



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gogo v Sairam Supermarket; Cooperative Bank K. Limited (Interested Party) (Civil Appeal 142 of 2019) [2023] KEHC 23560 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23560 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CIVIL APPEAL 142 OF 2019  
RPV WENDOH, J  
OCTOBER 12, 2023**

**BETWEEN**

**PETER OMONDI GOGO ..... APPELLANT**

**AND**

**SAIRAM SUPERMARKET ..... RESPONDENT**

**AND**

**COOPERATIVE BANK K. LIMITED ..... INTERESTED PARTY**

*(eing an appeal arising from the Ruling and Order of Hon. R.K. Langat (PM) given on 30/10/2019 in Rongo SRMCC No. 260 of 2019)*

**JUDGMENT**

1. Peter Omondi Gogo (the appellant) preferred the instant appeal against the ruling and order of Hon. R.K. Langat (PM) dated 30/10/2019 in Rongo SRMCC No. 260 of 2019.
2. The facts giving rise to this appeal are contained in the respondent's Notice of Motion (the application) dated 13/8/2019. The respondent sought the following orders:-
  - a. Spent.
  - b. That pending the hearing of the application inter - parties, an order do issue for the attachment before judgement of the defendant/respondent properties and more particularly:-
    - Assorted shop merchandise.
    - Any other movable property of the defendant.



- c. That the Officer Commanding Station Kamagambo Police Station be directed to provide security to the auctioneers during the attachment and or the break into any premises to attach the defendant/respondent's properties.
  - d. That the defendant/respondent be required or directed to furnish such security to satisfy the payment of the debt owed and costs as a condition for the release of the attached properties and in default, an order be made for the disposal of the property by public auction.
  - e. Costs be provided for.
3. The application was supported by the affidavit of Patel Vikas, the Managing Director of the respondent. He deposed that the appellant approached the respondent with a request for supply of assorted goods to his shop situated in Rongo; that the respondent supplied the appellant with goods on diverse dates but the appellant failed to pay the outstanding balance of Kshs. 297,500/=; that the appellant relocated to an unknown location to avoid payment of the debt. The respondent contended that it did its investigations and found that the appellant owned attachable properties which could be attached to offset the debt owing.
  4. The trial court issued interim orders allowing the respondent to proceed with the attachment of the respondent's merchandise and any other movable properties.
  5. The appellant opposed the application. The appellant swore an affidavit dated 20/8/2019. He deposed that the application lacks merit, it is malicious and mischievous; that the application as presented and the prayers therein are illegal; that he does not owe the respondent any money and he has never been served with the application nor the summons. Contemporaneously, the appellant filed an application dated 20/8/2019. The appellant asked the trial court to set aside its orders issued on 13/8/2019 for attachment before judgement and release of motor vehicle registration No. KCD 019Q (**suit motor vehicle**). The basis of the appellant's application was that the suit motor vehicle belonged to one Benta Ojalla Omollo and the Co-operative Bank (the interested party) who were not parties to the suit before the trial court.
  6. The trial court heard both applications. The court allowed the respondent's application dated 13/8/2019 but dismissed the appellant's application dated 20/8/2019. The trial court ordered that the appellant deposits a sum of Kshs. 297,500/= as security pending the hearing of the main suit and in default, the attached properties remain in the custody of the respondent; that the goods will remain attached until the suit is heard and determined.
  7. The above holding precipitated this appeal which was commenced via a memorandum of appeal dated 3/3/2020. The appellant preferred 11 grounds which can be summarized as follows:-
    1. That the trial Magistrate erred in law and in fact by holding that attachment before judgement under Order 39 of the Civil Procedure Rules was available to the respondent in the circumstances of the case;
    2. That the trial court erred in law and in fact by ordering that the appellant do provide security in the sum of Kshs. 297,000/= without paying any or any sufficient regard to the laid down principles relating to provision of security in the circumstances;
    3. That the trial court erred in law and in fact by disposing the matter fully by way of an application and thereby denying the appellant an opportunity to be heard on the merits of the case.

The appellant prayed:-



- a. The ruling and resultant orders given on 30/10/2019 be vacated and substituted with an order dismissing the respondent's application for security/attachment before judgement.
  - b. The appellant be awarded costs of the lower court and the appeal herein.
8. The appellant filed written submissions dated 28/6/2022. The appellant abandoned ground 8 of his appeal and submitted that the sole issue for determination is whether the respondent met the threshold for the grant of orders pursuant to Order 39 (5) both in fact and law. It was submitted that the principles governing attachment before judgement were laid down by the Court of Appeal in the case of *Kuria Kanyoko T/A Amigos Bar and Restaurant vs Francis Kinuthia Nderu & 2 Others*. The appellant submitted that the respondent had to demonstrate that not only was the appellant about to dispose of his property or to remove them from the jurisdiction of this court but that he also intended to do so with the intention of obstructing or delay any decree passed against him. The appellant submitted that the respondent alleged that he was selling his goods hastily and he was not at his shop, but he never stated that he intended to do so.
  9. The appellant further submitted that Mr. Patel Vikas only claimed that he was the director of the company with no proof that he was authorized to swear an affidavit or bring a suit against the appellant by a company resolution. It was further stated that the respondent did not authorize their former and current Counsel to act for them and thus, the entire suit is defective, null and void as it was held in the case of *East African Portland Cement Ltd vs Capital Markets Authority & 4 Others (2014)* eKLR.
  10. The appellant urged the court to find that the suit fell short of the requirements of the law in issuing orders before judgement and allow this appeal with costs.
  11. The respondent filed its written submissions dated 24/4/2023. On whether it was deserving the orders for attachment before judgement, The respondent submitted the basis for granting Mareva injunction is provided for under Order 39 of the Civil Procedure Rules. The respondent further relied on the findings in the case of *Kanduyi Holdings Limited vs Balm Kenya Foundation & Another (2013)* eKLR where the court explained the origin of Mareva injunctions.
  12. The respondent further submitted that in the case of *Guaranty Trust Bank (K) Limited vs ES Solo Holdings Limited (2021)* eKLR the court opined that Order 39 Rule 5 deals with situations where the defendant is about to dispose of or remove property from the jurisdiction of the court; that Order 39 Rule 5 translates to the codification of an interlocutory relief referred to as Mareva injunction or freezing order. The respondent further relied on the cases of *Beta Healthcare International Limited vs Grace Mumbi Gitbaiga (2016)* eKLR and *African Banking Corporation Limited vs Netsatar Limited & 6 Others Nairobi Milimani HCC No. 299 of 2009 (UR)* where the courts discussed the principles of granting freezing orders.
  13. The respondent urged that it had submitted compelling evidence to demonstrate that there was imminent disposal and removal of the property from the jurisdiction of the lower court by the appellant; that it carried out its investigations and found that the appellant was not at his shop, had incurred bad debts and was disposing of his assets to avoid payment of his debts. The appellant asked this court to find that it satisfied the requirements of Order 39 Rule 5 and this court should re-affirm the trial court's decision.
  14. The interested party filed its submissions dated 17/5/2023 in which it was submitted that it was not a party to the suit which involved the private commercial transactions/contracts between Peter Omondi Gogo and the respondent both of whom are strangers to the interested party and not owners of motor vehicle registration number KCD 019Q (suit motor vehicle); that the interested party discovered that



the trial court ordered attachment of the suit motor vehicle before judgement and thereby, adversely affected the interested party.

15. The interested party submitted that it co-owns the suit motor vehicle with Benta Ojala Omollo and not the appellant; that despite the evidence being produced in the trial court, the trial court dismissed the application provoking this appeal. The interested party relied on the case of *Joseph Kinuthia Mungora vs East Africa Rail Handling Logistics Ltd & Another (2019)* eKLR where the court considered a judgement debtor co-owned the attached motor vehicle with a third party who was not a party to the suit. The interested party reiterated that the suit motor vehicle was not co-owned with the appellant against whom the execution was intended and this court should set aside the impugned ruling.
16. I have considered the grounds of appeal and the submissions by all parties. The issue for determination is whether the respondent satisfied the conditions precedent to attachment before judgement as outlined in Order 39 Rule 5 of the *Civil Procedure Rules*.
17. The respondent through its application dated 13/8/2019, alleged that the appellant owed it some money for the supply of goods and services to the appellant's business premises amounting to Kshs. 297,000/= . Being apprehensive that the appellant may dispose of its property and/or abscond the trial court's jurisdiction, the respondent moved the trial court to attach the goods before judgement.
18. The respondent's application was premised on Order 39 Rule 5 (1) - (3) of the *Civil Procedure Rules* which provides:-
  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.
19. The Court of Appeal in the case of Kuria Kanyoko T/A Amigos Bar (supra) held:-

“The burden of showing that the appellant had disposed of his properties or removed them from court's jurisdiction or was about to abscond in either case with the object of defeating any decree that may be passed against him lay on the respondents....Courts should be extremely slow in ordering attachment of a defendants property before judgment not only because it is hardly consistent with justice to exact punishment but also because of the time-consuming process of the courts, the rights and liabilities of parties may not be determined for a long time....The power to attach is not to be exercised lightly without proof of the mischief aimed and on vague allegations.



20. In *Savings & Loan Kenya Ltd. vs. Eustace Mwangi Mungai Nairobi HCC No. 715/2001 Milimani Ringera J.* (as he then was) held: -

“I think that however well-grounded the plaintiff’s apprehension might appear to be, it remains just that; well ground apprehension. Without evidence that the defendant intends to do what is feared, the court cannot grant the order of pretrial attachment of the defendant’s property or ask him to furnish security. Is there any such evidence here? I fear not. There is no deposition of any positive fact tending to show that the defendant intends to dispose of his assets. Such positive facts might have included the fact that the defendant either negotiating the sale of his properties or entering into an agreement to sell the same.”

21. In *Atul Shah & another vs. Bharat Doshi & Another (2006)* eKLR the court held:-

“I am of the view that the purpose of the rule upon which the plaintiffs have moved under is to secure the plaintiff against any attempt on the part of the defendant who may try to defeat the trial of the case or the execution of the decree obtained by the plaintiff. When one looks at order XXXVIII (now Order 39 of the Civil Procedure Rules 2010) it is clear that the court ought to be satisfied from affidavits or otherwise that the defendant is likely to leave the jurisdiction of the court. That to my view means that either by affidavit or the pleadings the plaintiff ought to firstly show that the defendant is likely to leave the jurisdiction of the court and it is also important for the plaintiff to make out a prima facie case in order to satisfy the court that the orders sought can be granted.

22. Similarly, in *Bangrauf Grain Millers vs. Bread Kenya Ltd (2005)* eKLR it was stated:-

“The plaintiff is required to prove that defendant with intent to delay the plaintiff or to avoid the process of court or to obstruct or delay execution has either disposed of or removed from the local limits of the jurisdiction of the court his property or is about to abscond or leave the jurisdiction of the court”.

23. Deriving from the principles set in the above cases and the provision of Order 39 Rule 5 of the *Civil Procedure Rules*, a party who wishes the court to come to its aid for attachment of goods before a decree is passed, must demonstrate:-

- a. The defendant intends to abscond the trial court’s jurisdiction.
- b. The defendant intends to dissipate the assets.
- c. The disposal is to defeat the outcome of the case.

24. I have perused the respondent’s application dated 13/8/2019. The contention is an outstanding debt of Kshs. 297, 500/= which the appellant failed to pay. The respondent demonstrated this by attaching to its affidavit a statement of account which shows that the appellant has an alleged outstanding debt of Kshs. 297,500/=. The respondent’s Managing Director deposed at paragraphs 7, 8 and 9 that it conducted its own investigations and it is convinced that the appellant had the intention to abscond the trial court’s jurisdiction and relocate to an unknown place. However, there is no report by a private investigator for instance, to corroborate the respondent’s allegations that the appellant had the intention to abscond the trial court’s jurisdiction or was in the process of disposing of his assets. Further, there is no evidence produced by way of a sale agreement to demonstrate that the appellant was selling his assets. The averments by the respondent remain just that, apprehensions with no supporting evidence.



25. Further to the foregoing, Order 39 Rule 5 (2) makes provision in mandatory terms that the plaintiff must specify the properties to be attached and its value thereof. The respondent sought orders to attach “assorted shop merchandise and any other movable property of the defendant.” In my view, this was not specific enough. The respondent intended to use the court to obtain orders in order to conduct a fishing expedition and investigate the properties owned by the appellant and attach the same. The fishing expedition, led to the attachment of motor vehicle registration number KCD 019Q which does not belong to the appellant but is co-owned by one Benta Ojala Omollo and the interested party, by virtue of it being his financier. The property which should be attached must belong to the defendant but not a third party. It was therefore illegal for the respondent to purportedly attach the suit motor vehicle without first conducting its own due diligence.
26. With outmost respect to the trial court, this court is of the view that the trial Magistrate erred by issuing the attachment orders ex-parte without first hearing the appellant. By issuing the attachment orders ex-parte, the orders were more or less final in nature and there was nothing more to be decided. It would have been prudent to instead give the parties the earliest date possible to be heard while asking all the parties to maintain status quo. The trial court proceeded suo moto, to vary its orders of 13/8/2019 and asked the appellant to now deposit a sum of Kshs. 297,500/= as security pending the hearing and determination of the main suit. Having also noted that there was an application before it challenging the erroneous attachment of the suit motor vehicle, it would have also been prudent for the trial court to order its immediate release instead of clamping it up as part of the attached property.
27. In the end, I find that the trial Magistrate misdirected himself and the respondent was not deserving of the orders granted in its application dated 13/8/2019.

The following orders do issue:-

1. The appeal has merit and it is hereby allowed as prayed.
2. The ruling and orders of Hon. R.K. Langat (PM) dated and issued on 13/10/2019 are hereby set aside.
3. The motor vehicle registration number KCD 019Q co-owned by Benta Ojalla Omollo and Co-operative Bank (K) Limited be released to the owner forthwith.
4. Costs of this appeal awarded to the Appellant.

**DATED, DELIVERED AND SIGNED AT MIGORI THIS 12<sup>TH</sup> DAY OF OCTOBER 2023.**

**R. WENDOH**

**JUDGE**

**Judgement delivered in presence of:-**

**Peter Gogo in person** for the Appellant.

**Ms. Nyaata h/b for Mr. Mainga** for the Respondent.

**Ms. Kibaba h/b for Mr. Makori** for the Interested Party.

**Emma & Phelix** - Court Assistants.

