



REPUBLIC OF KENYA



**Ali v Freshline Fruits and Vegetables Limited & another (Civil Case E481 of 2020)  
[2021] KEHC 235 (KLR) (Commercial and Tax) (11 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 235 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E481 OF 2020  
WA OKWANY, J  
NOVEMBER 11, 2021**

**BETWEEN**

**ABDIFATAH BILLE ALI ..... APPLICANT**

**AND**

**MAHDI ABDIKADIR AHMED ..... 1<sup>ST</sup> DEFENDANT**

**FRESHLINE FRUITS AND VEGETABLES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is in respect to the Plaintiff's application dated 18<sup>th</sup> November, 2020 wherein he seeks the following orders: -
  - a. Spent.
  - b. That pending hearing and determination of the application this Honourable Court grants a temporary injunction restraining the Defendants/ Respondents their servants' agents or employees from removing, transferring, disposing or charging or in any manner interfering with the subject property pending hearing and determination of the application.
    - i. Motor vehicle registration number KCQ 688S valued at Kshs. 1,200,000.
    - ii. Motor vehicle registration number KCQ 560Y valued at Kshs. 1,400,000.
    - iii. Motor vehicle registration number KCW 427H valued at Kshs. 3,800,000.



- iv. Office furniture on 2<sup>nd</sup> floor Medina Estates Ltd on Plot No. 209/105/64/5 valued at Kshs. 40,000/= .
  - v. Office furniture on 3<sup>rd</sup> floor Medina Estates Ltd on Plot No. 209/105/64/5 valued at Kshs. 80,000/=.
  - vi. 3 big cold room systems including a compressor of Kshs. 4,500,000/=.
  - vii. Small cold room system including a compressor of Kshs. 600,000/=.
- c. The Defendants/Respondents furnish security in the sum of USD 425,000 for satisfaction of the decree that may be issued.
- d. In the alternative to prayer (c) above the following properties be attached and kept by Messrs. Moses Omware t/a Wiston Auctioneers.
- i. Motor vehicle registration number KCQ 688S valued at Kshs. 1,200,000.
  - ii. Motor vehicle registration number KCQ 560Y valued at Kshs. 1,400,000.
  - iii. Motor vehicle registration number KCW 427H valued at Kshs. 3,800,000.
  - iv. Office furniture on 2<sup>nd</sup> floor Medina Estates Ltd on Plot No. 209/105/64/5 valued at Kshs. 40,000/=
  - v. Office furniture on 3<sup>rd</sup> floor Medina Estates Ltd on Plot No. 209/105/64/5 valued at Kshs. 80,000/=
  - vi. 3 big cold room systems including a compressor of Kshs. 4,500,000/=
  - vii. Small cold room system including a compressor of Kshs. 600,000/= QUOTE
- e. That the Nairobi County Police Commander do provide security in the enforcement of the orders by this Honourable Court.
- f. The costs of the application.
3. The application is supported by the plaintiff's affidavit. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents opposed the application through the Replying Affidavit and further affidavit dated 10<sup>th</sup> December, 2020 and 16<sup>th</sup> March 2021 respectively.
4. A summary of the Plaintiff's case is that he entered into an agreement with the defendants in which he invested the total sum of USD 425,000 in the 1<sup>st</sup> Defendant company but that he later realized that the business premises had been closed for non-payment of rent. He further states that he also discovered that the money he had invested was deposited in offshore bank accounts and that the defendants later agreed to refund to him the said sum of USD 425,000 which agreement they did not fulfil thus precipitating the filing of this suit.



5. The defendants concede that they indeed entered into an agreement in which they agreed to sell 250 shares in the 1<sup>st</sup> Defendant company valued at USD 300,000 to the plaintiff. They confirm that the Plaintiff made part payment for the shares which were then transferred to him in good faith despite the fact that he did not make the full payment.
6. The Defendants however state that the application is not merited and is supported by documents that have since been verified to be forgeries. They contend the company was and still is a going concern, with active operations in its premises located at ICD Inland Ports, Madina Go-Downs (opposite GM) on Mombasa Road. They further state that, through his affiliated company Xumbeys Ltd, the Plaintiff invested a further sum of USD 161,882 towards the 1<sup>st</sup> Defendant but that it soon emerged that throughout the Plaintiff's presence in the 1<sup>st</sup> Defendant, he exploited and fraudulently withdrew a total of KES 9,753,900/- from the 1<sup>st</sup> Defendant's company account by himself and through his aforesaid affiliated company Xumbeys Limited, thereby imperiling the 1<sup>st</sup> Defendant company and siphoning out money required for operations. They state that upon being apprehended, the Plaintiff was released when he undertook to refund all the money he had taken illegally.
7. It is the defendants' claim that it became apparent that the Plaintiff was never genuinely intent on investing in the 1<sup>st</sup> Defendant company but was instead clandestinely scheming to acquire a work permit through the 1<sup>st</sup> Defendant Company so as to legitimize his stay in the Country considering that he is an American citizen. They claim that the Plaintiff quickly resigned on 9<sup>th</sup> July 2020 and voluntarily surrendered his 250 shares.
8. The defendants contend that the plaintiff did not, at the time of his resignation, state that he had any outstanding claim against them or make reference to a loan Agreement or agreement to repay any moneys to him. They contend that his resignation was unequivocal and unqualified. They maintain that the document that the plaintiff refers to as a 'LOAN AND INVESTMENT AGREEMENT' is a forgery, and is therefore inadmissible.
9. Parties canvassed the application by way of written submissions which I have considered. The main issues for determination are: -
  - a. Whether the Plaintiff has made out a case for the granting of orders of injunction.
  - b. Whether the application satisfies the tests for attachment and/or furnishing security before judgment.

### **Injunction**

10. The conditions for the granting an order of injunction were well explained in the case of *Giella vs Cassman Brown & Co. Ltd* (1973) E.A wherein it was held that: -

“The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”



11. In *Nguruman Limited vs Jan Bonde Nielsen & 2 Others*, CA No. 77 of 2012, the court discussed the 3 conditions for granting orders of injunction as follows: -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraba Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.” (Emphasis added).

12. What amounts to a prima facie case was discussed in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, as follows: -

“...So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”



13. I will now turn to consider the applicant's case with a view to establishing if it fulfils the conditions set out in the above cited cases. The applicant seeks orders of injunction to restrain the defendants from removing, transferring, disposing or dealing in any manner whatsoever with the subject property listed in the application. The applicant claims that the defendants are in the process of disposing of their assets so as to ensure that no money is available to pay his debt.
14. The defendants, on the other hand, deny all the allegations made by the plaintiff and contend that the application is founded on an illegality as it is supported by documents that have been found to be forgeries.
15. My finding is that the applicant has not established a prima facie case with high chances of success. I say so because the plaintiff has not furnished this court with any material to show that the 1<sup>st</sup> defendant is winding up its operations or is in the process of selling its assets or that he has a lien over the defendant's property so as to necessitate the granting of the orders of injunction.
16. I note that the dispute before this court concerns an alleged debt of USD 425,00 and not the subject property that the plaintiff seeks to restrain the defendants from supposedly disposing of.
17. Having found that a prima facie case has not been established, I find that it will not be necessary to consider the remaining two conditions for the granting of orders of injunction as all the 3 conditions have to be established sequentially for an order of injunction to be granted.

**Security for the sum of USD 425,000**

18. On Whether the Defendants' property should be attached before judgment or order made for security in the sum of USD 425,000 for satisfaction of the anticipated decree, the Plaintiff submitted that under Clause 2 of their agreement it was stated that in the event the 1<sup>st</sup> Defendant is unable to pay the amount invested and the loan, the 2<sup>nd</sup> Defendant shall be liable to have their pre-emption rights waived.
19. The defendants denied the allegation that they entered into any agreement with the plaintiff over the alleged debt and maintained that the alleged agreement was a forgery.
20. Order 39, rule 1 of the Civil Procedure Rules provides that: -

1. 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.

Order 39, rule 5 provides that:

- 5 (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.

21. 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, Helen Njeru Nderu and Andrew Kinuthia Nderu* (1988)2 KAR 1287-1334 as follows: -

“The power to attach before judgement must not be exercised lightly and only upon clear proof of the 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.”

22. The same was adopted in the case of *Shiva Enterprises Limited vs. Jivaykumar Tulsidas Patel t/a Hytech Investment* (2006) eKLR, where the following was stated: -

“That a party would need to meet that high standard of proof before a party is ordered to supply security for the amount claimed. The jurisdiction that the Plaintiff invoked has to be appropriately exercised to ensure that a party meets the afore stated high standards. It ought to always be remembered that the purpose of that jurisdiction is to secure the Plaintiff against the Defendants act aimed at defeating judgment that may be entered. It is however



not the intention of that jurisdiction to harass or to punish the Defendant before judgment is entered against him. It is worthy to quote from the case of *Kuria Kanyoto T/A Amigos Bar and Restaurant v Francis Kinuthia Nderu, Helen Njeru Nderu and Andrew Kinuthia Nderu* [1988]2 KAR ...”

23. In *Awo Shariff Mohamed t/a Asmi Services Station vs. Caltex Oil Kenya Ltd* [2008] eKLR, the court while discussing the provisions of Order 39 of the [Civil Procedure Rules](#) (which then was Order 38) stated: -

“It is my view that the interpretation of the provisions of Order 38 is clearly set out in the above authorities. The purpose of the procedure is to secure the Plaintiff against any attempt on the part of the Defendant to defeat the execution of any decree that may be passed or to delay the proceedings in the Plaintiff’s case. But because the Court has not had opportunity to try the case yet the Court has to act carefully and not to grant orders lightly. Always remembering that justice demands that both parties be heard before the dispute is determined. Therefore, the requirements of the provisions of the Order (38) must be complied strictly.

24. Similarly, in *FTG Holland vs. Afapack Enterprises Limited & Another* [2016] eKLR, where the Court of appeal held the view that: -

“The power to attach before judgment is not to be exercised lightly and without clear proof of the mischief to be avoided.”

25. In the instant suit, the applicant’s main argument was that the defendants are rushing to dispose of the assets of the 1<sup>st</sup> defendant so as to ensure that no money is available to pay him due to the liability principle. As I have already noted in this ruling, no material was placed before this court to show that the defendants were disposing of their assets. I am therefore not satisfied that the applicant has discharged the burden of proving that the defendants are about to close shop or are acting in a manner to suggest that they are avoiding any decree that may be passed against them.

25. For the reasons that I have stated in this ruling, I find that the application dated 18<sup>th</sup> November 2020 is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the main suit.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 11<sup>TH</sup> DAY OF NOVEMBER 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17<sup>TH</sup> APRIL 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Anyoka for Plaintiff/Applicant.

Mr. Ochieng for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents.

Court Assistant: Margaret

