Bruton Gold Trading LLC v Anne Atieno Amadi t/a Amadi & Associates Advocates & 6 others (Civil Case E211 of 2023) [2023] KEHC 18370 (KLR) (Commercial and Tax) (9 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18370 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE E211 OF 2023

A MABEYA, J

JUNE 9, 2023

BETWEEN

BRUTON GOLD TRADING LLC ..... PLAINTIFF

AND

ANNE ATIENO AMADI T/A AMADI & ASSOCIATES ADVOCATES ..... 1ST DEFENDANT

BRIAN OCHIENG AMADI ..... 2ND DEFENDANT

EDWARD TAYLOR ALIAS MBORONDA SEYENKULO SAKOR .... 3RD DEFENDANT

ANDREW NJENGA KIARIE ..... 4TH DEFENDANT

AFRICAN BANKING CORPORATION LIMITED (AKA ABC BANK) ..... 5TH DEFENDANT

KIKANAE ADRIAN TOPOTI ..... 6TH DEFENDANT

DANIEL NDENGWA KANGARA ALIAS DANIEL MURIITHI .... 7TH DEFENDANT

RULING

1. A Mareva Injunction is a Court Order freezing a debtor's assets to prevent them from being removed from the jurisdiction of the Court. It takes its name from the English case of Mareva Campania Naviera S.A vs International Bulk carriers S.A [1986]1ALL ER 213.

2. In Guaranty Trust Bank (K) Ltd vs ES Solo Holdings Ltd [2021] eKLR the Court held:

> " The statutory basis for granting Mareva Injunction is provided for under Order 39 of the Civil Procedure Rules. In Kanduyi Holdings Limited V Balm Kenya Foundation & Another [2013] Eklr, the court held: -
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> > ''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 Navierra 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''

13. Order 39 Rule 5 deals with situations where the Respondent is about to dispose of or remove property from the jurisdiction of the Court.

14. In Beta Healthcare International Limited v Grace Mumbi Githaiga & 2 others [2016] Eklr, the court relied on Goode On Commercial Law, 4th Edition at Page 1287 in determining the threshold of granting a freezing injunction and observed: -

> " The grant of a freezing injunction is governed by principles quite distinct from those laid down for ordinary interim injunctions. ... Before granting a freezing injunction the court will usually require to be satisfied that;
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> (a) The claimant has 'a good arguable case' based on a pre-existing cause of action;
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> (b) The claim is one over which the court has jurisdiction;
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> (c) The defendant appears to have assets within the jurisdiction;
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> (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
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> (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."

3. From the foregoing, it can safely be said that the cornerstone for a freezing order is the satisfaction that a plaintiff has a good arguable case and the existence of a real risk that a debtor who has assets within the jurisdiction is about to abscond or remove those assets from the jurisdiction or otherwise have them dissipated if the injunction is not granted.

4. The 1st defendant is the Chief Registrar of the Judiciary of the Republic of Kenya. The law firm of Amadi & Associates is registered in her name. The 2nd to 4th defendants are Advocates of the High Court of Kenya. They practice as such within the Republic of Kenya. The 5th defendant was described as a male adult working in Kenya while the 6th defendant is of Liberian Nationality.

5. In or about September 2021, the plaintiff, which is a gold trading company based in Dubai (UAE), entered into an agreement with the 5th & 6th defendant for purchase from the later of 1500kg of gold bars. Between 22/9/2021 and 21/10/2021, the plaintiff paid a total sum of US$592,970/= into the 1st defendant's law firm account No. 011-215-xxx-xxx-xxx for the said purchase. A further sum of US $149,236.48 was paid to or on account of the 6th defendant's accommodation and other costs.

6. Despite as aforesaid, no gold was delivered to the plaintiff as agreed or at all. Instead the plaintiff was informed that orders had been obtained in HCCOM NO. E 873 of 2021 Rufus Yaa vs Universal Global Logistics & Anor, restraining the exportation of the subject consignment. In view of the foregoing, on 18/5/2023, the plaintiff instituted the present suit claiming various declarations and a total sum of US $1,642,206/48 being the amount paid for the undelivered gold and loss of business and income.

7. Simultaneous with the plaint, the plaintiff took out a Motion on Notice dated 17/4/2023 under Order 40 Rules 1, 4 and 11 of the CPR and Article 159 of *the Constitution* of Kenya.

8. In the Motion, the plaintiff sought a raft of orders including the freezing of Ac. Nos. 011-215-xxx-xxx-xxx and 011-239-xxx-xxx-xx at the 7th defendant in the name of Amadi & Associates, Advocates and all personal accounts of the 1st, 2nd, 3rd and 5th defendant at any bank in Kenya. In the alternative, the plaintiff sought that the said defendants do deposit in a joint interest earning account the sum of US $ 742,206/48. There was also a prayer for accounts, bank statements for the above two accounts and all other private accounts held by the said defendants.

9. The grounds for the application were set out on the face of the Motion and the supporting and further affidavits of Demetrios Bradshaw sworn on 4/5/2023 and 26/5/2023, respectively.

10. The deponent rehearsed all that was stated in the plaint and further alleged that the order served upon the plaintiff in HCCOM No. E 873 of 2021 was a forgery. That the said suit was later withdrawn by the plaintiff therein. The matter was reported at the Kiambu Police Station which led to the arrest of the 5th defendant. That the funds deposited in Ac. No. 011-215-xxx-xxx-xxx were withdrawn in cash by the 1st and 2nd defendant. That the 1st, 2nd, 3rd, and 5th defendant were beneficiaries of the said monies.

11. He averred that the 2nd and 3rd defendant had committed themselves to return the monies to the plaintiff. That if action was not taken against the defendants swiftly, the defendants may continue to perpetrate their illegal, fraudulent commercial activities to the detriment of innocent citizens and investors. That as a sign of commitment to resolve the matter, the 1st defendant's firm and the 2nd and 3rd defendant forwarded two cheques amounting to US$9000 in May, 2022.

12. On the foregoing allegations, Majanja J granted orders ex-parte freezing the accounts of the 1st defendant's firm and the personal accounts of the 1st, 2nd, 3rd and 5th defendant on 18/5/2023.

13. This was met with fierce opposition from the 1st, 2nd and 3rd defendant by way of replying affidavits and Motions to discharge the said ex-parte orders and to strike out the suit.

14. The 1st defendant relied on her replying affidavit sworn on 19/5/2023. She swore that the application was incurably defective as the Notary who commissioned the supporting affidavit and the commissioner who certified the exhibits thereto were two different persons in two different jurisdictions. That the plaintiff was guilty of material non-disclosure. She deposed that she is currently

the Chief Registrar of the Judiciary and had tendered leave of absence from the firm of Amadi & Associates, Advocates ("the Firm") in 2014.

15. That she was unable to procure the change of name of the firm due to the existence of another firm with a similar name. She denied being involved in any of the dealings that was the subject matter of the suit. According to her, she had left the firm in the hands and conduct of the 2nd to 4th defendant. That she had long relinquished her status as signatory to the accounts held by the firm. She prayed that the interim orders be discharged through her Motion dated 19/5/2023.

16. For the 2nd and 3rd defendant, they filed a replying affidavit of Andrew Njega Kiarie sworn on 19/5/2023 and a Motion on Notice of even date seeking the discharge of the said interim orders and the striking out of the entire suit.

17. The deponent stated that it was he and the 2nd defendant who were running the affairs of the Firm. That he received communication by way of whatsapp on 14/10/2021 to offer Escrow services as a Firm. Consequently, an Escrow Agreement was entered into on 15/10/2021 for holding funds from the plaintiff for release to the 5th defendant as per instructions of the plaintiff or its representative. A total sum of US$ 587,759/= was received from the plaintiff through the firm's account No. 011-215-xxx-xxx-xxx. The same was released to the 5th defendant on instructions of the plaintiff's representative Thomas Ben and Mr. Demetrios.

18. The 2nd and 3rd defendant denied that they were representing Universal Global Logistics Company Ltd (UGL) and averred that the US$9000 paid to the plaintiff's advocates was but a refund of their fees in the botched transaction. They denied the existence of any agreement between them and the 1st defendant and the 5th and 6th defendant for delivery or export of gold. That the firm was only an avenue through which the funds were transferred to the 5th defendant. That the plaintiff had withheld from this Court the existence of the Escrow Agreement.

19. In their Motion for striking out the suit, they alleged that the existence of the Escrow Agreement dated 15/10/2021 had been suppressed by the plaintiff. That there was an arbitral agreement in the said Escrow Agreement and this Court is not the proper forum for resolution of the dispute herein. That there were various emails by the plaintiff authorizing the 3rd defendant to pay the 5th defendant the subject funds.

20. The 7th defendant opposed to application vide the replying affidavit of Kajuju Marete sworn on 23/5/2023. It gave notice of intention to raise a preliminary objection and decreed all the allegations of the plaintiff safe the transfer of the funds to the Account resident with it.

21. In response to the replying affidavits of the 1st, 2nd and 3rd defendant, the plaintiff filed further affidavits of Demetrios Bradshaw sworn on 26/5/2023. In those affidavits, the deponent denied the 1st defendant's averments and sought to show that the 1st defendant was properly sued in this suit. Indeed, the entire affidavit was about Anne Atieno Amadi being the proprietor of the Firm and that the orders sought against her should issue. In that affidavit, the plaintiff reproduced the exhibits produced in the supporting affidavit but were now duly marked and sealed. It alleged that the action of the 2nd and 3rd defendant forming a new law firm KN Advocates LLP in October, 2022 was a clear evidence of the 1st to 3rd defendants' intention of moving their assets outside the jurisdiction of this Court.

22. In his replying affidavit against the 2nd and 3rd defendants' Motion dated 19/5/2023, Demetrios Bradshaw swore a replying affidavit on 26/5/2023. He asserted that the Escrow Agreement is not the basis of this suit. That the said agreement was null and void for having been signed by UGL which is a non-existent entity.

23. That since Anne Atieno Amadi had disclaimed knowledge of that agreement and that the 2nd and 3rd defendant having gone to another law firm, KN Advocates LLP the said Escrow Agreement was invalid. That only the 1st defendant can seek to rely on the said Escrow Agreement and not the other defendants.

24. It was further averred that the correct route should have been to apply to stay the proceedings and not to strike out the suit as the 2nd and 3rd defendant had sought.

25. The parties filed their respective written submissions dated 26/5/2023 for the plaintiff and 1st defendant and the 2nd and 3rd defendant dated 27/5/2023. The Court has considered the said submissions and the authorities relied on.

26. This is an application for Mareva Injunction. I have already set out the respective parties cases in the preceding paragraphs. The issues for determination are; whether the application by the plaintiff is incurably defective and should be struck off for being supported by an improper affidavit; whether there was material non-disclosure for which the ex-parte orders should be discharged; whether the suit should be struck out and if not, whether the orders sought by the plaintiff should be granted.

27. The preliminary point taken by the 1st to 3rd defendant was that the verifying affidavit and the affidavit in support of the Motion were incurably defective. That they fell foul of section 9 of the *Oaths and Statutory Declarations Act* Cap 15 Laws of Kenya. That they are inadmissible in any court of law in Kenya. That they should be struck out together with the application and the entire suit.

28. While the *Oaths and Statutory Declarations Act*, provide rules and formalities on how affidavits are to be taken in Kenya by a Commissioner for Oaths, there seem to be none as regards affidavits taken abroad. It would seem that, an affidavit or declaration taken abroad before a Notary Public, it must be proved by an affidavit or other proof that the same was taken by a Notary Public and that the signature and seal of attestation affixed to such document was of such Notary Public. Mere affixing of seal and signature are not enough.

29. This issue was dealt with by Ringera J (as he then was) in Pastificio Lucio Garofalo SPA vs Security & Fire Equipment Co & Anor [2001] eKLR. In that case, the good judge held that:-

> " As regards whether the affidavit is taken before a Notary Public, there is no specific statute in Kenya or rules of Court dealing with the formalities and admissibility in Court of affidavits taken abroad. However, section 88 of the *Evidence Act*, Cap 80 Laws of Kenya provides that documents which would be admissible in the English Courts of Justice are admissible in Kenyan courts without proof of the seal or stamp or signature authenticating it or of the judicial or official character claimed by the person by whom it purports to be signed. In England, by virtue of Order 41 Rule 72 of the Rules of the Supreme Court, affidavits taken in the Commonwealth countries are admissible in evidence without proof of the stamp and seal or the official position of the person taking the affidavit. It accordingly follows that the same position obtains in Kenya. As there is no presumption in favour of documents made outside the Commonwealth, it follows that the affidavit in the instant case which was taken in Napoli, Italy has to be proved by affidavit or otherwise to have been taken by a Notary Public in Italy and that the signature and seal of attestation affixed thereto was that of such Notary Public. There is no such proof here.
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> ...in the result, I find the verifying affidavit of Emile Viola inadmissible in evidence and I would order the same struck out of the record."

30. In the present case, both the verifying affidavit, supporting affidavit, two further affidavits of Demetrios Bradshaw and his replying affidavit were taken in Dubai (UAE) which is not a Commonwealth Country. They are shown to have been sworn before "Private Notary Abdulraham Alsharhan". They have a stamp of Notary Public Abdulraham M. Alsharhan. They are not proved by an affidavit or otherwise that the signature and stamp of attestation is that of the Notary Public named therein.

31. Since the documents are from a country that is not part of the Commonwealth, the presumption accorded in Part V of the *Evidence Act*, Cap 80 is not available to them. They had to be proved as held in the Pastificio case for them to be admissible in evidence in Kenyan Courts. There had to be an affidavit or otherwise to show that the stamp and signature appearing thereon was that of Notary Public Abdulraham Alsharhan. That is what section 88 of the *Evidence Act*, Cap 80 Laws of Kenya implies.

32. Accordingly, the Court finds the said affidavits to be incurably defective and are hereby struck out. However, both the plaint and Motion can be saved by having compliant verifying and supporting affidavits properly sworn. Further under Order 51 of the CPR, a Motion can be entertained without an accompanying affidavit.

33. The other objection taken by the 1st, 2nd and 3rd defendant was is that the annextures to the supporting affidavit were improperly sworn. That they were affixed with a stamp of an unnamed Commissioner for Oaths in Nairobi whilst the supporting affidavit was sworn in Dubai.

34. Rule 9 of the Oaths and Statutory Declarations Rules provide that:-
"All exhibits to Affidavit shall be securely sealed thereto under the seal of the Commissioner, and shall be marked with serial letters of identification."

35. An affidavit and annextures produced in a proceeding constitute evidence. One cannot seek to prove a document which he has not seen and or is unable to produce at the time of taking an oath that is an affidavit. That is why, it is a requirement that the Commissioner for Oaths has to ensure that the deponent of an affidavit takes oath in his presence and vourches the truth of the statements he makes. He is also to seal and sign the exhibit or annextures that the deponent relies on in his statement of oath.

36. In Francis A. Mbalanya vs Cecilia A. Waema [2017] Eklr, the Court held:-

> " It is trite in law that an affidavit and the annextures attached on it constitute evidence. Indeed where a person seeks to proof (sic) a fact by way of affidavit, he is obligated to exhibit any document on his affidavit. However, before such a document can be received in evidence by the Court, the law requires that such a document must be sealed by the Commissioner for Oaths. The law that requires the sealing and marking of annextures with serial letters is in mandatory terms, and must be complied with. Although the plaintiff's Advocate submitted that the failure to seal and mark the annextures is a defect in form that should be ignored by the Court, the law has declared in mandatory terms that annextures must be sealed and numbered. That is the only way they can be allowed on the record.
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> ...
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> In the instant case, the law has provided in mandatory terms, the manner in which evidence by way of annextures can be received by the Court. The failure to comply with that law, like in the instant case, can only lead to one thing, the striking out of the offending documents."

37. I am in agreement with the said rendition of the law. Affidavit evidence is the substitute to oral testimony. Failure to adhere to the strict requirements of the law as to affidavits would not only be oppressive to the opposite party, but will breach the law on adduction of evidence and lead to undesirable results thereby compromising the administration of justice.

38. In the present case, not only were the annextures not produced before the Notary Public before whom the oath was taken, they were all together not sealed by the Commissioner for Oaths who purported to seal them. They only contained a mark or stamp of an unkown Commissioner for Oaths at Nairobi who never signed or marked them as a sign of authentication. They amount to but mere pieces of papers and cannot amount to evidence in support of the averments in the supporting affidavit. They are therefore struck out.

39. The Court notes that the plaintiff took steps and cured that grave anomaly by annexing those annextures to the Further Affidavit of Demetrios Bradshaw of 26/5/2023. Accordingly, since they are now properly on record, they constitute evidence that can be relied on by the plaintiff and the Court can consider them.

40. The striking out of the affidavits should have signified the end of the matter. However, since this is not the final Court. I need to consider the merit of the plaintiff application were to be wrong on the issue of affidavits.

41. The next issue for consideration is whether the plaintiff is guilty of material non-disclosure. The 2nd and 3rd defendant contended that the plaintiff failed to disclose the existence of the Escrow Agreement dated 15/10/2023. That by virtue thereof, this Court lacks jurisdiction to entertain the matter as any dispute between the parties ought to be referred to arbitration. That in the premises, the suit should be struck out.

42. On the other hand, the plaintiff contended that the said Escrow Agreement was part of a fraud and the arbitral agreement therein is not enforceable. That the 2nd and 3rd defendant cannot avail themselves the benefit of the Escrow Agreement because it was between the Firm and the plaintiff. That it is further unenforceable as one of the parties thereto, UGL is a non-entity as it does not exist as confirmed by the Registrar of Companies.

43. In The King vs The General Commissioners of Kensington Exparte Princess Edmond De Pligac [1917] 1 KB 486, it was held:-

> " It is perfectly well settled that a person who makes an exparte application to the Court that is to say in the absence of the person who will be affected by that which the Court is asked to do is under an obligation to the Court to make the fittest possible disclosure, then he cannot obtain any advantage from the proceedings and he will be derived of any advantage he may have already obtained by him. That is perfectly plain and requires no authority to justify it."

44. Further, in MAT Ltd vs Elcombe [1988]3 ALL ER 188, the Court held:-

> " In considering whether there has been relevant non-disclosure and what consequence the court should attach any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in those appeals to me to include the following; (i)The duty of the applicant is to make a full and fair disclosure of the material facts (ii) The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the Court and not by the assessment of the applicant or his legal advisers; (iii) the applicant must make proper inquiries before making the application.

The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries".

45. I have looked at both the plaint and the supporting affidavit, nowhere did the plaintiff allude to the existence of such an agreement. If it be true that the plaintiff was misled into executing the same in the larger scheme of fraud, as it is alleged in the further and replying affidavits and submissions of the plaintiff, nothing would have been easier than to plead so both in the plaint and the supporting affidavit on the strength of which the exparte orders were obtained. It was not the plaintiff's case that it did not have a copy of the said Escrow Agreement. The plaintiff knew of the existence of that document but chose not to disclose it to Court. There was no mention of the same in its plaint or supporting affidavit.

46. Was that document material? I think it was. That document set out what was agreed to between the plaintiff and the Firm of Amadi & Associates. The emails produced by the 2nd and 3rd defendant show how that agreement came about. It is the plaintiff who gave instructions to the 3rd defendant vide an email dated 14/10/2021 to prepare that agreement.

47. In the view of the Court, the plaintiff was guilty of material non-disclosure. However, since the application has been heard inter-partes, that is now water under the bridge. What the Court has to consider is, the effect, if any, of the said Escrow Agreement.

48. I have considered the decision relied on by Mr. Murage for the plaintiff of the Supreme Court of Appeal of South Africa in Namasthethu Electricity (PTY) Ltd vs City of Cape Town & Anor (Case No. 201 of 2019)[2020] ZASKA 74. The same is on the place of arbitral agreements founded on fraud. In that case, the Court held: -

> " The question that must now be answered is whether in light of the fraudulent and corrupt conduct of which the appellant was undoubtedly guilty, the city after validly cancelling the contract can be compelled to submit to an arbitration process in accordance with the dispute resolution clause in the contract, an issue to which I now turn. It is trite law that fraud is conduct which vitiates every transaction known to law....
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> No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved, but once it is proved it vitiates judgments, contracts and all transactions whatsoever..
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> As regards an arbitration or similar adjudication clause contained in an agreement which was found to have been induced by fraud, this Court has emphatically ruled that once the agreement had been rescinded by an aggrieved party, the said arbitration clause cannot stand.."

49. While I appreciate that in that case the appellant had been found guilty of fraud, here no such finding has been made. I am alive that the plaintiff did not refer to the said agreement either in its statement of claim or the supporting affidavit. It did not plead that it had been induced or misled into entering into the said Escrow Agreement. However, in paragraph 33 of the plaint it has pleaded fraud. If it is able to prove those particulars, I doubt whether that Escrow Agreement with the arbitral clause would stand.

50. In this regard, I decline to strike out the suit as sought. In any event, the proper course should have been to apply for the stay of the suit.

51. Notwithstanding that I have struck out the affidavits of the plaintiff, since I am not the final court, I will address the main application. Is the plaintiff entitled to the grant of the freezing orders and the other orders sought?

52. At the beginning of this ruling, I set out the principles applicable in a Mareva Injunction. As stated, the principle applies to a creditor who has a right to recover what he is owed even before he proves his right by a judgment. All that is required is for him to establish that he is owed and that the debt is due. That there is a danger that the debtor may abscond or dispose of his assets so as to defeat any judgment that may ultimately be passed.

53. In the present case, the plaintiff has proved that the claim is one which the court has jurisdiction that the named defendants have assets within the jurisdiction. The question to be answered is, whether there is a good arguable case and whether the defendants are about to abscond or remove their assets from the jurisdiction of the Court.

54. The plaintiff established that it transferred a sum of US$593,000 to the firm of Amadi & Associates, Advocates between 21/9/2021 and 16/10/2021. The plaintiff alleges that the same was for purchase of 1500kg of gold bars from the 5th and 6th defendant. However, no gold was delivered.

55. On its part, the Court has noted that from exhibits "Dem 5" produced by the plaintiff, all what the payment advises dated 21/9/2021, 27/9/2021 and 16/10/2021 show is that, the payments were being made for ATS Air Transport. On the other hand, according to the 3rd defendant in his replying affidavit, the monies were received on the strength of 3 invoices marked "ANE 5(a)(b) & (c)" dated 15/10/2021, 21/9/2021 and 24/9/2021, respectively. Those invoices showed that the funds were for general disbursement including office expenses, computer consumables, printing, telephone, photocopy, photos to filing of the necessary documents and attendances by letter, email etc. There is nothing at all about purchase and/or delivery of gold. Why the parties decided to hide the real intention and purpose of those funds is not clear. It is left to speculation and conjecture.

56. In view of the foregoing, has a case for freezing orders been made?

57. From the record, it is clear that at least a sum of US$593,000/= was wired to the account of Amadi & Associates, Advocates at the 7th defendant by the plaintiff. The 2nd and 3rd defendant have admitted to have received a total sum of US$587,759/= at their client A/c No. 011-215-xxx-xxx-xxx at the ABC Bank. That the said funds were released to the 5th defendant on the instructions of the plaintiffs' representative Mr. Thomas Ben & Mr.Demetrios in terms of the Escrow Agreement.

58. There is evidence that the said funds were withdrawn by the 2nd and 3rd defendant in cash or transferred to the firm's Kshs Ac. No. 011-239-xxx-xxx-xx at ABC Bank between 22/9/2021 and 25/10/2021. It is disturbing that the cash withdrawals were in large sums which is against the Prudential Guidelines of the CBK.

59. The question is, is the sum of US$742,206.48 claimed by the plaintiff due from the 1st, 2nd, 3rd and 5th defendants? I have already stated that the amount transferred to the firm of Amadi & Associates was only US$593,000/= out of which the 2nd and 3rd defendant admit only US$587,759/=. In paragraph 17 of the plaint, the plaintiff has acknowledged that it made payments totaling US$ 149,236/48 to or on account of the 6th defendant for "his accommodation and other transactional costs". With such an admission, that amount cannot be subject to a summary recovery from the 1st, 2nd 3rd and 5th defendant by way of a freezing order. It has to be established at the trial that the said defendants actively participated or induced the plaintiff to make such direct payments to or on account of the 6th defendant for any liability to pay the same to attach.

60. As regards the balance of US$593,000/= transferred to the firm of Amadi & Associates Advocates, the plaintiff avers that the liability of the 1st defendant is by virtue of her being the registered proprietor of the said law firm. There was ample evidence produced to show that Anne Atieno Amadi is the registered proprietor of the said Law Firm. However, I am alive to the fact that a Certificate of Registration of a business name is only a prima facie evidence of ownership of a business entity. If, however, there be further evidence to the contrary, then the court will go with the hard evidence produced.

61. In the present case, the evidence is clear that Anne Atieno Amadi ceased to practice as an Advocate of the High Court of Kenya in 2014 when she was appointed the Chief Registrar of the Judiciary. She communicated this fact to the Law Society of Kenya. However, the problem is that she left that Law Firm to continue to be under active management of the 2nd and 3rd defendant. The two are the ones who were actively involved in the receipt, withdrawal and disbursement of the said funds. Save for Anne Atieno Amadi being the proprietor of the said Firm, there is nothing to show that she was part of or she did actively or otherwise participate in the whole scheme of things leading to the present law suit.

62. The question is, in the absence of any direct evidence connecting Anne Amadi to the alleged scheme, can she be liable to a freezing order? I don't think so. Although her joinder as a party was necessary by virtue of Order 30 of the Civil Procedure Rules, her joinder was necessary to shed light as to who was in charge of the said Firm at the material time. She being the registered proprietor of the Law Firm, it was necessary that she be enjoined as a party as the Law Firm is the one which received the funds in question. I make this observation well knowing that she indicated the difficulties she had in having to effect the change of the business name.

63. In my view from the evidence on record, save for the letter dated 9/6/2020 for opening an account with ABC Bank, there was absolutely no evidence to show that Anne Atieno Amadi was involved in the day to day running of the Firm. Neither was there anything to show that she was either a beneficiary of the said funds or she participated in the profits of the said Firm. Further, there was nothing to connect her with the receipt and disbursement of the subject funds. Of course her continuing to be the registered proprietor of the Firm which is in active legal business while she is the CRJ of the Republic of Kenya, is something to be frowned upon but that frowning would not extend to freezing her personal accounts.

64. There were insinuations and suggestions that because the 2nd defendant is a son to the 1st defendant and that the 1st defendant being at the helm of the Judiciary that may have contributed to the forged orders of 25/10/2021 in HCOM NO. E 873 of 2021. I think the 2nd defendant is an adult who is supposed to carry his own cross independent of his mother. It cannot be a case of "the son has eaten sour grapes so the mother's teeth should be set on edge". Each must carry own cross according to own actions. Further, a court of law cannot act on assumptions, suppositions and speculation. The court acts on hard evidence. There was nothing to connect the 1st defendant in her current position as the CRJ with the said HCOM E 873 of 2021.

65. Accordingly, I have come to the inescapable conclusion that the freezing orders of 18/5/2023 should not have been issued against the 1st defendant. Neither can they now issue.

66. As regards the 2nd 3rd and 5th defendant, everything points towards them. The 2nd and 3rd defendant admit that they were the ones running the law firm of Amadi & Associates, Advocates at the material time. The two are the ones who withdrew the funds from the subject account and made the disbursements. However, at paragraph 18 of the supporting affidavit, Demetrios Bradshaw swore that the 5th and 6th defendant received the monies paid directly to them and through the firm of Amadi &

Associates, Advocates. That averment was never denied as the 5th and 6th defendant did not respond to the application.

67. The conclusion that Court makes is that the plaintiff has established an arguable case against the 2nd, 3rd, 5th and 6th defendant. They have a case to answer as to the monies paid by the plaintiff. It has also established that the case is one which this Court has jurisdiction over and that the said defendants have assets within this jurisdiction.

68. That being the case, is there evidence that the said defendants are about to abscond, or their assets are at a risk of being moved out of the jurisdiction of this Court or are in danger of being dissipated before judgment?

69. In order to answer that question, one has to consider the evidence tendered in the supporting affidavit of 4/5/2023, the deponent swore at paragraphs 25 and 26 as follows:-

> " 25. THAT if swift action is not taken to stop the Defendant/Respondents herein from illegal and fraudulent commercial activities and freeze the accounts of the defendant/Respondents participating in blatant scams involving Gold (whether genuine or fake) innocent citizens and investors risk losing their hard earned funds and the Defendant/Respondents here may transfer their illegal proceeds to the detriment of their victims and render the suit herein nugatory.
>
> 26. THAT further to the foregoing, the complexity of the suit herein, the parties involved one of them being a senior member of the Judiciary and sitting on the Judicial Service Commission and the fact that a fraudulent court order was created in the suit against the Plaintiff filed by the 3rd Defendant/ Respondent, makes it necessary that this application be heard urgently and the prayers sought granted to prevent any further corrupt and illegal schemes being perpetrated against innocent third parties and to preserve the integrity of the Judiciary".

70. In his further affidavit of 26/5/2023, Demetrios Bradshaw swore in paragraphs 35, 39 and 40 as follows:-

> " 35. That I am informed by my Advocates on record, which information I verily believe to be true, that a business name has no arms or legs or indeed separate legal personality from its proprietor and as such the proprietor is held liable for any act or omission carried out in the name of the said business name.
>
> 39. That the orders sought in the present application are warranted on the following grounds:
>
> a. The plaintiff/Applicant has filed a cause of action against Amadi and Associates Advocates whose registered proprietor is Anne Atieno Amadi the 1st Defendant/Respondent herein;
>
> b. The 1st Defendant/Respondent herein in her own documents, has confirmed that she appointed the 2nd and 3rd Defendant/ Respondents as agents of her Bank Account number 011215011005599 held by the applicant yet none of them disowned the money when it cleared into the Bank Account opened by the 7th Defendant/Respondent, having failed, refused

and or neglected to legally relinquish control of Amadi and Associates.

c. The 2nd and 3rd Defendant/Respondents have confirmed having received the money into the bank account belonging to Amadi and Associates and withdrawing the same under the authority donated to them by the 1st Defendant/respondent (the account holder).

d. There is no evidence tendered or at all that the money ever moved from the custody of Amadi and Associates to a third party.

e. The operating status of Amadi and Associates is unknown, the registered proprietor disowning it and the 2nd and 3rd Defendant/Respondents having registered a new business name immediately after the criminal investigation began;

f. The money paid to Amadi and Associates by the Plaintiff/Applicant was to facilitate the transport of Gold to Dubai UAE and no Gold was ever delivered, nor is there any evidence of its existence;

g. In light of the foregoing, the 1st to 3rd Defendant/Respondents need only show that they paid the money to a third party in order to exonerate themselves, in any event any amount above Kenya Shillings One Million or USD 9999 can only be transacted by way of bank transfer.

h. The hands and legs of Amadi and Associates are those of the 1st Defendant/Respondent and therefore a claim and or preservatory orders such as those sought herein have to be issued as against her legal person which legal person holds personal accounts.

i. The 2nd and 3rd Defendant/Respondents, having withdrawn the Plaintiff/applicant's funds from the account and failed refused and or neglected to provide evidence of the said money leaving their custody are also liable as agents of the 1st Defendant/Respondent and the last hands that held the Plaintiff/Appliant's funds; and

j. It is very evident that the Defendant/Respondents herein are all disowning the transaction leading to the loss of funds by the Plaintiff/Applicant yet none of them disowned the money when it cleared into the Bank Account opened by Anne Atieno Amadi.

40. That in response to paragraphs 36 to 38, of the 1st Defendant/Respondent's Replying Affidavit, I am advised by my Advocates on record which advise I verily believe to be true that, the acts of the Defendant/Respondents herein enumerated in paragraph 35 hereabove clearly shows the danger posed by the 1st to 3rd Defendants/Respondents in moving their assets outside the jurisdiction of this court."

71. The above averments are the only ones on record that in support of the final principle on Mareva Injunction that is, that the debtor is about to abscond from the jurisdiction of the Court or that the assets of the debtor are about to be removed from the jurisdiction or are in danger of being dissipated to avoid the judgment that might be passed.

72. I have carefully considered the said averments and the material on record. However, I am unable to see any concrete evidence to suggest that either the defendants are about to abscond or are dissipating their assets. The 2nd and 3rd defendant are only said to have moved to a new partnership firm of Advocates by the name of KAN Advocates LLP. That Firm is shown to be in Kenya within the jurisdiction of this Court. Nothing was said about the 5th defendant.

73. In my view, for a party to be entitled to a freezing order, it must establish firm, consistent, substantiated and cogent evidence of the likelihood of the debtor absconding or him dissipating his assets to defeat the likely judgment that may be passed against him. This is so because a freezing order is a draconian remedy that is meted out against a debtor who is clearly shown to be acting in a calculated manner that is geared towards defeating the ends of justice if the case is left to go through trial in the normal manner.

74. In the present case, none has been established. Mere suppositions and/or speculation cannot do. The plaintiff has to wait to prove its case in the normal manner and execute its judgment as per the law provided. A creditor must show the risk of dissipation of assets in order to be entitled to a freezing order which is akin to execution and attachment before judgment. This has not been shown in this case.

75. Apart from the freezing orders, there were prayers sought for disclosure and accounts. I think that from the evidence on record, the said prayers would have been granted were the affidavits not struck out.

76. In view of the foregoing, I make the following orders: -

    (a) The verifying affidavit to the plaint is hereby struck out.

    (b) The plaintiff is to file and serve a compliant verifying affidavit within 21 days of the date hereof in default the plaint shall stand struck out.

    (c) The 2nd and 3rd defendants' application dated 19/5/2023 for striking out the suit is dismissed with costs.

    (d) The 1st defendant's application dated 19/5/2023 is allowed with costs. Consequently, the orders made herein on 18/5/2023 are hereby set aside.

    (e) The Motion dated 17/5/2023 is hereby dismissed.

    (f) For reasons contained in the ruling, I will make no order as to costs on the application dated 17/5/2023.

    It is so ordered.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 9TH DAY OF JUNE, 2023.

A. MABEYA, FCIArb

JUDGE