REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOBASA

COMMERCIAL AND ADMIRALTY JURISDICTION

AT MOMBASA

COMMERCIAL CASE NO. 25 0F 2020

CHAMPAKLAL RAMJI RAISHI PATEL.....PLAINTIFF

VERSUS

I & M BANK LIMITED.....1ST DEFENDANT

MEHUL PATEL.....2ND DEFENDANT

PRAKESHA PATEL.....3RD DEFENDANT

AND

NDETO MUTUA.....INTERESTED PARTY

R U L I N G

1. On the date the suit was filed, the plaintiff simultaneously filed a Notice of motion under certificate of urgency 18th March 2020 seeking among other an mandatory injunction compelling the 2nd and 3rd defendants to pay some Kshs 134,807,083.14 to the 1st defendant; a mareva injunction to freeze all assets of the 2nd and 3rd defendants whether held in accounts or safe boxes and CDSC accounts pending determination of the application; conditional before judgment attachment of motor vehicle, KCJ 089T and KCF 120C, pending further orders of the court; security by way of deposit of Kshs 200,000,000 and USD 225,000 or such other sum as may be sufficient to justify(sic) the decree and a warrant of arrest do issue against the 2nd and 3rd defendants for their production before the court. As against the 1st defendant, orders were sought for an injunction restraining the sale of the plaintiff's 2,000,000, equity Bank Shares and that property Known as CR No. 32224, subdivision No. 9560(Original no 9410/4 pending the determination of the suit.

2. The application was supported by the Affidavit of the applicant which expounded on the grounds disclosed on the face of the motion and then exhibited the documents to prove the dealings between the parties. The documents include a letter of offer dated the 10.12.2015 granting to the 2nd and 3rd defendants financial facilities in the aggregate sum of Kshs 250,000,000 to be guaranteed by the plaintiff by execution of a Personal guarantee in the sum of Kshs 60,000,000 and a pledge and creation of a lien over the plaintiff's 2,000,000 shares held in Equity Bank Ltd. That agreement appears to have been renewed or restructured subsequently by other letters of offer dated the 4.11.2016, 18.12.2017, 12.3.2019 and lastly on18.11.2019. The dispute between. In those letters of offer, the facility sum continued to be varied but the purpose seems to have been maintained to remain that of working capital requirements for the ordinary course of the borrower's business. I note that the offer letters were duly executed by all the parties save for the last which bears no signature of the plaintiff.

3. The plaintiff equally exhibited a legal charge dated the 12.2.2018 and a further charge dated 9.8.2019 securing an aggregate sum of Kshs 60,000,000 and registered against **subdivision No.9560 (Original No. 9410/4, section I, Mainland North- CR 32224).** In addition, several correspondence was exhibited between the parties spanning from beginning of dealing to the start of the dispute.

4. The dispute as pleaded and disclosed in the affidavit of the applicant and the annexed document emerges to be that the plaintiff agreed to guarantee the 2nd and 3rd defendants indebtedness with the 1st defendant on the assurance that the facility would be strictly utilised for trading in securities listed and traded at the Nairobi stock Exchange which would be held, once bought, in the account of I&M Nominees Ltd, a subsidiary of the 1st defendants and that no transaction of such shares would be conducted without the concurrence of the 1st

defendant. However, the plaintiff grieves and contends that the security by pledge of the Equity Bank shares was varied and substituted with an enhanced guarantee and indemnity of Kshs 90,000,000 and a legal charge of Kshs 30,000,000 and the shares would then be released forthwith but the 1st defendant then went back on the covenant and refused to release the shares to date. His other grievance is that despite the indication from the 2nd and 3rd defendant that they would settle the indebtedness by a letter dated 5.12.12019, the 2nd defendant did demand from the plaintiff the settlement of all the pending obligations with a threat that the securities would be realised. He was also surprised to learn from the 2nd defendant that there were no securities held by the 1st defendant's subsidiary and that even the shares held with cooperative bank ltd had been sold. In fact, the two borrowers informed him that they had moved their entire portfolio to Cooperative bank and invested with another partner and that he should just pay the 1st defendant then expect payment from them within one or two years. The plaintiff thus takes the position that the 1st defendant connived with the 2nd and 3rd defendants to prejudice his position and therefore the 1st defendant should not be allowed to enforce the securities against the plaintiff and that in the event of such enforcement he be entitled to the right of subrogation against the two borrowers as well as the benefit of reduction of the cash lien of Kshs 20,000,000 and that his obligation could only arise after a demand is made to the 2nd and 3rd defendants followed by a default. He concludes that he is entitled to some information on how the obligation upon him is made up, which information he has sought but the 1st defendant has declined to give and the 2nd defendant has equally declined to permit the release of such information. It is reiterated that by fraud and connivance the defendants have sought to have the plaintiff's assets liquidated and that it is unjust and unconscionable to let that scheme of things to continue.

5. With the leave of the court, the plaintiff filed an affidavit on 16.4.2020 and a further affidavit on 12.5.2020 sworn by the plaintiff. Upon reading the two affidavits, I have formed the opinion that the first was intended to show that after the matter was in court ad timelines set for filling responses and submissions, the 2nd and 3rd defendants had taken further steps to dispose the suit motor vehicles and to urge that prayer 6 of the motion to granted to preserve the same. It was also purposed to show that the interested party had taken no steps to assert rights over the subject motor vehicle and that there were no shares held by the 2nd and 3rd defendants in any CDS accounts. The further Affidavit was to answer to the Replying Affidavits sworn by the respondents.

6. I must express my appreciation, even at this level, for the preparedness exhibited by the plaintiff's counsel shown by the fact that, simultaneous with the plaint and application he filed written submissions on the application as well as copies of authorities. How I wish all could move in that fashion. Further submissions and list of authorities were filed on 26.5.2020.

7. For the defendants/respondents and the interested party responses were file with all resisting the application. For the1st defendant, a Replying affidavit by one Bilal Jamil was filed as well as a defence and witness statement. The essence of the 1st defendant's resistance to the application was that the plaintiff, willingly and voluntarily guaranteed the indebtedness of the 2nd and 3rd defendants by executing the four Letters of Offer, Letter of Guarantee and Indemnity, a Legal Charge and a Further Charge which securities remain in place and upon the default by the said debtor the same were exposed and subject to realisation in satisfaction and settlement of the obligations thus secured. It was therefore contended and maintained that there was always and continues to exist and vest upon the 1st defendant as the lender to retain the documents given as security and to use the same to enforce the rights and obligations therein created.

8. It was asserted in addition that the plaintiff waived his right to indemnity and subrogation against the 2nd and 3rd defendants and covenanted that his liability would never be limited, varied or discharged by the 1st defendant's failure or choice not to enforce any other security held or availed to it. It was then denied that the plaintiff ever became entitled to the release of the securities and that the claim against the 1st defendant was misconceived, unmerited and untenable in that no evidence of collusion was availed and therefore no prejudice has been visited against the plaintiff by the 1st defendant it being reiterated that the plaintiff had no right to terminate the guarantee prior to giving a notice of at least three months. On those reasons the 1st defendant prayed that the application as it sought orders against it be dismissed with costs.

9. For the 2nd and 3rd defendants, a Replying affidavit sworn by the 2nd defendant was filed at the same time with a joint statement of defence as well as a witness statement made by the said 2nd defendant. In that Replying Affidavit, the defendants take the position that the facility guaranteed by the plaintiff was fresh, never aimed at plugging a shortfall because their account with the 1st defendant had never been on the debit status and that the purpose was never limited to trading in shares only but extended to cover provision of working capital in the ordinary course of business of the two defendants. On the basis and foundation of the dealings between him, the 3rd defendant and the plaintiff, it was contended that it was the plaintiff who approached them with a proposal for partnership by which the plaintiff would provide would provide capital and securities for the share trading business in exchange for 50% of the profits while the 2nd defendant would provide the contribution in the form of his share trading skills.

10. It remained the defendants' position that it was mutually agreed that he would be in charge of the day-to-day running of the business and because he had no other source of income, he would draw a monthly allowance of Kshs 1,200,000 to meet personal expenses and running costs of the business and that once the prerequisites set by the 1st defendant were made and the offer letter dated 10.12.2015 was issued and signed, the business kicked off. An additional contention was made that come 2016, there was bank interest rates capping which brought with it share value erosion a fact which necessitated that that additional capital be obtained and injected into the business hence the Bank of India facility and the additional facility from the 1st defendant secured by the Charge and Further Charge. It was the same down turn in share prices and law operating capital that necessitated the plaintiff voluntary injection of the USD 200,000 and that the contents of the email by the 2nd defendant that the sum was a personal loan attracting interest was intended for consumption by the bank only and not enforceable between the parties.

11. The defendants maintained that having explained to the plaintiff the dire trading environment, the plaintiff urged him not to give up but to continue trading and even convinced him to lend out Kshs 10,200,000, which pends being refunded to him, pending the plaintiff visiting USA to access some money that would be sufficient to settle the obligations due to the bank, hence the 2nd defendants letter to the ban dated the 5.12,2019. The 2nd defendant thus maintains that he did his best but the economic environment informed by the interests rates capping

made the business untenable and that he committed no impropriety as alleged by the plaintiff who was privy to all the transactions with the 1st defendant. The accusation that the facilities had the limited purpose of trading in shares listed at the Nairobi stock Exchange and that the 2nd defendant diverted the finances to other unauthorised purposes, the 2nd defendant asserted that the same cannot be true because the letters of offer particularly that dated 12.03.2019 was clear that the purpose of the facility was to avail working capital in the ordinary course of the business. For all the facts so deposed, the plaintiff's application was termed beset with untruths and misrepresentation and thus deserved dismissal.

12. The defendant in particular denied ever operating any facility at cooperative bank, termed the allegations that he owes other people money he has refused to pay as scandalous and unwarranted in this litigation and viewed the application to have failed to meet the threshold for grant of the orders sought.

13. For the interested party, Grounds of Opposition were filed on 20.4.2020 and a Replying Affidavit on the 27.4.2020. In the two documents the interested party takes the position that she validly bought the two motor vehicles while no encumbrance subsisted against both and had the same transferred the same to herself and subsequently to third parties. She thus asserts that the plaintiff's suit as far as the motor vehicles are concerned is misplaced, does not lie and is otherwise overtaken by events and cannot be granted but ought to be dismissed. To buttress her position, the interested party exhibited to court a copy of log book to KCF 120C, a list of vehicles she owns payment receipts for the transfer of KCJ 089T and an agreement for sale of KCF 120C to Semil Motors Ltd.

14. On the date the suit was filed, it was placed before the court under a certificate of urgency, the application was certified urgent, orders issued in terms of prayer 3 & 5 and *inter-partes* hearing set for the 01.04.2020. the record shows that the matter was never dealt with on the 01.04.2020 but was on the 02.04.2020 placed before Mugure Thande J, who gave directions and timelines for filling of responses and submissions with 18.05.2020 being set for mention to confirm compliance. However, before the set date, on the 16.04.2020, the plaintiff once again moved the court by a certificate of urgency of the same date and an Affidavit to justify urgency and the court granted prayer 6 thus restraining the sale or transfer of the two motor vehicles, KCJ 089T and KCF 120C from sale or transfer to any third party pending the determination of the application.

15. Pursuant to the directions given in court on the 02'04.2020, the plaintiff filed written submissions with authorities dated 11.05.2020 on the 12.05.2020, further submission dated 22.05.2020 0n 26.05.2020 and on the date of hearing availed to court a decision **Kenya Akiba Micro Finance Ltd vs Ezekiel Chebii & Others [2012] eklr** on the application and onus of proof under Section 112 of the Evidence Act. on their part the 1st defendant filed submissions dated 16.05 2020 on the 18.5.2020, the submissions by the 2nd and 3rd defendants were dated 18.5.2020 and filed the next day while the third party did file submissions on the 18.05.2020 with a list of authorities being filed on the 25.05.2020. Thereafter parties attended court on the 28.05.2020 to highlight the filed submissions. Before the highlights could be taken, the applicant applied to amend his motion at prayer 2 by deletion of the words pending hearing *inter-partes* so that the prayer if granted be pending determination of the suit. That application was allowed by the court after the opposition by Mr Oloo was taken and considered by the court.

Submissions by the applicant

16. The plaintiff's counsel, Mr Khagram, in highlighting did adopt his written submissions in whole the sought to highlight the point that there was a clear of the clearest cases to merit grant of an interlocutory mandatory injunction; that there was no partnership between the plaintiff and the 2nd and that defendant; that the conduct between the defendants leading to there being no shares to the credit and account of the 1st defendant's subsidiary Ms I & M nominees ltd was a clear evidence of collusion by which the 2nd and 3rd defendants traded in other names and accounts and aimed at prejudicing the plaintiff and thus disentitled it to the right to realise the security offered to it and lastly that the letter of offer dated 4.11.2016 was to substitute the shares with the legal charge. Those grounds when put together with the fact that the interested party had not demonstrated payment of the purchase price by the interested party were sufficient to enable the court grant the application as prayed it being stressed that when the plaintiff sought to be availed specific information, the 1st defendant ignored the request and instead made a demand for payment of the debt due from the plaintiff and prior to making any demand to the principal debtors. To the plaintiff the bank is seeking to take advantage and benefit from own wrongdoing a matter the court should not condone. For this proposition reliance was placed in the decision in **Judith Muok Atieno vs Barclays Bank Ltd [2016] eklr** as well as **Nabro properties ltd vs sky structures ltd [2002] eklr**.

17. In urging the application, the counsel cited to court several decisions notably; **Kenya Breweries Ltd vs okeyo [2002] klr** where the court of Appeal set the principles for consideration before grant of a mandatory injunction; **MCdouglas Kagwa vs weekly Review [1992] eklr** as well as **Imperial Bank Ltd vs Janco Investmennts ltd [2018] eklr** on when to issue Mareva injunction and a tracing order. The case of **Lalji Karsan Rabadia vs Commercial bank of Africa ltd [2015] eklr** was cited for the position of the law that a surety or guarantor is a secondary debtor whose obligation to pay is dependent upon the default by the principal and does not arise until the principal defaults. **Halsbury's laws of England** and **Keating on Construction of Contract** were also cited for the proposition that a surety may be discharged when bad faith or connivance by the creditor at the default of the principal is disclosed and in particular he cannot be called upon to answer to dealings done without his consent. Others cases were cited on when to grant restrictive temporary injunction.

Submissions by the 1st defendant

18. For the 1st defendant the position taken was that the facilities even though intended to finance the trade in shares listed at Nairobi stock exchange, the letters of offer were self-explanatory that the purpose included application and use of the said resources for general investment purposes which was the altered in march 2019 to be for working capital requirements in the ordinary course of business of the 2nd and 3rd defendant. It was thus denied that there was diversion of the funds with the connivance of the 1st defendant a further point was taken that when the plaintiff refused to continue guaranteeing the indebtedness of the borrowers it meant that there had been a default which then entitled the 1st defendant to make the demand as it did. It was then contended that the plaintiff had the obligation to honour his guarantee by paying the outstanding debt rather than seeking to be discharged on the grounds set out.

19. The counsel then cited to court several decisions including **surekha Shah vs I & M bank Ltd [2019]klr, ICCI Bank Ltd vs Surya Holding Ltd [2017]eklr** and **kenya commercial finance co ltd vs Afraha ducational society [2001]EA 86** for the proposition that the sequence of considerations before grant of an interlocutory prohibitory injunction must be followed and that prima facie case is the foundation upon which the other conditions rest and that court considering an application for an interlocutory injunction ought to refrain from making final findings on issues of fact as that may embarrass the trial judge at the hearing. The 1st defendant asserts that there had not been demonstrated any prima facie case because the securities given by the guarantees were continuing and were yet to be discharged. Reliance was then put on the decisions in **Kenindia Assurance Ltd –vs- Commercial Bank of Africa Ltd** to support the position that on when and how a guarantor may be discharged where the plaintiff has consented even if such consent was only at the onset it being emphasised that there was a term in the guarantee, clause 13, providing that before the ultimate balance owing was paid, the guarantors obligations remained.

20. On the pledge of 2,000,000, Equity Banh shares and in addressing the plaintiff's contention that having been omitted from the letter of offer dated 4.11.2016, it ceased to be part of the security, the 1st defendant took the view that by that date the security had been perfected and securely in its hands. It was stressed that the guarantee established a lien over every asset of the plaintiff in the banks possession. The decision in **Sita Steel Rolling Mills Ltd vs jubilee Insurance Ltd [2007] eKLR** was then cited for the proposition of the law that a waiver can be express or implied.

21. On irreparable loss, the defendant relied on the decision in **Surekha's case (supra)** and made submissions to the effect that a party who has offered a property as security cannot turn around and allege that the sale can result in any irreparable loss. On the last consideration being balance of convenience, the 1st defendant cited the decision in **ICICI Bank's case** (supra) urging that the circumstances of the case favours rejection of the application for the disputed facts to be dealt with on the merits. The summary of those submissions is that the plaintiff had failed in his onus to establish the prerequisites of grant of the injunction sought and therefore was not entitled to the orders.

22. In their submissions, the 2nd and 3rd defendants, reiterated their position that they and the plaintiff were in a partnership which entitled the 2nd defendant a monthly salary, that the facility afforded was never limited to trading in shares at the Nairobi stock exchange but included provision of working capital and therefore it cannot be true that the facility was employed for purposes different from those intended. It was then contended that on the facts disclosed there had not been lid a basis to order their arrest, furnishing of security or even freezing of the assets. The counsel cited to court **Uba kenya bank Ltd Jyoti structures limited [2018] eKLR** for the holding that a freezing order is never to be used to pressurise the defendant, as type of asset stripping or to confer any proprietary interests on the plaintiff over the property of the defendant but sole intended to obviate dissipation of assets during the pendency of litigation and designed to obstruct or delay the execution of any judgment in the suit. A mareva injunction was submitted to be an equitable temporary in nature and just l like mandatory injunction which is only available in exceptional and special circumstances. The decisions in **Agyp (K) Ltd vs Vora [2000] EA 287** and **Martha Khayanga Simiyu vs HFCK [2001] 2EA 540** were relied upon with emphasis that the conduct of the applicant regarding candour and disclosure of material facts are critical considerations. The decision in **Nguruman Ltd vs Jan Bonde Nielsen [2020] eKLR** was cited on the purpose of undertaking as to damages. in the submissions nothing was said of the sale of the two motor vehicles save that the same was done before the suits were filed and purely for personal reasons and not to pre-empt any possible decree in favour of the plaintiff.

23. The Interested party also filed and attended court to highlight submission whose effect was that she bought and had the two motor vehicles transferred to her on 27.12.2019 and 21.3.2020, way before the suit was filed and served upon her, and that in buying the chattels, she had no notice of the plaintiff's claim. It was the submitted that being not the property of the 2nd defendant the same were not subject to being attached to answer any decree that may be passed against the said non-owner. To the Interested Party's counsel, the orders sought against the two motor vehicles can only issue against a defendant and that here there is no substantive suit against his client.

Issues, Analysis and Determination

24. I have had the benefit to not only read the submissions filed and the law cited but also had the highlights by the counsel. The dispute emerging from that reading and the reading of the pleadings begs the court's determination on whether material has been placed before the court to merit the grant of; a mandatory injunction, mareva injunction to freeze the assets of the 2nd and 3rd defendants, conditional attachment of the two described motor vehicles, warrant of arrest against the 2nd and 3rd defendant, an order for provision of security as well as prohibitory injunctions stopping the sale of the securities given by the plaintiff to the 1st defendant. In coming up with that position, I have taken cognisance of the fact that prayers 1,3,4 & 5 stood spent the time the matter came up for hearing *inter-partes* and was so heard.

25. In the course of my reading towards appreciation of the dispute I must say from the onset that the dealings between the plaintiff and 2nd and 3rd defendant is not disputed just like the fact that the plaintiff outlaid himself in such dealings by availing the working capital in both cash and by guaranteeing the banking facilities from the 1st defendant. Even the extent of such outlay is not contested by the 2nd and 3rd defendants. What emerges as the contention between those three parties is whether the three were in a partnership and whether the 2nd defendant as the person in charge and management of the day to day operations used the funds put at his disposal for the intended purposes.

26. As between the plaintiff and the 1st defendant, the dispute discloses itself in the question whether that defendant ensured compliance with the terms of the contract between the parties by ensuring that the facility was used only for the intended purpose of buying shares traded at the Nairobi stock exchange and that all such securities purchased were registered in the 1st defendants subsidiary, one I & Nominees Ltd account mehul & Praksha Patel and held to the bank's order as security of the facility. On that question the plaintiff contends that the 1st defendant conspired with the 2nd and 3rd defendants by allowing the funds to be utilised otherwise without buying the intended securities for which reason he contends the ban is not entitled to the realisation of the securities provided by the plaintiff being enforced against him.

27. The necessity to join the Interested party is evident to be informed by the fact that the said party bought the two motor vehicles belonging to the 2nd and 3rd defendant just as the dispute between the parties was simmering and the plaintiff views the purchase to have been calculated to assist the 2nd defendants hide or just spirit away his known assets beyond the reach of any recovery process by the plaintiff. Based on such disputes, as briefly summarised, the plaintiff pursues the grant of the prayer alluded to above and which I prose to evaluate

and determine in the following order.

Mandatory injunction

28. Prayer 2 of the motion, as amended, even if expressed to seek a mandatory injunction pending suit, is in truth a prayer for judgment for the specified sum. In deed it is the kind of an order that summarily disposes the dispute and leaves nothing to be dealt with at the hearing. It is the kind of an order that can only be made after the court satisfies itself in a conclusive determination as to the rights of the parties. I determine that the relationship between the plaintiff and the borrowers remain arguable either way and must await the tender of evidence before the plaintiff case can stand proved or disproved. It is thus my finding that that it would be pre-emptive and premature to give the mandatory in the fashion prayed. In coming to this conclusion, the fact that the court has not been convinced that that there is an exceptionally clear and strong case meriting a determinative order at this interlocutory stage is underscored.

Conditional attachment of motor vehicles KCJ 089T and KCF120C

29. While the plaintiff maintains that the two motor vehicle belong to the 2nd and 3rd defendants, both defendants and the Interested Party maintain that the same were in fact sold, property in them passed and legal ownership moved to the interested party before the suit was filed and orders served. The provisions invoked to ground this request are to be found under Order 39 Rules 1,2,5 & 6 Civil Procedure Rules. A reading of the rules and the decisions of the superior courts on the application thereof give the learning that before an order for attachment before judgment can be ordered, the applicant must establish, to the satisfaction of the court, that the defendant is, with the design to defeat, delay or obstruct the plaintiff in executing any decree in a pending suit, about to dispose or remove from the jurisdiction of the court, the whole or part of his property. The rules are designed to provide a pre-emptive remedy and to curtail dissipation of the defendants'asssets. I see no intention or purpose in the rules geared towards undoing a disposal once effected and at an interlocutory stage. Other requirements I get from the rules is that the proprietary interests must, prima facie, be vested upon the defendant and the order is only available against the defendant as the person who may ultimately be called upon to satisfy the plaintiff's decree.

30. In the matter before me, there is evidence, prima facie, that the two chattels were indeed sold and transferred to the interested party on the 27.12.2019 and 21.03.2020. from those dates, it would pass, before contrary evidence is presented that the two chattels are not owned by the 2nd or 3rd defendant and therefore no attachment against the tow can validly be issued against the property not shown to belong to both or either.

31. Over and above the absence of attachable interests in the motor vehicles, the law is that an order of attachment before judgment cannot be given in the first instance and before the defendant is called upon to show cause. My appreciation of the law in this area is that the proper prayer by the plaintiff should have been limited to a request for notice t0 show cause. I hold the view and find that if a court gives an order for attachment before judgement before the defendant is called upon to show cause, such an order would, under the rules and stare decisis, be invalid and a nullity. In **David W.Ndirangu v Adijah Hassan Abdalla [1980] eKLR** the court of appeal expressed the displeasure at the easy and slight way the court had resorted to while granting such orders. In separate decisions, the three judges said: -

> **Miller, JA :- "By rule 6 of the order, it is upon the defendant's failure to show cause why he should not furnish security, or to furnish the security required within the specified time that the court may order the attachment of the property sufficient to satisfy the decree which may be passed in the suit. The learned judge was in error to order the summary attachment of the vehicle at first instance on the respondent's application without calling upon and requiring the appellant to show cause…**
>
> **Potter JA:- I agree that the order for attachment of the Toyota motor vehicle which was a nullity and should be set aside. I also agree that the appeal should be allowed with costs in this court and below. <u>It has been the melancholy experience of this court that orders for the attachment of a defendant's property before trial of the cause are frequently made without proper adherence to the provisions of the Civil Procedure Rules. This is another such case.</u>**
>
> **The final step is set out in rule 6(1) where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, the court may order the attachment of property sufficient to satisfy the decree. In my own view the learned judge ordered an attachment of property in this case in total disregard of the provisions of rules 5 and 6…**
>
> **Law JA The learned trial judge (Nyarangi J) on January 22, 1979, ordered the attachment of a motor vehicle, on an *ex parte* application for attachment before judgment, without directing the defendant/appellant either to furnish security, or to appear and show cause why he should not furnish security, in breach of order XXXVIII rule 5. This purported attachment was a nullity, as property cannot be ordered to be attached before judgment at the instance of a plaintiff unless the defendant is given an opportunity to show cause why he should not furnish security, or fails to show cause, or to furnish the required security…"**

32. While the proximity between the date of alienation of the two chattels together with the price quoted as the purchase price may be suspect, subject to proof by evidence, the fact that there is evidence that the two motor vehicles were not the property of the defendants when the suit was filed and served puts them outside being subjected to an attachment before judgment. A property with vested interests upon third parties to the suit is, by Rule 10 of Order 39, expressly mandated never to be subjected to attachment before judgment. That prayer as sought fails but since I doubt the good faith in the dealings between the 2nd defendant and the Interested Party, and to preserve those vehicles as part of the subject of the suit, I direct that the same shall remain in their current state of registration and ownership pending the determination of the suit.

33. Closely related to this determination, is prayers 7 & 8 seeking arrest of the two borrowers as well as directing then to furnish security or show cause why they cannot furnish security. On these prayers the cardinal consideration is whether the court has been satisfied that the defendant has absconded from jurisdiction, disposed or moved his property or shown an intention to abscond from jurisdiction, dispose or move his of his property from the jurisdiction of the court all calculated to delay, obstruct or defeat the execution of any decree that may be

passed against him. In the instant matter it is not disputed that within three months before the suit was filed the 2nd defendant sold and had two of his known assets and had the same transferred to the interested party. In his sworn Replying Affidavit, no explanation is offered for the decision to sell the said chattels nor was any glimpse offered as to what other property is owned by the two defendants but there is a forceful assertion that they do not intend to flee from Kenya but rather that both are keen to face the litigation and reveal the truth. Of note is the fact that the sale is not denied but conceded. With that common position and when one looks at the proximity of disposal with the dispute I am convinced that the plaintiff has discharged, on a prima facie basis even at this interlocutory stage, the burden of proving that the alienation is to defeat any decree that may issue against the defendant. In **KURIA KANYOKO t/a AMIGOS BAR & RESTAURANT vs. MOSES KINUTHIA NDERU & OTHERS (1988) 2 KAR 126**, the court of appeal held that:

> **"The burden of showing the appellant had disposed of his property or moved them from the 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."**

34. Having discharged the burden upon him, I do find that the plaintiff is entitled to the order that the 2nd and 3rd defendant attend court on date to be agreed with the parties and show cause why they cannot be ordered to furnish security in the sum of Kshs 200,000,000 and USD 225,00. However, just now that the application has been heard *inter-partes* with the participation of the 2nd and 3rd defendants, I do not appreciate any fear that they will not attend court to show cause for which reason the prayer for warrants of arrest will serve no just purpose. I decline to grant prayer 7 of the Notice of Motion.

Injunction against sale of the shares and land offered as security

35. That the shares and land were given and pledged to the bank as security for the payment of the borrower's obligations to the bank is not in contention but conceded. The point in dispute is whether by the shares were dropped as such security by consent and whether the alleged collusion between the three defendants had discharged the plaintiff of such liability on the principle of law that none should be allowed to reap the benefits from own wrongdoing. Those questions are strenuously argued and contested and in my opinion therein lies a prima facie case that must be investigated upon evidence being led at the trial. I consider a prima facie case to emerge owing to the fact that there was indeed a covenant between the 1st defendant and the other two that at no time would the debt exceed the securities held in the shares purchased and held on the order of the bank. In that regard the following clause9(h) of the last facility letter, dated 3.9.2019, (I see the same covenant captured as clause 9(j) in all the previous security letters) will at trial be focal for courts determination. That clause on its plain reading and the meaning emerging point to the parties' intention that at all times, the shares bought and pledged as security would exceed the facility availed by at least 40%. I get that clause to fully secure the 1st defendant to an extent that any time that ration would be overshot, the 2nd and 3rd defendants as borrowers were obligated to make good the overshot within fourteen days. In the matter it is contended by the 1st defendant that it holds no shares on account of the other defendants. At trial it would be the duty of the trial court to determine if that be true and under what circumstances the limit was exceeded to the colossal sums now said to be due and wing and sought to be recovered by the realisation of the suit property. That clause placed the obligation to compute the margin upon the 1st defendant and the obligation to settle the excess upon the 2nd and 3rd defendants. That together with the allegation and assertion that the Equity Bank shares were dropped as security present to court not just an arguable case but a strong one and thus a prima facie one that deserves preservation by this court so that the litigation to be pursuit remain valid rather than a pretence or just academic.

36. While it remains the law that the court must consider the three established principle in ***Giella vs Cassman Brown & Co*** **[1973]** EA 358, it is also the law in the same decision and the subsequent ones that the existence of a prima facie case is the first pillar of the three and the foundation that must be present before the court takes the next step. In my opinion, in some cases, the presence of a prima facie case would itself entitle a party to an interlocutory injunction purely on the constitutional dictate that every person is entitle to access justice and access it in a robust and efficacious manner. I have asked myself whether it would be just to identify the tow arguable points I have done above, and then ambivalently decline an injunction. I have also posed to myself the question whether the justice system will remain portrayed as efficacious if an injunction is declined at this junction then at trial the plaintiff succeeds to prove that there was some wrong doing by the defendants. I have posed to myself the questions while considering whether it is the law that whenever damages may appear adequate no injunction shall never issue. The law in my understanding is that an injunction is a discretionary remedy issued by the court to prevent a wrong that is threatened. To say that a wrong be permitted to pass merely because the wrongdoer is muscled enough to pay damages, however much and irrespective of a brazen injury or just a fraudulent one, would to my mind be contra the equity's foundation of the remedy. A court of law ought never to cast itself as providing succor to violation of the law. In **Waithaka v Industrial and Commercial Development Corporation [2001] eKLR, Ringera j,** did anxiously consider the point and delivered himself in the following words:-

> **As regards damages, I must say that in my understanding of the law, it is not an inexorable rule that where damages may be an appropriate remedy, an interlocutory injunction should never issue. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespasses. That would not only be unjust but it would also be seen to be unjust. I think that is why the East African Court of Appeal couched the second condition in very careful terms by stating that normally an injunction would not issue if damages would be an adequate remedy.**
>
> **By using the word "normally" the Court was recognizing that there are instances where an injunction can issue even if damages would be an adequate remedy for the injury the applicant may suffer if the adversary were not injuncted. I think some of the considerations to be borne in mind is the strength or otherwise of the applicant's case for a violation or threatened violation of its legal rights and the conduct of the parties. If the adversary has been shown to be high-handed or oppressive in its dealings with the applicant this may move a Court of equity to say:**
>
> > **'money is not everything at all times and in all circumstances and don't you think you can violate another citizen's rights only at the pain of damages.'"**

37. In this matter, there emerges a very loud complaint that the plaintiff is being exposed to loss of very valuable property out of what is termed collusion between the defendants. If that were to succeed at trial after the property shall have been lost courtesy of a denied

injunction, the court would have cast itself for having decided the injunction request on the basis of financial strength rather than the competing right of the parties' presented in the dispute. Such scenario will equally cast the court as having disregarded the constitutional principal on equality before the law[1]. It shall as well not escape the attribute of having allowed a person accused of wrong doing to benefit from the wrong before a determination is made on the accusations[2]. To this court the rule of law and civility in human relationships, including contracts, must be left to flourish over opulence when it comes to determination of legal disputes and rights.

38. The second test, whether damages would be an adequate remedy, is not an absolute test that every time damages is demonstrated to be adequate no injunction issues. Rather the test is that, normally where damages are an adequate remedy, injunction should not issue. Ability to pay damages should not be the permit, for those able to pay, to violate the legal rights of the less able. In **Margaret Wanjiru T/A Peggy Phones Vs Peter Kamau T/A Kawandara General Stores & 2 Others [2015] Eklr the** court said: -

> **"On whether or not damages would be an adequate remedy, I am of the view that to deny a citizen guaranteed legal constitutional right is an extreme and harsh step that must be frowned upon. Frowned upon for it portends a situation where so long as one is endowed of financial muscle, he would offend and trod upon others rights and always demonstrate ability to pay. That would fly on the face of the constitutional dictate against discrimination and equality before the law. It shall open a window by which the financially strong would flout the law with abandon so long as they can pay damages. That has the inevitable prospects of a lawless society where monetary power and other ignoble considerations rather than civility and obedience to the rule of law would reign supreme.**
>
> **It is not difficult to imagine the extent of anarchy and dissent that would then ensue with resultant disruption of smooth operation of orderly and legitimate commerce. Such is the scenarios all civilized societies seek to obviate by surrendering to the dictates of the rule of law and due process."**

39. Before me I have come to the conclusion that it would be unfair in the circumstances of the case and the materials availed to refuse an injunction because the plaintiff has not sought the recovery of any damages. My conclusion on the prayers for injunction is that the same is well merited and not being doubt on the two considerations, I shall not address the question of balance of convenience.

Mareva injunction

40. The court has, while considering the prayer for provision for security, issued a notice to the 2nd and 3rd defendant to attend court and show why they should not furnish security. Now the purpose of a mareva injunction in this suit would be to secure the satisfaction of any decree that may issue against the defendants. In my view, in the context and circumstances of this suit would aid the furtherance of any security the court may order to be furnished. However, in considering such a grant, the court must be cognisant that the order does not take the form and stature of a forfeiture order, a way to pressurise the defendant into paying a disputed debt nor should it confer upon the plaintiff any proprietary rights over the defendant's asset. The purpose and effect of the order must be limited to obviating the prospects of the would be judgment debtor from dissipating his property so as to defeat or delay the enforcement of any prospective judgment. Being a discretionary matter, the conduct of the parties is pertinent. Here the fact that there is admitted alienation of two motor vehicles is the kind of a conduct that would attract the remedy of mareva injunction. For the foregoing reasons, I do grant to the plaintiff prayer 11 of the Motion.

Motion by the 2nd and 3rd defendant to strike out the counter claim against the two

41. By their Notice of Motion dated the 11.5,2020, the two defendants pray that the counter claim by the 1st defendant against them, as co-defendants, be stuck out for being impermissible under the rules. The sole reason put forth in support of the application is that in law, a counter-claim is a cross action and can only lie against a plaintiff and not a co-defendant and that any claim against a defendant by co-defendant can only be pursued by way of a Notice against a co-defendant but not as sought by the 1st defendant.

42. The application was opposed by the 1st defendant/Respondent by the Grounds of Opposition dated and filed on the 14.05.2020 whose gist was that the law under Order 7 Rule 8 as well as Order 8 Rule 1(5) permits the defendants to file and pursue a counter-claim against the plaintiff and any other party whether parties or non-parties to the suit including a co-defendant and that the counter-claim as filed raises serious triable issues meriting better determined at the same time with the plaintiff's claim. The 1st defendant also filed a list of authorities citing some 5 decisions.

43. On the directions by the court to the counsel for the parties, both filed written submission dated 3.6.2020 and 9.6.2020 respectively. In those submissions the applicants relied upon and cited to court two decision; one by the court of appeal and another by the High court while the respondent relied on the five decisions of the High court filed the same day with the Grounds of Opposition.

44. I have read the submissions and the authorities cited by both sides and it is clear to me that the determination of the Motion only seeks an answer to one question; - *whether the law anticipates and permits the pursuit of a counter-claim by a defendant against a co-defendant?*

45. Going by the materials placed before the court I take it that both sides view the matter as very straight forward and demanding no more than the interpretation of the rules on counter-*claim.* In executing the court mandate in this matter, it having been brought to my attention the interpretation by other judges in this jurisdiction, the starting point must be **Order 7 rule 7 & 8** which state:-

> **"Rule 7. Where any defendant seeks to rely upon any grounds as supporting a right of counterclaim, he shall, in his statement of defense, state specifically that he does so by way of counterclaim.**
>
> **Rule 8. Title of counterclaim.**

Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff, together with any other person or persons, he shall add to the title of his defence a further title similar to the title in a plaint, setting forth the names of all persons who, if such counterclaim were to be enforced by cross-action, would be defendants to such cross-action, and shall deliver to the court his defence for service on such of them as are parties to the action together with his defence for service on the plaintiff within the period within which he is required to file his defence"

46. When the words of a statute are plain with no ambiguity, it is desirable and obligatory that the court does not import meaning other than the clear one into the text. In such a situation the court is bound to adopt a tool of interpretation that preserves and assigns to the words used their plain and ordinary meaning. In the instant case I do find that the words of the rule are neither ambiguous nor equivocal and it is thus not open that the context or background be delved into. I read the words of the Rule to only permit a counter-claim by a defendant against the plaintiff but not against a co-defendant. That is the reasonable interpretation to give to the rule if the counter-claim is left to remain a cross-action. A cross- action can only be raised against the person with the initial action and not a co-defendant with no action against the other. The use of the words ***'together with any other person or persons'*** ought to present no ambiguity. It presents no ambiguity because if the Rules Committee intended to refer to the defendant, nothing would have been easier to use the word defendant the same way the plaintiff has been expressly used. Those words must be heard to mean any other person not yet party to the suit.

47. On that basis and even having read the various persuasive decisions cited to the court, I do find that the 1st defendants counter-claim against the 2nd and 3rd defendants don't lie but otherwise bad for being incongruent with the law on counter-claims. On the basis that it is bad in law, I order it struck out with costs to the two applicants.

48. In the end, I do find that the plaintiff is entitled the grant of prayer 8 ,9,10 and 11 and in the following terms: -

a. An order that the 2nd and 3rd defendant shall attend court and show cause why they cannot be compelled to provide security for the sum claimed by the plaintiff.

b. An order of temporary injunction does issues against the 1st defendant and restraining it, either by self, agents, employees or agents from liquidating or selling the plaintiff's 2,000,000 in equity bank Ltd pending hearing and determination of the suit

c. An order of temporary injunction does issues against the 1st defendant and restraining it, either by self, agent's employees or agents from realising by sale the security offered to it being the Charge and Further Charge over the property known as **subdivision No 9560(original Number 9410/4 and registered as CR No.32224)** pending the hearing and determination of this suit

d. A *mareva injunction* be issued to freeze all assets of the 2nd and 3rd defendant, held to their credit in any bank including those held by banks in safe/ locker boxes and any by the Central Depository and Settlement Corporation in any CDSC accounts pending the hearing and determination of the suit.

e. I award the costs of the application to the plaintiff

49. On the 2nd and 3rd defendant's application dated 11. 5.2020, I do find the same wholly merited in that the law as it stands today, in my appreciation, does not envisage a counter-claim by a defendant against another defendant but rather by a defendant against the plaintiff. On such finding I do strike out the counter-claim as against the 2nd and 3rd defendants with costs.

50. Having so said, I direct that the suit now be fast tracked, any outstanding pleadings or documents be filed and served within 14 days from today for the matter to proceed to case conference on the 28th of September 2020

Dated, **signed** and **delivered online** by mode of MS Teams, this **20th** day of **July 2020**

P J O Otieno

Judge

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[1] Article 27 of the Constitution of Kenya

[2] Nebro Properties Ltd vs Sky tructures Ltd (2002)eklr