendant as a Guarantor; and therefore there is no basis why they should be ordered to furnish security for the entire amount. He further pointed out that, since the plaintiff's prayer (e) seeks to have him discharged from his obligation to pay the aforesaid amount, it is incongruous that he should at the same time ask for security for the said amount. He added that the plaintiff cannot be secured and/or protected from paying an amount he himself has denied liability for in his pleading.

8. At paragraph 10 of his show cause affidavit, the 2nd defendant conceded that he sold his two motor vehicle which were his known assets at the time. He however explained that this was done solely to shield himself from financial challenges, which the plaintiff was well aware of. He added that he did not foresee this suit and therefore could not have sold the vehicles with a view of defeating any decree that may be passed in this suit.

9. The 2nd defendant made reference to Paragraph 33 of the Ruling dated 20th July 2020 to support his assertion that a prayer to furnish security ought to be premised on an apprehension that the defendant is about to move outside the jurisdiction of the court. Hence, he averred that neither him nor the 3rd defendant has absconded or intend to flee from the jurisdiction of the Court. He added that they have substantial interest in Kenya, where he lives with his Kenyan wife and their children, who are also Kenyans; and that had it been their intention, they would have fled soon after the institution of this suit.

10. The 2nd defendant was cross-examined at length on 28th January 2021 by Mr. Khagram. He denied that he was trying to run away from his obligations to the 1st defendant. He acknowledged that he had known the plaintiff for over 20 years and that the plaintiff had furnished the guarantee needed for him to obtain financial facilities from the 1st defendant. The 2nd defendant further conceded that he borrowed some BP 200,000 from the plaintiff by way of a friendly loan; and that he sold his motor vehicles about three months prior to the filing of the instant suit. He however denied that the sale was done with the sole intention of defeating any decree that would be passed in this suit. He likewise denied that they are a flight risk.

11. Mr. Khagram also cross-examined the 3rd defendant, Ms. Praksha Patel, and she denied having approached one Mr. Mayul Malde with a request to have her car transferred to his name. She conceded that she owned a car, a Ranger Rover Registration No. KCJ 089T, which she had pledged to the Bank of India for a loan, and which she sold in June or July 2019; and hastened to add that at the time of sale she had no knowledge that they would be sued by the plaintiff. Ms. Patel also conceded that they owned a house on Moyne Drive which they also sold. She nevertheless denied Mr. Khagram's suggestion that they dissipated their assets to defeat this claim.

12. The 2nd and 3rd defendants also relied on the affidavit of Shrena Mayur Shantilal Malde, sworn on 24th September 2020. She averred therein that she is related to the 2nd and 3rd defendants as sister/brother and sister/sister in law, respectively. In that capacity, she averred that she has close personal knowledge of the 2nd and 3rd defendants and could vouch for their character, trustworthiness and honesty. She added that, as far as she knows, the couple has earned a living honestly through legal and clean business. At paragraph 6 of her affidavit, Ms. Malde deposed that from her personal knowledge of the 2nd and 3rd defendants, she did not think that they were a flight risk or that they were likely to run away from the Court's jurisdiction. She accordingly made an undertaking, at paragraph 7 to the following effect:

> " Since I know the 2nd and 3rd Defendants very well, I present myself and undertake that should they flee this court's jurisdiction with a view to defeat or in a manner that is likely to defeat

this case, this court should be at liberty to summon me to explain the whereabouts of the 2nd and 3rd defendants."

13. In cross-examination, Ms. Malde reiterated her averment that the 2nd and 3rd defendants are persons well known to her; and that the 2nd defendant is a man of his word. While conceding that she did not know much about this case, Ms. Malde re-affirmed her evidence that neither the 2nd defendant nor the 3rd defendant was a flight risk.

14. In the light of the foregoing evidentiary material, Mr. Khagram urged the Court to find that the 2nd and 3rd defendants had utterly failed to show cause why they should not furnish security. He relied on *Karl Jenning v Ali Liwali* [1997] eKLR and *International Air Transport Association & Another v Akarim Agencies Company Limited & 2 Others* [2014] eKLR and sought that the two be ordered to give security to cover the plaintiff's claim. In his submission, neither the 1st defendant nor his sister Shrena Mayur Malde were candid in their respective show cause affidavits. He pointed out that despite the admissions of indebtedness made earlier, the 2nd defendant incongruously sought to try and raise a contrived position that the plaintiff is not owed any money and must pay the 1st defendant the amount claimed as he was a guarantor. He urged the Court to note that, in cross-examination, the 2nd defendant admitted that he was indeed indebted to the plaintiff in the sums of Kshs. 10,390,118/= and BP200,000; and to the 1st defendant in the sum of Kshs. 134,807,083.14.

15. In respect of the evidence of Ms. Shrena Malde, Mr. Khagram drew the attention of the Court to the fact that she confirmed that she was neither in a position to guarantee the repayment of the 2nd and 3rd defendants' debt nor to ensure they remained in the Country to meet any decree that may be issued against them. He accordingly urged the Court to bear in mind that the orders sought against the 2nd and 3rd defendants are merely intended to safeguard any decree issued against them herein from being rendered infructuous. He therefore concluded his submissions by asserting that the 2nd and 3rd defendants have failed to show cause why they should not be ordered to give security; and that their intentions are manifest from their conduct, including the wrongful disposal of their assets. He accordingly prayed that they be required to deposit security for the due performance of the decree that may be passed in this matter.

16. On his part, Mr. Oluga made reference to the ruling of Hon. Otieno, J. dated 20th July 2020 which he quoted in extenso at paragraph 2 of his written submissions dated 13th October 2022. He thereafter proposed that the Court be guided by the following considerations:

    (a) Whether the plaintiff has demonstrated that the 2nd and 3rd defendants have absconded from its jurisdiction;

    (b) Whether the plaintiff has proved that the 2nd and 3rd defendants intend to abscond from jurisdiction;

    (c) Whether sufficient proof has been availed by the plaintiff to show that the 2nd and 3rd defendant has disposed of or move his property;

    (d) Whether the plaintiff has demonstrated that the 2nd and 3rd defendants have an intention to dispose or move his or his property from the jurisdiction of the Court;

    (e) Whether the actions of the 2nd and 3rd defendants are calculated to delay, obstruct or defeat the execution of any decree that may be passed against them.

17. Counsel then proceeded to submit that, guided by the foregoing parameters, the 2nd and 3rd defendants ought not to be called upon to provide security because:

(a) The amount claimed by the plaintiff are owed to the 1st defendant and not to the plaintiff; and that, in any event, the plaintiff, as a guarantor, is equally liable to the 1st defendant for the payment of the outstanding debt due to the 1st defendant.

(b) The 2nd and 3rd defendants have no intention of absconding the jurisdiction of the Court and have been in the country for over two years since this suit was filed.

(c) The 2nd and 3rd defendants have demonstrated that their two assets were only sold to shield them from financial challenges; and that at the time, they had no reason of knowing that there was a suit in the offing.

(d) There is no evidence at all to show that the 2nd and 3rd defendant's actions are calculated to delay, obstruct or defeat the execution of any decree that may be passed against them in this case; the 2nd and 3rd defendants having demonstrated that they sold their assets way before the instant suit was filed.

18. In the premises, Mr. Oluga urged the Court to decline the invitation to order the 2nd and 3rd defendants to furnish security as they have shown sufficient cause and justification why they should not be ordered to furnish security.

19. The application was filed under Order 39 Rules 1, 2, 5 and 6 of the *Civil Procedure Rules*. Rule 1 provides that:

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.

20. As has been pointed out, the Court (Hon. Otieno, J.) had occasion to consider and make a determination on the application and at paragraph 34 of his ruling dated 20th July 2020, he came to the conclusion that there was no proof that either the 2nd or 3rd defendant was intent on absconding or leaving the local limits of the jurisdiction of the Court. He accordingly held:

> " Having discharged the burden upon him, I do find that the plaintiff is entitled to the order that the 2nd and 3rd defendants attend court on date to be agreed with the parties and show

cause why they cannot be ordered to furnish security in the sum of Kshs, 200,000,000 and USD 225,000. However, just now that the application has been heard inter partes with the participation of the 2nd and 3rd defendants, I do not appreciate any fear that they will not attend court to show cause for which reason the prayer for warrants of arrest will serve no just purpose. I decline to grant prayer 7 of the Notice of Motion."

21. In the premises, any evidence or submissions made by the parties in connection with allegations as to whether or not the 2nd and 3rd defendants are intent on absconding or leave the jurisdiction of the Court are misplaced and therefore untenable at this stage.

22. The foregoing notwithstanding, the plaintiff also prayed, at paragraph 8 of the Notice of Motion dated 18th March 2020 that:

> "...the Second and Third Defendants be directed within a time to be fixed either to furnish security for the sum of Kshs. 200,000,000/= and BP225,000 or such amount and/or proportion thereof as may be sufficient to justify the decree or to appear and show cause why they should not furnish such security."

23. In effect, what the plaintiff seeks is attachment before judgment, in respect of which the Court of Appeal held thus in *Kuria Kanyoko t/a Amigos Bar and Restaurant v Francis Kinuthia Nderu & Others* (1988) 2 KAR 126:

> "There is elementary wisdom in these observations. Had the respondent prayed in aid the equitable remedy of interim injunction to restrain the applicant from either absconding or disposing of his assets, assuming these were believed to be the case, the cost of either party would have been within the limits permissible by reason and common sense. If the result of this case teaches anything, it is that the Courts should be essentially slow in considering attachment of a defendant's property before judgement, not only because it is hardly consistent with justice to exact "punishment" before the Defendant's liability to execution is established, and also because in view of the tardy and time-consuming process of the Courts, the rights and liabilities of the parties may not be determined for a long time possibly years."

24. Similarly, in *John Kipkemboi Sum v Lavington Security Guards Limited* (Civil Appeal No. 124 Of 1998) the Court of Appeal reiterated its decision in *Kuria Kanyoro T/A Amigos Bar & Restaurant v Francis Kinuthia Nderu & Others* (*supra*) that:

> "The power to attach before Judgment must not be exercised lightly and only upon clear proof of mischief aimed at by order 38 rule 5, namely that the Defendant was 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".

25. As pointed out herein above, the Court (Hon. Otieno, J.) made a finding of fact at paragraph 33 of its ruling thus:

> "In the instant matter, it is not disputed that within three months before the suit was filed the 2nd defendant sold and had two of his known assets and had the same transferred to the interested party. In his own Replying Affidavit, no explanation is offered for the decision to sell the said chattels nor was any glimpse offered as to what other property is owned by the two defendants but there is a forceful assertion that they do not intend to flee from Kenya

but rather that both are keen to face the litigation and reveal the truth. Of note is the fact that the sale is not denied but conceded. With that common position and when one looks at the proximity of disposal with the dispute I am convinced that the plaintiff has discharged, on a prima facie basis even at this interlocutory stage, the burden of proving that the alienation is to defeat any decree that may issue against the defendant."

26. In this regard, Order 39 Rule 5 of the *Civil Procedure Rules* provides that:

(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.

27. In this instance, the assertion of the 2nd and 3rd defendants was, in essence, that the amounts claimed by the plaintiff are sums owed to the 1st defendant and not to the plaintiff; and that, in any event, the plaintiff, as a guarantor, is equally liable to the 1st defendant for the payment of the outstanding debt due to the 1st defendant. The parties appear to be in agreement that whereas the sum of Kshs. 134,807,083.14 is an amount allegedly due from the 2nd, 3rd defendants to the 1st defendant as principal borrowers, the plaintiff was their guarantor. It would therefore be foolhardy for the 2nd and 3rd defendants to say that the plaintiff has no cause of action against them yet the law recognizes that the primary responsibility of repaying a guaranteed debt is on the principal borrower. Hence, in *Halsbury's Laws of England*, Fourth Edition Reissue) Vol 20(1) para 239 it is stated that:-

> When a creditor has acquired a right to immediate payment of the debt from the guarantor, the guarantor is entitled to call upon the principal debtor to pay the amount of the debt guaranteed, so as to relieve the guarantor from his obligation, even though the guarantor, has paid nothing under the guarantee, even though the creditor has not demanded payment from him or the principal debtor"

28. Additionally, there is a component of the plaintiff's claim that is alleged to be the consequence of loan arrangement between the plaintiff and the 2nd defendant. This arrangement is the subject of Prayers (i), (j), (k) and (l) of the Plaint, in respect of which the 2nd defendant stated as hereunder in cross-examination (per the typed proceedings):

> "I do have the plaint filed on... (Ref to prayers sought by the plaintiff and last page thereof, and specifically prayers No. I, j, k and l). The prayers are for the sum of Pounds 200,000 and Kshs. 10,390,118/=against the 2nd and 3rd defendants. It is myself and my wife. Interest on

200,000 pounds at 8% from 1st May 2017 to the date of payment...The money was paid to our account in financing the shortfall..."

29. The 2nd thereafter admitted that the money was a friendly loan from the plaintiff to him and that he thanked the plaintiff for it in an email and committed to refunding the money with interest at 7% per annum. Indeed, what was strenuously challenged by Mr. Oluga was why the two defendants should be called upon to furnish security in respect of sums not claimed. In this regard he pointed out that the show cause was in respect of an amount of Kshs. 200,000,000/= which is itself in excess of what is due to the 1st defendant. This amount is plainly a typographical error as it is not borne out of the Plaint. It therefore does not detract from the assertion that the 2nd and 3rd defendants borrowed monies from the plaintiff. As to whether the assertions are true will be the subject of the pending trial.

30. The second aspect of the response by the 2nd and 3rd defendants is their contention that their two assets were only sold to shield them from financial challenges; and that at the time, they had no reason of knowing that there was a suit in the offing. They therefore conceded that their only known assets have already been disposed of and transferred into the names of third parties. Indeed, at page 14 of the plaintiff's Further Affidavit is a Copy of Records furnished by National Transport and Safety Authority (NTSA) indicating that, as at 20th April 2020 Motor Vehicle Registration No. KCF 120C which was previously owned by the 2nd defendant was registered in the name of Ndeto Mutua. Similarly, the Court was shown another Copy of Records (see page 16 of the plaintiff's Further Affidavit) which shows that Motor Vehicle KCJ 089T was likewise registered in the name of Ndeto Mutua. It is instructive therefore that, in cross-examination, the 2nd defendant conceded that:

"...Ndeto is an agent and was waiting for someone to buy the car. I don't recall how much I bought the car for. One ....was paid into my daughter's account because my daughter and Ndeto used doing business together..."

31. Thus, the question to pose is why the 2nd defendant would proceed with the transfer even after being served with the instant application in which an order for security was one of the prayers sought by the plaintiff, if, as contended by him he was acting in good faith. It is also noteworthy that in cross-examination the 3rd defendant also feigned ignorance as to the exact amount they sold the Motor Vehicle Registration No. KCJ 089T for, while conceding that they continued to use the motor vehicle after its alleged sale.

32. I also found it significant that the 3rd defendant denied any knowledge that her husband was trading in shares with the plaintiff, yet she, at the same time asserted, and expected the Court to believe her assertion, that the BP200,000 paid by the plaintiff was to be injected into the share transactions business. Moreover, she also conceded that that they once owned a house on Moyne Drive, which they disposed of.

33. In the premises, after taking into account the material placed before the Court in the show cause proceedings, I am convinced that the 2nd and 3rd defendants have failed to show cause why they should not be ordered to furnish security.

34. In this regard, Order 39, Rule 6 of the *Civil Procedure Rules* stipulates that:

(1) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time security not fixed by the court, the court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

(2) Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the court shall order the attachment to be withdrawn, or make such other order as it thinks fit.

35. In the case at bar, the plaintiff has already been granted a mareva injunction in the following terms:

> " A mareva injunction be issued to freeze all assets of the 2nd and 3rd defendants, held to their credit in any bank including those held by banks in safe/locker boxes and any by the Central Depository and Settlement Corporation in any CDSC accounts pending the hearing and determination of this suit.

36. Moreover, in the ruling dated 20th July 2020, Hon. Otieno, J. made certain orders in respect of the suit property that are akin to attachment before judgment. The learned judge pronounced himself as follows at paragraph 32:

> " ...since I doubt the good faith in the dealings between the 2nd defendant and the Interested Party, and to preserve those vehicles as part of the subject of this suit, I direct that the same shall remain in their current state of registration and ownership pending the determination of the suit."

37. In the premises, and granted all the circumstances of this case, including the orders already made, which orders have not been appealed or set aside, it is hereby reiterated that:

(a) Motor Vehicle Registration No. KCJ 089T, Range Rover, and Motor Vehicle Registration No. KCF 120C shall remain in their current state of registration and ownership and shall continue to be held in the safe custody of Ndeto Mutua pending the hearing and determination of this suit.

(b) That the costs of the show cause proceedings shall be costs in the cause.

38 It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 3TH DAY OF APRIL, 2023

OLGA SEWE

JUDGE