



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**HC. MISC. CIVIL APPLICATION NO. 1 OF 2015**

**IN THE MATTER OF: ADVOCATES REMUNERATION ORDER 2009**

**IN THE MATTER OF: ADVOCATE-CLIENT COSTS ARISING FROM HIGH COURT ELECTION PETITION NO. 14 OF 2013  
MALINDI BETWEEN BENSON KARISA NJIRANI MANENO (PETITIONER) –VS- JACOB MACHEKELE, INDEPENDENT  
ELECTROL AND BOUNDARIES COMMISSION & PETER SAFARI SHEHE (RESPONDENTS)**

**MADZAYO MRIMA & JADI ADVOCATES.....APPLICANTS/RESPONDENTS**

**VERSUS**

**HON. PETER SAFARI SHEHE.....RESPONDENT/APPLICANT**

**CORAM: Hon. Justice R. Nyakundi**

**Ms. Dr. Khaminwa for the Appellant**

**Madzayo Mrima for the Respondent**

**RULING**

This notice of motion by the applicant filed in court on 13.9.2019 and supported by an affidavit of **Peter Safari Shehe** expressed under Order 51 (1) & (3), Order 40 (1)& (4), Section 1 (a)& 1(b) & 3 (a) and 63 (e) of the Civil Procedure Act delves into the factual matrix of the issues in Election Petition No. 14 of 2013 where he seeks the following reliefs:

***a). That this application be certified as urgent and service be dispensed with at the first instance.***

***b). That this Honorable Court be pleased to grant temporary injunctive orders against the applicant/respondent and their agents restraining them from proceeding with the auction sale slated for 16<sup>th</sup> September 2019 pending hearing and determination of this application/suit.***

***c). That the applicant/respondent and their agents be compelled to release to the respondents/applicants Tipper Lorry registration number KCC 846S which was seized on the 2<sup>nd</sup> September 2019.***

***d). That costs and interest be awarded to the respondent/applicant.***

In a gist contained in the affidavit averments its deposed that if the execution and sale of the detailed motor vehicle registration number KCC 846S takes effect he would suffer substantial loss and extreme hardship.

That the loss would not be adequately compensated in damages. He further avers that the applicant/respondent filed an Advocate client bill of costs dated 31.3.2015 totaling to Kshs.6,507,822.52.

That the said bill of costs was taxed at Kshs.2,000,000/= as per the certificate of costs issued on 6.4.2017. He further avers that the applicant/respondent failed to obtain a decree in light of the certificate of costs and unprocedurally instructed an Auctioneer (Kilimanjaro Auctioneers) to proceed and attach the respondent/applicants assets.

That the motor vehicle slated for auction was released upon payment of Auctioneer fees of Kshs.285,101/= pursuant to a court order dated 15.3.2019.

That the secured seizure and attachment of the motor vehicle is contrary a breach of the law as the costs awarded in the Election Petition and

its set off with the Advocate-Client costs.

In reply to the application, the respondent to the notice of motion filed grounds of opposition filed in court on 17.9.2019 stated as follows:

**1). That the application is a gross abuse of the court process to delay the end of litigation without lawful justification that the respondents is acting pursuant to a decree on record dated 2.5.2018 and issued on 25.5.2018 contrary to the applicant assertions.**

**2). That the makers used in the application herein are now resjudicata.**

**3). That the applicant has not demonstrated good faith to warrant the orders sought as no efforts whatsoever has been made to satisfy the decree.**

**4). That the applicant has failed to make material disclosure regarding the application seeking almost similar orders which was discussed on 25.7.2019.**

Several other allegations are made by the parties in the notice of motion and grounds of opposition.

## Analysis

The law relating to injunctions has been provided under Order 40 (1) (2) of the Civil Procedure Rule which provides as follows:

**1. "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;**

**(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 orders."**

The applicant does not get to be granted an equitable remedy of injunction unless he satisfies the following conditions set out in the cases of **Giella vs Cassman Brown and Co. Ltd [1973] EA. 358 at 360, Mrao Ltd v First American Bank of Kenya and 2 Others, [2003] KLR 125, Moses C. Muhia Njoroge & 2 Others vs Jane W. Lesaloi and 5 Others, [2014] eKLR**

a). where he is required to demonstrate that he has a prima facie case with serious triable and arguable issues with a probability of success against the respondent. The test on prima facie case does not mean establishing a case beyond reasonable doubt

b). He will suffer irreparable harm/injury which cannot be adequately compensated by damages.

c). Balance of convenience: In granting an injunction under this condition the court must be satisfied that the hardship or inconvenience which is likely to be caused to the applicant by declining the injunction will be greater than that which is likely to be caused to the respondent.

Based upon the pleading and evidence in a suit as lightly pointed out in the case of **Kenleb Cons Ltd v New Gatitu Service Station Ltd & Another [1990] KLR 557** where **Bosire J** stated:

**"[T]o succeeds in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right, legal or equitable, which requires protection by injunction."**

What and how a court can be able to decide on what constitutes a serious triable issue is not altogether crystal clear. To my mind the language in the Supreme Court Rules (White book Supreme Court more clearly expresses the view which the court has to take into account as reflected in the following passage:

**" 'not frivolous or vexatious', a serious question to be tried', 'a real prospect of success' – what then is the American Cyanamid threshold test? Lord Diplock said it is sufficient if the court asks itself: is the applicant's action 'not frivolous or vexatious?', is there 'a serious question to be tried?', is there 'a real prospect that he will succeed in his claim for a permanent injunction at the trial?**

**..... The expression 'frivolous or vexatious' is a term of art well known to lawyers in the context of applications to strike out pleadings. It states a low test and may not include a virtually hopeless claim provided it is honestly brought. For this reason, the authorities show a preference for stating the American Cyanamid threshold test in terms giving natural meanings to the expressions 'a serious question to be tried' and 'a real prospect of success' and for ignoring the expression 'not frivolous or vexatious'. The prospects of the plaintiff's success are to be investigated to a limited extent. All that has to be seen in whether**

*he has prospects of success which, in substance and reality, exist. Odds against success do not defeat him unless they are so long that the plaintiff can have no expectation of success, but only a hope. If his prospects are so small that they lack substance and reality, then he fails; for he can point to no question to be tried which can be called 'serious', and no prospects of such success which can be called 'real'."*

An injunction usually is not an independent cause of action and cannot stand without a substantive claim alleging a violation or an infringement of a right. Typically, a remedy for interlocutory injunction comes in as an ancillary to support the substantive claim. In broader sense the court applies the above three pronged-tier approach to determine whether a claim is ripe for grant of an injunction but as **Lord Diplock** noted in **American Cynamide Co. vs Ethicon Limited [1975] AC 396; [1975] 2 W. L. R. 316**

*"The whole point of temporary injunction is to keep matters in status quo until the main issue in the case can properly be heard."*

It is against this background I should consider whether the averment from the affidavit of an applicant present a claim that is ripe for a preliminary injunction to issue pending a final Judgment in the case. The relief sought by the applicant is to restrain the respondent from proceeding with the auction sale of the motor vehicle **KCC 846S** which was seized on 2.9.2019.

The respondent in opposition, for one argues that the court should closely scrutinize the genesis to ensure that the applicant by his action does not deny the fruits of the certificate of costs due and owing to the respondent. According to the respondent the interlocutory injunction by the mover will alter and stop execution process to enforce the decretal sum that the applicant is aware it's a claim on the merits. As matter stand the applicant has no substantive suit for an injunctive injunction to issue on grounds that there is a serious issue to be tried and argued at the main trial. Except for the attachment of the motor vehicle in this case, the undisputed facts as noted in applying the principles in **Giella vs Cassman and American Cynamide (supra)** the evidence in this case is inconsistent with the elements of a prima facie case. The interim injunction objective is to further the protection of existence of a legal right or interest to avoid the applicant to suffer a greater harm before the alleged claim is heard and determined.

I am therefore satisfied that the question of whether the injunction to restrain the enforcement of a valid Judgment will not be imposing a higher risk of injustice against the respondent.

Whether there is a serious issue to be tried conversely it is to deprive the respondent the enjoyment of the fruits of his Judgment. It follows therefore even in assessing whether an absent injunction will cause irreparable harm to the applicant the answer is in the negative. For the effect of it will take away the constitutional rights and statutory rights of the respondent enforcing a Judgment to secure his economic and social rights under Article 43 of the Constitution. Weighing these factors one after another even the balance of convenience favors the respondent.

The applicant having failed to satisfy all the three conditions for the grant of an interlocutory injunction under Order 40 Rule (1) (2) of the Civil Procedure Rules this court declines to exercise discretion as a result the application is lost with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 15<sup>th</sup> DAY OF OCTOBER 2019.**

**R. NYAKUNDI**

**JUDGE**

**In the presence:**

1. Mr. Mwadilo for the applicant
2. Mr. Kinyanjui for the Respondent