



**Maisha Steel EA Limited; Welrods Limited (Defendant) (Civil Case E421 of 2021)
[2024] KEHC 13648 (KLR) (Commercial and Tax) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13648 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E421 OF 2021
A MABEYA, J
NOVEMBER 7, 2024**

**IN THE MATTER OF
MAISHA STEEL EA LIMITED PLAINTIFF
AND
WELRODS LIMITED DEFENDANT**

RULING

1. Before Court is the plaintiff's application dated 25/7/2024. It is brought under Order 40 Rules 1 and 10 and Order 51 Rule 1 of the Civil Procedure Rules 2010, sections 1A, 1B and 3A and 63(c) of the [Civil Procedure Act](#) and the inherent powers of the Court.
2. It seeks to attach the defendant's property and restrain the defendant from advertising for sale, selling, charging, leasing, transferring or in any way whatsoever disposing off the defendant's property known as L.R. No 209/8864 and its plant and machinery wherever located within the republic of Kenya pending the determination of the suit.
3. The application is supported by the grounds set out on its face and the affidavit of Nikeshkumar Bipinchandra Patel sworn on 25/7/2024. These were that the parties on 11/3/2023, the parties entered into an agreement for the purchase of the defendant by the plaintiff for a sum of Kshs.611,000,000/-. The purchase included land, machinery and immovable assets.
4. That according to the preliminary agreement, the plaintiff was to deposit Kshs 51,000,000/- as a commitment fee pending the completion of the sale. That in pursuance thereof, the plaintiff made payments totaling Kshs. 96,180,217/- towards the aforesaid purchase. That the said payments included sums for operational costs, including shipping fees, raw materials, petty cash and other items.



5. That the parties agreed that a comprehensive contract was to be entered into but the parties failed to agree on the final purchase price. As a result, it was agreed that the defendant would refund the amount so far paid to it by the plaintiff within 90 days of 7/9/2024.
6. Despite as aforesaid, before the end of the said 90 days, the plaintiff realized that the defendant was in the process of disposing of its assets to potential third-party buyers. The plaintiff claimed that as a result of the defendant's actions, the plaintiff had suffered losses amounting to over Kshs.155million which the plaintiff claims.
7. That the defendant has no other known asset apart from LR No. 209/8864 that can be used to settle the amount owed. The defendant contended that unless the court intervened, the defendant's known asset would be dissipated, rendering any judgment ineffective.
8. The defendant opposed the application through a replying affidavit sworn by Chandrakant Patel on 5/8/2024. He admitted that the plaintiff had offered to purchase the defendant for Kshs. 611,000,000/- with a deposit of Kshs 51,000,000/- being paid as a commitment fee to expedite the formal agreement.
9. That the plaintiff was to assume operations on 1/6/2023, including covering running costs. He admitted that the plaintiff made several payments but a balance of Kshs 16 million was never settled. That by agreeing to take over the operations of the defendant's operations from 1/6/2023, the operational costs of the defendant were absorbed into the plaintiff's account and the funds paid towards the deposit were used to cover the said costs.
10. That the plaintiff had been urged to finalize the agreement but without success thereby being in breach of the agreement. That as a result the defendant had incurred losses and special damages that it intended to claim from the plaintiff due to the said breach.
11. The defendant contended that the plaintiff had not established a prima facie case with any likelihood of success or that it would suffer irreparable harm. That the plaintiff's claim was for specific sums arising from a transaction and granting an injunction against the defendant would cause significant inconvenience.
12. The plaintiff filed a further affidavit of Nikeshkumar Bipinchandra Patel sworn on 3/9/2024. He explained that the plan was for the plaintiff to take over the defendant's operations on 1/6/2023, but this depended on the conditions in clause 5 of the preliminary agreement.
13. That the defendant cannot claim liability for operational costs if the sale negotiations or the actual sale agreement were not completed. That the preliminary agreement did not specify the rights of either party and confirmed that the takeover was based on the expectation that the agreement would be finalized. That in the premises, the operations remained to be under the defendant. That any profits made during this period were not received by the plaintiff.
14. The application was canvassed by way of written submissions which I have carefully considered. It was submitted for the plaintiff that the orders sought in the application had the effect of freezing the property. That it was undisputed that there was an agreement for the purchase of the respondent entity and the plaintiff had performed the terms of the agreement and expended sums that were not part of the preliminary agreement. T
15. That it had established a prima facie case. That the defendant had admitted to having an asset within the jurisdiction. That the defendant had already entered into a sale agreement with another entity and there is a threat of the only known asset which would be utilized to settle the claim being disposed.



That if the ongoing dissipation of the only known asset of the respondent is not halted, any judgment that may ultimately be entered may never be able to be executed.

16. For the defendant, it was submitted that the plaintiff had breached the agreement between the parties and therefore had not come to Court with clean hands. That by agreeing to take over the defendant's operations on 1/6/2023, the operational costs were on its account.
17. That the plaintiff had not completed paying the purchase price as a result of which the defendant had suffered loss including the director's fees and other expenses. That there was no evidence to show that the defendant would not be able to repay the sums claimed in the event of judgment being entered against it.
18. I have considered the application, the responses filed thereto and the rival submissions by counsel. The main issue is whether the plaintiff has met the threshold for granting the injunctive orders sought for the attachment of the defendant's property.
19. The principles applicable in the grant of interlocutory injunctions are now settled. In *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR, the court held that: -
 - a) establish his case only at a prima facie level,
 - b) demonstrate irreparable injury if a temporary injunction is not granted, and
 - c) finally, any doubts as to (b) by showing that the balance of convenience is in his favour."
20. A prima facie case was defined in the case of *Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others* [2003] eKLR, as being a case in which on the material presented to court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party so as to call for an explanation or rebuttal from the latter.
21. The applicant invoked section 40(1) of the Civil Procedure rules. It is not in dispute that the parties herein had a contractual relationship whereby they agreed that the plaintiff would purchase the defendant entity. The parties are in agreement that, in pursuance thereof, the plaintiff paid to the defendant certain sums.
22. The point of departure is where is whereas the plaintiff claims the monies were paid towards the purchase price, the defendant alleges they were for operational costs as the plaintiff had taken over the company from 1/6/2023.
23. 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;

- (a) The claimant has 'a good arguable case' based on a pre-existing cause of action;
- (b) The claim is one over which the court has jurisdiction;



- (c) The defendant appears to have assets within the jurisdiction;
- (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
- (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"

24. In *Electric Mobility Company PTY Ltd vs. Whiz Enterprises PTY Ltd* [2006] NSWSC 580, the court stated that: -

“... must be proved on the balance of probabilities in the way and to the extent that is usual in interlocutory applications for restraint generally. There is no need for the case to be made out in some special way. The reference by Mustill J [Ninemial] to “solid evidence” is meant in my view only to emphasize that there must be actual evidence from which the appropriate inference may be drawn by the Court. On the other hand, the appellate courts have reminded primary judges that they must always be vigilant to ensure that parties' assets are not frozen and their business lives impeded lightly and that Mareva relief is not to be used to give plaintiffs security for the satisfaction of their judgments...”

- 25. In the present case, it is not in dispute that certain sums were paid to the defendant for the intended purchase. That the deal has fallen through. Each party is accusing the other for the breach. The main claim is for the refund of the amounts expended. The defendant's claim is that certain of the sums claimed were operational costs and not claimable by the plaintiff.
- 26. The Court is alive to the fact that an injunction is not to issue where the damages to be suffered is compensable. In the present case however, it is not an ordinary order of injunction being sought. The plaintiff has asserted on oath, and not denied, that the defendant is in the process of disposing off the only asset it has.
- 27. What is clear is that the defendant received funds from the plaintiff for its purchase. That evidence is on record and not disputed. It may be disputed as to whether it is the entire Kshs.96m or less. What is not disputed is that the defendant owes money to the plaintiff and is in the process of disposing off its assets. Without there being security for the claim, how is the likely judgment to be settled?
- 28. In my view, where there is evidence that a likely judgment might be just that, a paper judgment, a court is to avoid such circumstances by invoking the provisions of the law that allow a freezing order. In the present case, the defendant has admitted receiving monies from the plaintiff. It has not denied that it is in the process of disposing off its assets. In the premises, the Court satisfied that the plaintiff has established a prima facie case.
- 29. The court further finds that the applicant had provided sufficient evidence which calls upon the court to exercise its discretion to issue a freezing order. Looking at the circumstances of this case, the balance of convenience is in favour of granting the freezing order so as to preserve the assets of the defendant.
- 30. Accordingly, the Court finds the plaintiff's application to be meritorious and allow the same in terms of prayer no 3 with costs.
- 31. It is so ordered.



DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF NOVEMBER, 2024.

A. MABEYA, FCI Arb

JUDGE

