



**Paul v Avanzar Solutions Limited & another (Civil Appeal 1190 of 2023)
[2025] KEHC 13497 (KLR) (Civ) (30 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13497 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 1190 OF 2023

AC MRIMA, J

SEPTEMBER 30, 2025

BETWEEN

LINUS MWITI PAUL APPELLANT

AND

AVANZAR SOLUTIONS LIMITED 1ST RESPONDENT

BEN GACHOYA 2ND RESPONDENT

(Being an appeal from the Ruling and Order of Hon. H. M. Ng'ang'a (Principal Magistrate) delivered on 26th October 2023 in Nairobi CMCC No. E5143 of 2022)

JUDGMENT

1. This Court has had the liberty of going through the litigation since the inception of Nairobi [Milimani] Chief Magistrates Civil Suit No.5143 of 2022 [hereinafter referred to as 'the suit']. The suit was instituted by the Appellant herein, Linus Mwit Paul, against the Respondents herein, Avanzar Solutions Limited & Ben Gachoya. The gist of the suit rested on the Appellant's assertion that he had substantially serviced the loans advanced to him by the Respondents and as such any attempt by the Respondents to exercise any possessory rights over his two motor vehicles which he offered as security could only be a nullity.
2. With a view to assert his rights aforesaid, the Appellant filed an application by way of a Notice of Motion dated 11th October 2022 seeking injunctive reliefs against the Respondents over any interference with his two vehicles which the Respondents intended to attach alleging non-satisfaction of the loans advanced.
3. The application was heard inter partes and a ruling delivered on 16th December 2022. The Court found that the Appellant had indeed established a prima facie case as there were several issues that ought to



be interrogated including the actual loan amounts advanced, any breaches on repayments, the issue of interest charged among others. The Court allowed the application and granted an injunction for a period of 6 months within which period the suit was to be heard and determined. It seems that, despite some hitches, the trial eventually took off, but did not go far as the Appellant only testified in-chief and is yet to be cross-examined. It was that passage of time that prompted the Respondents to file an application seeking security pending trial. That was vide a Notice of Motion dated 31st July 2023 whose ruling was rendered on 26th October 2023. The application was allowed and the ruling is now the subject of this appeal.

4. With the guidance of the Court, more so given that the appeal was against an interlocutory ruling, parties agreed to abandon the interlocutory application and to instead deal with the hearing of the main appeal. To that end, directions were issued dispensing with the filing of the Record of Appeal and that written submissions be forthwith filed. Both parties complied with the filing of their respective written submissions wherein several decisions were referred to in support of the rival positions.
5. This Court has carefully considered the record of the trial Court, that before this Court, the submissions and the decisions referred to and it is now duty bound to determine whether the Notice of Motion dated 31st July 2023 which was determined through the impugned ruling delivered on 26th October 2023 was properly allowed.
6. Before getting into the heart of the discussions, suffice to further note the suit was to be heard and determined in 6 months within which period the Court granted an injunction. Certainly, the 6 months period lapsed and the suit had not been determined. Amid a hot contest in Court, the injunctive orders were discharged on 12th June 2023 on condition that they be reinstated once the Appellant filed evidence of payment since the grant of the orders in December 2022. Urging non-compliance of the above orders, the Respondents filed the Notice of Motion dated 31st July 2023 which was eventually allowed, hence, this appeal.
7. There is no doubt that the parties disagree over the state of affairs. On one hand, the Respondents advanced their monies to the Appellant in the form of loans and they are entitled to lawful repayment if any of them is outstanding. On the other hand, the Appellant is also entitled to the protection of the law if it is true that the Respondents are acting outside *the Constitution* and law. That was the balance which the trial Court carefully applied in granting the injunction; to accord both parties an opportunity to present their cases before an arbiter within 6 months. As it turned out that the suit was not determined as intended, the Court heard both parties and eventually, and, conditionally discharged the orders until when the Appellant would file evidence of payment from the time the orders were issued. For reasons unknown to Court, the Appellant did not tender any evidence of payment as ordered.
8. Therefore, with the injunction out of the way and the non-compliance, the Respondents were at liberty to pursue the two motor vehicles which had been used as collateral. However, it turned out that the Appellant had interfered with their tracking systems and the Respondents could neither locate them nor could they physically find them. It is also on record that the Appellant had on several occasions been asked to avail the vehicles for valuation purposes, but in vain. It was on that background that the Respondents filed the Notice of Motion dated 31st July 2023 which was eventually allowed.
9. The above application was hinged on Order 39 Rule 5 of the Civil Procedure Rules which provides as follows: -
 5. Where defendant may be called upon to furnish security for production of property [Order 39, rule 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.

10. The Court of Appeal laid the principles governing attachment and/or arrest before judgment in *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...

11. In *Awo Shariff Mohamed t/a Asmi Services Station vs. Caltex Oil Kenya Ltd* [2008] eKLR, the Court rendered thus: -

.... 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

12. Further, the Court in *Shiva Enterprises Limited v Vijaykumar Tulsidas Patel t/a Hytech Investment* (2006) eKLR observed that:

... 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 aforesaid 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.

13. In considering the above principles coupled with the fair trial requirement that parties be accorded an opportunity to be heard, there is no doubt that applications under Order 39 Rule 5 are unique and as such, they call for higher threshold than the ordinary applications in civil litigation. Therefore, a Court must be certainly satisfied that there is credible evidence of the contemplated events in Rule 5[1].
14. Returning to the case at hand, the Court shielded the Appellant from any execution right from the inception of the suit. Further, even before discharging the injunctive orders, the Court ordered the Appellant to avail the vehicles for valuation and also directed the Appellant to tender evidence of making payments for a period of 6 months. The Appellant did not comply with any of the orders. That aside, it came out that the Appellant had dislodged the vehicles' tracking system which was installed by the Respondents there by making it impossible for the Appellants to keep track of the vehicles.
15. Addressing its legal mind as an impartial arbiter, this Court finds and hold that the circumstances in this case as were, availed the Court sufficient evidence to be satisfied that indeed the Appellant was out to obstruct or delay the execution of any decree that may be passed against him and/or was about to remove the whole or any part of motor vehicles from the local limits of the jurisdiction of the Court. The trial Court was, therefore, right in allowing the application.
16. Having found as much, the upshot is that the appeal is unmerited and the following final orders do hereby issue: -
 - (a) The appeal is dismissed.
 - (b) For clarity, the ruling of the trial Court dated 26th October 2023 is hereby affirmed.
 - (c) Given the age of the suit, the hearing and determination shall be expedited.
 - (d) The Appellant shall bear the costs of the appeal assessed at Kshs. 100,000/= [Kenya Shillings One Hundred Thousand Only]. The costs shall be paid within 30 days of this date and in default execution to issue.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF SEPTEMBER, 2025.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Ongeri, Learned Counsel for the Appellant.

Michael/Amina – Court Assistants.

