

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**COMM. CASE NO. E399 OF 2024**

**BETWEEN**

**STANSHA LIMITED.....**  
**.....PLAINTIFF**

**AND**

**CO-OPERATIVE BANK OF KENYA  
LIMITED.....1<sup>ST</sup> DEFENDANT**  
**WESTMINISTER COMMERCIAL AUCTIONEERS.....2<sup>ND</sup>  
DEFENDANT**

**RULING**

**Introduction and Background**

1. By way of the Notice of Motion dated 22<sup>nd</sup> July 2025 made under inter alia **Order 39 Rule 1 & 5** of the ***Civil Procedure Rules*** (“the ***Rules***”), the 1<sup>st</sup> Defendant (“the Defendant”) seeks an order of attachment before judgment against the Plaintiff’s arbitral award of Kshs. 410,410,971.93 (“the Award”) and that it be restrained from transferring, assigning, receiving, or disposing of the Award or proceeds arising therefrom.

2. The application is supported by grounds on its face and the affidavits of its Legal Officer, Kennedy Odhiambo Otiato, sworn on 22<sup>nd</sup> July 2025 and 1<sup>st</sup> October 2025 and it is opposed by the Plaintiff through the replying affidavit of its director, Sharon Gathoni, sworn on 21<sup>st</sup> September 2025. The parties have canvassed the application by way of written submissions which I have considered and together with the pleadings, I will make relevant references to in my analysis and determination below.

### **Analysis and Determination**

3. The said **Order 39 Rule 1 and 5** of the **Rules** provide as follows:

#### ***ORDER 39 - ARREST AND ATTACHMENT BEFORE JUDGMENT***

*Where at any stage of a suit, other than a suit of the nature referred to in paragraphs [a] to [d] of section 12 of the Act, the court is satisfied by affidavit or otherwise—*

*[a] that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him-*

*[i]has absconded or left the local limits of the jurisdiction of the court; or [ii]is about to abscond or leave the local limits of the jurisdiction of the court; or [iii]has disposed of or*

*removed from the local limits of the jurisdiction of the court  
his property or any part thereof; or*

*[b] that the defendant is about to leave Kenya under  
circumstances affording reasonable probability that the  
plaintiff will or may thereby be obstructed or delayed in the  
execution of any decree that may be  
passed against the defendant in the suit,*

*The court may issue a warrant to arrest the defendant and  
bring him before the court to show cause why he should not  
furnish security for his appearance:*

*Provided that the defendant shall not be arrested if he pays  
to the officer entrusted with the execution of the warrant  
any sum specified in the warrant as sufficient to satisfy the  
plaintiff's claim; and such sum shall be held in deposit by  
the court until the suit is disposed of or until the further  
order of the court.*

.....

*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.*

4. The question then is whether the Defendant has made out a case to warrant grant of the application for attachment and injunction

before judgment. Several decisions of our superior courts have laid down the principles to be followed when considering such an application. 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** the Court of Appeal stated 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.*

5. In **Shivam Enterprises Limited v Vijaykumar Tulsidas Patel T/A Hytech Investments [2006] KEHC 257**, Kasango J., amplified the requirements of proof under the subject rule and observed as follows:

*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*

*aforestated 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.*

6. In respect of **Order 39 Rule 1**, Kasango J., in **Omar Saleh Sherman v Bianchi Umberto Vant T/A Bianchi Plant and Machinery [2015] KEHC 4398 (KLR)** held that *“In my view those provisions of Rule 1 and 2 are very clear. They do not require the court to inquire into the disputes in the case. Not at all. But that is what the parties have engaged in, in their affidavits and written submissions. It is clear from Rule 1 that the Plaintiff is required to show that the Defendant with intent to delay, avoid or obstruct execution of any decree has absconded and left local limits of the court’s jurisdiction; is about to abscond; has disposed or removed his property from the local limits of the court’s jurisdiction, or that he is about to leave Kenya in circumstances that afford reasonable probability he intends to delay execution of decree.”*

7. The Defendant's position is that it advanced several financial facilities to the Plaintiff including a Mortgage, Performance Bond of Kshs. 70,900,000.00 and Advance Payment Guarantee of Kshs. 141,800,000.00 to facilitate a contract with Athi Water Works Development Agency (AWWDA). That the contract was terminated in November 2019, and AWWDA recalled the Performance Bond and Advance Payment Guarantee and the Defendant honored the call-up, paying out Kshs. 212,814,286.70, which over-drew the Plaintiff's account.
8. The Defendant states that the Plaintiff acknowledged the settlement of the guaranteed sum and agreed to convert it into a Term Loan Facility of Kshs. 218,000,000.00. That despite restructuring the loan in September 2020, the Plaintiff defaulted on repayments and as of 16<sup>th</sup> April 2025, the debt stood at Kshs. 478,595,190.52. The Plaintiff was awarded the sum of Kshs. 410,410,971.93 on 13<sup>th</sup> January 2023 as per the Award and the Defendant fears the Plaintiff may dispose of or dissipate the Award proceeds instead of using them to settle the debt. The Bank notes that the Plaintiff has given assurances through various correspondence to use the Award to pay the debt but has taken no concrete steps to do so. The Award is described as the Plaintiff's only known substantial asset and that

without a court order, there is a real risk that enforcing any future court decree would be frustrated.

9. In response, the Plaintiff depones that the Defendant did not prove that it intends to delay proceedings, avoid court process, obstruct execution of a decree, or remove property from the court's jurisdiction. That an application for attachment before judgment is reserved solely for a plaintiff seeking security from a defendant and that the Defendant cannot bring such an application against a Plaintiff. The Plaintiff contends that an arbitral award is not property that can be attached under **Order 39 Rule 1** of the **Rules** as the Award is a separate court process and arises from proceedings between the Plaintiff and AWWDA, a stranger to this suit. It states that the Defendant was not a party to the arbitration and that interfering with the Award would amount to interfering with another court's proceedings, that the Award has not been adopted or set aside by any court and the Defendant has not attached any court decree, ruling, or judgment adopting the Award, nor has it shown that the Award is final and enforceable.
10. The Plaintiff states that the cancellation of the underlying contract was found by the arbitrator to be irregular and illegal and

therefore, the Defendant's release of Kshs. 212,814,286.70 was also irregular and illegal from the beginning. It restates that the Award of Kshs. 410,410,971.83 is for breach of contract by AWWDA, not for the guaranteed amounts and that the Defendant's claim for the guarantees and interest is a separate issue. That since the contract with AWWDA was terminated, there is no income to assign to the Defendant and the Plaintiff avers

that it did not actually obtain the facility as intended.

11. Going through the pleadings, submissions and principles of attachment and an injunction before judgment, I find that while the Defendant has demonstrated a genuine debt and the Plaintiff's financial distress, it has failed to prove the specific statutory requirements for attachment before judgment, which the courts have consistently held must be strictly met. It should not be lost that the test for attachment before judgment is not simply a risk of non-payment or financial difficulty but the court must only exercise this power upon clear proof of the mischief that the defendant is about to dispose of his property; or is about to remove his property from the jurisdiction, with the intent to obstruct or delay the execution of any decree.

12. The Defendant has provided no evidence that the Plaintiff is about to dispose of or about to remove the Award proceeds. Its entire case rests on the Plaintiff's past default and insolvency, the Plaintiff's failure to pay the debt despite prior assurances and a general, though genuine, apprehension that the Plaintiff might dissipate the funds. This Court in ***Shivam(supra)*** warned that this jurisdiction is not to be used to harass or punish a defendant before judgment. The Plaintiff's financial distress, without evidence of an impending dishonest or obstructive act is insufficient to impute an improper motive. The Plaintiff remains a Kenyan company with identifiable directors and personal guarantees from them, which are alternative remedies for the Defendant.

13. Further, whereas the Defendant has correctly submitted that the Award is a "chase in action", the Plaintiff is also correct to point out that this chase in action is not the Plaintiff's property to attach at this stage. The Award is the subject of separate court proceedings for adoption and is not a liquidated asset in the Plaintiff's hands. As the Plaintiff submits, there is no decree, no guarantee of payment, and no certainty on when or if the funds will be received. Attaching a contingent right to payment from a third party, which is already

under another court's supervision, is a step too far and risks interfering with concurrent proceedings.

14. On whether an order under **Order 39 Rule 1** can issue, I also come to a similar conclusion that the Defendant has not alleged that the directors of the Plaintiff are about to flee the country. My reading of the Defendant's depositions is that they are merely apprehensive and fear or apprehension without a factual or evidential basis is insufficient support for an application under **Order 39 Rules 1 and 5** of the **Civil Procedure Rules** (see **Patrick Sagwa Kisia t/a Steg Consultants v Kay Construction Company Limited [2020] KEHC 1279 (KLR)**).

### **Conclusion and Disposition**

15. In the upshot, I find that the 1<sup>st</sup> Defendant's application dated 22<sup>nd</sup> July 2025 has no merit and the same is dismissed with costs to the Plaintiff.

**DATED SIGNED AND DELIVERED virtually at NAIROBI this  
8<sup>th</sup> DAY of MAY 2026**

.....  
**J.W.W. MONGARE**  
**JUDGE**

**IN THE PRESENCE OF**

1. N/A for the Plaintiff/Respondent
2. Mr. Munene for the Defendant/Applicant
3. Amos- Court Assistant

ORIGINAL