



**Union East Africa Trust Limited v Advent Valuers Limited (Civil Case E458 of 2020)
[2021] KEHC 207 (KLR) (Commercial and Tax) (5 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 207 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E458 OF 2020
MW MUIGAI, J
NOVEMBER 5, 2021**

BETWEEN

UNION EAST AFRICA TRUST LIMITED APPLICANT

AND

ADVENT VALUERS LIMITED RESPONDENT

RULING

NOTICE OF MOTION

1. The Applicant filed a Notice of Motion Application dated 9th November 2020 for orders that;
 1. An order of injunction be issued restraining the Defendant, its servants, agents and/or assigns from withdrawing, transferring or otherwise dealing with the sum of Kshs.24, 157, 638 being the amount received by the Defendant on behalf of the Applicant from October 2018 to June 2020 and held in the Defendant's Account No. 300013879 Prime Bank Limited – UAP Towers Branch and its Bank Account held with Stanbic Bank.
 2. An order of injunction be issued restraining the Defendant, its servants, agents and/or assigns from withdrawing, transferring or otherwise dealing with monies received by the Defendant on behalf of the Applicant from 1st July 2020 in the Defendant's Account No. 300013879 Prime Bank Limited – UAP Towers Branch or any other account at Prime Bank Limited – UAP Towers and its Bank Account held with Stanbic Bank and/or any other account with any other bank in Kenya.



3. Judgment on admission be entered for the Applicant against the Defendant for the sum of Kshs.25, 185, 387 on the Defendant's own admission of indebtedness to the Applicant in this regard.
2. Which Application was supported by the sworn Affidavit of Sophia Mukoba dated 6th November 2020 and stated;
 - a. The Applicant is an appointed trustee of Unilever Kenya Pension Fund and Uniafric Provident Kenya Fund Scheme (hereinafter "Pension Schemes"). The Applicant is the registered owner of several properties situate in Nairobi from which it receives rental income namely; Phoenix House – Kenyatta Avenue Nairobi CBD, Mvuli Park Apartments – Westlands, Kirichwa Drive Apartments – Riverside Drive and Farasi Lane (hereinafter "the Properties").
 - b. In 2018, the Applicant entered into a Property Management Agreement (the Agreement) with the Defendant to facilitate the management of the properties by the Defendant from 1st July 2018 to 28th June 2022.
 - c. On or about March 2020 while carrying out an internal audit, the Applicant noted that the Defendant had not remitted monies received on the Applicant's behalf from the properties from October 2018. The outstanding amount as at 2nd March 2020 was Kshs.25, 185, 387.
 - d. The Defendant does not dispute that it failed to remit the rental income for the said period. It acknowledged its indebtedness to the Applicant in the sum of Kshs.25, 185, 387 as at March 2020. In emails dated 11th March 2020 and 16th March 2020, the Defendant indicated that it was in the process of reopening the accounts and the amounts would be released in a few days. No action was taken by the Defendant.
 - e. The Defendant indicated that KRA was auditing its financial accounts and that its bank accounts were under scrutiny on returns and payment of due taxes and forwarded two letters from KRA dated 28th February 2020 and 11th May 2020.
 - f. In a meeting with the Defendant's Director Timothy P.Saruni on 14th May 2020, the Director indicated that he would provide to the Applicant the agency notices issued by KRA to the Defendant's bankers and also remit a portion of the outstanding rental income which it failed to provide.
 - g. The Applicant issued a demand letter to the Defendant on 26th May 2020 for Kshs.34, 135, 958.59 being the outstanding sums collected from the properties as at May 2020. The Defendant responded on 8th June 2020 acknowledging its indebtedness with respect to the sum of Kshs.25, 185, 387.05 and alleging that the deficit was deducted by the Defendant to cover for the service charge, which is not admitted as the Agreement provides for the separate collection of service charge.
 - h. In its response of 8th June 2020, the Defendant stated that it was preparing the first batch of payment to transit to the Applicant within the course of the week. The Applicant also held meetings with the Defendant between June and



August 2020 to agree on the mode of payment of the outstanding amount which continues to accrue. The Defendant made some payments during this period.

- i. The Applicant carried out an audit of its accounts from 16th August 2020 to 30th September 2020 and established that the outstanding amount from October 2018 to June 2020 stood at Kshs.24, 157, 638 and no further payments have been made to date.
- j. The Defendant's breach of its contractual obligations has impacted on the Applicant's contractual obligation to remit pensions and other benefits to the Pension Schemes and will be unable to continue remittance of the said amounts if the outstanding amounts held by the Defendant at the Defendant's Bank Account No. 300013879 Prime Bank Limited – UAP Towers Branch and its Bank Account held with Stanbic Bank are not released to the Applicant.
- k. The Applicant is not aware of any other attachable assets belonging to the Defendant and is seeking the freezing of the above mentioned accounts for the amounts owed to it.
- l. The Applicant is apprehensive that if the orders sought are not granted it will suffer substantial and irreparable loss which cannot be compensated in damages. In addition, thousands of pensioners, for whom the outstanding amounts are held in trust by the Applicant, risk to lose their hard earned pensions which action will lead to the loss of livelihoods and inevitably expose the Applicant to legal action.

REPLYING AFFIDAVIT

3. The Application was opposed vide the sworn Affidavit of Timothy P. Saruni dated 18th May 2021 and stated;
 1. Under the Agreement, the Defendant was authorized to disburse funds operating account for operation and maintenance of the premises which is inclusive of recurring monthly for all approved third party contractors, recurring monthly payments of utilities, payment of property rates and ground rents and many other payments for the proper functioning of the properties which the Defendant has always done.
 2. There was an inadvertent mix up between the rents collected from the Plaintiff's properties with other rents collected through the Defendant's office and the Plaintiff was aware of the same. The Defendant has since carried out an audit to assess how much if any is owed to the Applicant. (Marked PSR-3 emails and PSR-4 copies of the assessment of the accounts)
 3. Following the mix up in the accounts, in September 2020, the Defendant moved the Collection Rent Account in the name of Advert Valuers Ltd to a designated Collection Rent Account in the names of the Landlords and all the rents and service charges were deposited in the said account. (Marked PSR – 5 proof of notice to all Tenants)



4. The Defendant's fees and charges since September 2020 were not paid and the amount is to be assessed and set-off from the amount if any owing to the Plaintiff after reconciliation of accounts.
5. After the Plaintiff raised the issue with the Defendant, the Defendant ordered for an interim account audit and found that some amounts were missing and as a sign of good gesture, paid to the Plaintiff Kshs.7 Million. (Marked PSR-6 proof of payment)
6. The audited accounts produced by the Plaintiff were done unilaterally without the involvement of the Defendant and only related to the service charge account. The parties need to reconcile the accounts to determine whether there is any outstanding amount and if so how much. Thereafter the Defendant shall organize on how and when to settle the said amounts.
7. Notwithstanding the interim freezing Orders which were issued against the Defendant's accounts (Stanbic Bank Account No. 0100005716491, Prima Bank Account Nos. 3000138162 & 3000138179) dated 23rd November 2020, the accounts hold a total amount of Kshs.7.08 Million which amount has not been considered. Some of the Defendant's clients are still banking and depositing funds to these accounts. (Marked PSR-7 bank statements).

APPLICANT/PLAINTIFF'S SUBMISSIONS

4. It was the Applicant's submission that it has established a prima facie case by the acknowledgment of the Defendant's breach and indebtedness to the Plaintiff and implored the Court to be guided by the decision in *International Air Transport Association & Another vs. Akarim Agencies Company Limited & 2 Others (2014) KLR* as follows:

“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 favor 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.”
5. The Plaintiff has a good arguable ease/ prima facie case: The Plaintiff submitted that, in the circumstances, a prima facie case has been established by the Defendant's acknowledged breach-and indebtedness to the Plaintiff. The Plaintiff thus implored the Court to be guided by the decision in



Marva Campania Naviera SA vs. International Bulkcarriers SA (1980) 1 All E.R. 21 and grant the injunctive order sought. In the said case, Lord Denning at page 215 held that:

“In my opinion that principle applies to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting judgment for it...”

6. The Plaintiff submitted that it has justifiable reasons to believe that a substantial portion of the rent and other deposits collected from the Properties has already been dissipated by the Defendant and that the remaining known portion is also at risk of dissipation.
7. The Plaintiff reasonably believes that the amounts may have been utilized by the Defendant to satisfy its outstanding tax obligations to KRA and/ or its obligations to other customers, to the Plaintiff's detriment. The Plaintiff is also quite apprehensive that, as the status of KRA's investigations is unknown and no evidence of whatsoever kind has been produced with respect to the other purported customers of the Defendant, there is a real likelihood that the remaining 6.81 million held at Prime Bank and Stanbic Bank will be withdrawn by the Defendant, thereby rendering the Plaintiff's claim in the main suit nugatory. Moreover, the Plaintiff has no information as to the assets held by the Defendant, save for the monies held at Prime Bank and Stanbic Bank, and may not be able to recover from the Defendant should judgment be entered in its favour.
8. In *Guaranty Trust Bank (K) Limited versus ES Solo Holdings Limited [2021] eKLR* where the court determined as follows:

“As regards the defendant's assets being spirited out of the jurisdiction, the plaintiff averred. and it was not denied, that the defendant had no known assets within the jurisdiction. The only known assets were monies in the disclosed bank accounts which the defendant had nearly depleted by withdrawals. The Court has considered that the agreement between the parties has since been terminated. If the monies in the accounts are not restricted in any way, there is a likelihood that the defendant, may clear out the accounts before the case is fully determined. As such, there is need for those accounts to be preserved until the trial of the suit.”
9. It was the Plaintiff's submission that the balance of convenience tilts in favor of granting the orders sought as it stands to suffer irreparable loss and damage that cannot be compensated by way of damages. Further, that it has satisfied the criteria for the grant of the Mareva injunctive orders sought in its Application. The Plaintiff has demonstrated on a balance of probability that it has a good arguable case, that there is a real likelihood of dissipation of the Defendant's known assets and the substantive irreparable loss to be suffered. The Plaintiff thus humbly asks the Court to exercise its discretion to preserve the subject matter of the dispute pending its final determination.
10. On whether the Plaintiff has satisfied the requirements for judgment on admission on the acknowledged debt: The Plaintiff argued that the Defendant at all material times duly acknowledged its indebtedness to the Plaintiff with respect to the sum of Kshs.25, 185, 387 and even proposed to come up with a repayment plan. Correspondence (marked TP3) of the Defendant's mediation Application dated 9th February 2021. The Defendant at paragraphs (c); (d) and (g) of its own Affidavit further admitted the debt stating that it inadvertently mixed up monies belonging with to the Plaintiff with other clients and that it is still reconciling its accounts to determine the totality of what is owed. The Plaintiff prayed for judgment on the admitted sum of Kshs.25, 185, 387 as it pursues the claim for the



outstanding sums not paid. On this, the Plaintiff asked the Court to be guided by the case of *Simal Velji Shab versus Chemafrica Limited (2014) eKLR* where it was held that

“ Admission may be of part of the claim and judgment will be entered for the admitted sum without waiting the determination of any other issue in the suit. That means, the existence of other issues will not prevent a court from entering judgment on admission which is clear and unequivocal.”

RESPONDENT/DEFENDANT’S SUBMISSIONS

11. The Respondent/Defendant submitted that following the mix up with the accounts, the Respondent paid Kshs.7 Million a fact that has not been disputed by the Applicant yet it is still claiming for the same amount. Further, that there are charges and fees owed to the Defendant which ought to be set off from any mounts that are outstanding and owing to the Plaintiff.
12. The Defendant added that the service charge that was being collected was not sufficient to meet the expenditure and the Defendant was forced to borrow money from the rent account to be able to meet the overheads in managing the premises. The auditing done by the Plaintiff was done only on the service charge instead of the entire rent that was being collected.
13. It was the Defendant’s submission that the Applicant is required to prove that there is plain and obvious admission by the Defendant for its Application to succeed as was held in *Choitram versus Nazari [1984] eKLR*

“ For the purpose of order XII rule 6, admissions can be express or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations onto a definite contract. It matters not if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis.”

DETERMINATION

14. I have considered the Application, the Replying Affidavit and the written submissions by both parties and from the above, the issues arising for consideration is as follows: -
 - a. Whether an injunction should issue against the Respondent?
 - b. Whether judgment should be entered in favour of the Applicant as on Defendant’s own admission of indebtedness to the Plaintiff?
Whether an injunction should issue against the Respondent?
15. The law governing the granting of interlocutory injunction is set out under Order 40(1) (a) and (b) CPR 2010 which provides that: -

“ Where in any suit it is proved by affidavit or otherwise—



- (a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;
- (b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further."

16. The conditions for consideration in granting an injunction were settled in the celebrated case of *Giella versus Cassman Brown & Company Limited (1973) E A 358*, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction as follows: -

"Firstly, 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."

See also; *Mrao vs First American Bank & 2 Others(2003)Mureithi vs City Council of Nairobi [1976-1985] EA 331* Madan JJA referred to *L Diplock in American Cynamid Co vs Ethicon Ltd [1975] 1All ER 504*

- 17. In the instant case, the Applicant contends that it is in danger of losing the sum of Kshs.24, 157, 638 being the amount received by the Defendant on behalf of the Applicant and ought to be remitted to the Applicant. If an injunction is not granted restraining the Defendant from withdrawing the said amount from the Defendant's bank accounts, then the Applicant will suffer irreparable damage, pecuniary loss of the Pensioners' investments and injure the Applicant's reputation as their Trustee.
- 18. The Applicant was apprehensive that if the orders sought are not granted it will suffer substantial and irreparable loss which cannot be compensated in damages. In addition, thousands of pensioners, for whom the outstanding amounts are held in trust by the Applicant, risk to lose their hard earned pensions which action will lead to the loss of livelihoods and inevitably expose the Applicant to legal action.
- 19. The Applicant and Defendant duly executed the Agreement/Contract on Properties' management, collect rent and remit to the applicant from 2018-2022. The Applicant did not receive the rent and after an audit the amount of 25,185,387.05 was /is outstanding. The Respondent admitted non- remittance and made proposals on repayment. The Respondent contended that the frozen bank accounts hold a total of about Kshs.7.018 Million which amount was not considered and some of its clients are still banking and depositing funds to the said accounts.
- 20. It is noteworthy that the Respondent has not taken any initiative since March 2020 to reconcile the accounts to confirm the outstanding amount to enable it settle the said amounts.



21. *UBA Kenya Bank Limited –versus- Sylvia Mututi Magotsi [2015] eKLR*, the court outlined the threshold for the grant of a freezing order as was stated in *Mareva Compania vs International Bulkcarriers SA (1975)*supra.
22. The mareva injunction is a mandatory Pretrial or Pre-Action injunction not to deal with the assets or funds in a way that would be detrimental to Applicant’s claim.
23. In my view the Applicant has satisfied the requirements for the grant of the injunction orders in form of mareva injunction to freeze the Account(s) by establishing a prima facie case and substantial loss or detriment if the funds Ksh 24,157,638 deposited are not frozen until reconciliation of accounts is completed or hearing and determination of the claim by the Court.

Whether judgment should be entered in favour of the Applicant as on Defendant’s own admission of indebtedness to the Plaintiff?

24. Order 13 Rule 2 of Civil Procedure Rules which provides: -

“ Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court admissions for such judgment or Order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such Order, or give such judgment, as the court may think just.”

25. The essence of this provision is to ensure that a party who is entitled to an admitted debt is not kept from the fruits of his judgment or made to incur unnecessary costs pursuing the admitted claim to full hearing. All that the Plaintiff is required to show is that there is a plain and obvious admission by the Defendant.
26. On 2nd March 2020, the Applicant’s auditor sent an email to the Respondent stating;

“We are finalizing on the audit for Union East African Pension Fund one of the key audit issues is an item termed as Due from Advert in the financials. This refers to the monies that were collected from the tenants by Advent but not remitted to the Scheme. From our analysis and reconciled positions with your accountant, Advent owes Union East African Pension Fund Kes. 25,185,387.”

27. The Respondent on 11th March 2020 responded to the said email as follows;

“We confirm the figures are correct as per our records and are yet to be remitted. We are organizing to release the entire amount at the earliest time possible and confirm that we have released Kshs 3Million this week, and hope to release the entire amount during the month.”

28. The admission must be unequivocal in the material facts capable of being established by the law argued without the benefit of trial. That is in finding that the admission is plainly clear and obvious the court has to be satisfied that the admission is not ambiguous and all material facts regarding the claim are not contested in any way at all. It must be an admission that has no doubt to the intention of the party making the admission.
29. However, the Respondent raised triable issue(s) that preclude the admission as being clear and unequivocal. The Respondent stated that part payment was made but not acknowledged or credited to reduce the debt outstanding. The audited accounts produced by the Plaintiff only related to the



service charge account and that the parties need to reconcile the accounts to determine whether there is any outstanding amount and if so how much.

30. The Applicant claimed from the Defendant Ksh 34,135,958.59/- after the Audit. The Defendant admitted Ksh 25,185,387.05/- and alleged to have paid Ksh 7,000,000/-
31. It cannot be concluded from the above facts, that the Respondent made a plain and obvious admission of the debt outstanding. This court finds that the said averments do not amount to an unequivocal admission.

DISPOSITION

1. The upshot of the above is that in order to protect pensioners investments, an order of mareva injunction is issued restraining the Defendant, its servants, agents and/or assigns from withdrawing, transferring or otherwise dealing with the sum of Kshs.24, 157, 638 (freezing the Account) being the amount received by the Defendant on behalf of the Applicant from October 2018 to June 2020 and held in the Defendant's Account No. 300013879 Prime Bank Limited – UAP Towers Branch and its Bank Account held with Stanbic Bank forthwith until further orders of the Court or after
2. An audit of the Accounts and/or Reconciliation the Accounts is carried out by the 2 parties; Union East Africa Trust Ltd and Advent Valuers Ltd to confirm the outstanding amount due to the Applicant and paid from the proceeds held in the subject Account.

Orders accordingly.

DELIVERED SIGNED & DATED IN OPEN COURT ON 5TH NOVEMBER 2021 (VIDEO CONFERENCE)

M.W. MUIGAI

JUDGE

