Post Bank Credit Limited (in Liquidation v Victoria Distributors Limited (Environment and Land Appeal 1 of 2023) [2024] KEELC 190 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEELC 190 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ENVIRONMENT AND LAND APPEAL 1 OF 2023

SO OKONG'O, J

JANUARY 25, 2024

BETWEEN

POST BANK CREDIT LIMITED (IN LIQUIDATION) ..... APPELLANT

AND

VICTORIA DISTRIBUTORS LIMITED ..... RESPONDENT

(Being an appeal from the ruling and order of Honourable P.N. Gesora, Chief Magistrate delivered on 7th July 2021 in Kisumu CMC ELC No. E040 of 2021)

JUDGMENT

Background

1. Veronica Akong'o Nyamodi, deceased (hereinafter referred to only as "the deceased") was a Managing Director of Kenya Industrial Estates Limited (hereinafter referred to only as "KIE") which is a parastatal (state corporation). The Government of Kenya allocated to KIE a parcel of land within Kisumu Municipality to use in the discharge of its mandate. KIE divided the said parcel of land into industrial sheds. Sometime in 1990, KIE allocated to the deceased Shed C1 and Shed D2 at a consideration of Kshs. 887,000/- under a mortgage scheme. It was a term of the mortgage scheme that the title to the said Sheds would only pass to the deceased upon full payment of the said sum of Kshs. 887,000/- by 15th April 1995.

2. KIE claimed that the deceased failed to service the mortgage facility that had been extended to her by KIE and the outstanding mortgage loan that was outstanding from her stood at Kshs. 6,043,101/- as at 1st February 2004. KIE claimed that it exercised its rights under the said mortgage and repossessed the said properties from the deceased and the same had since then been in its possession and management. KIE claimed that without any notice, the deceased irregularly and fraudulently processed title deeds for the said Sheds in her name. KIE claimed that Sheds C1 and D2 were issued with Title No. Kisumu Municipality/Block 2/102 and Title No. Kisumu Municipality/Block 2/103 respectively in the names

of the deceased. KIE claimed that the deceased thereafter purported to charge Title No. Kisumu Municipality/Block 2/102 (hereinafter referred to only as "the suit property") to the Appellant herein to secure a loan. KIE claimed that the deceased failed to pay the loan advanced by the Appellant and the Appellant instructed an auctioneer to put up the suit property for sale on 30th November 2016 in exercise of its statutory power of sale.

3. KIE filed a suit before this court namely, Kisumu ELC No. 308 of 2016 (subsequently transferred to the High Court and given case reference, Kisumu HCCC No. 56 of 2018) on 24th November 2016 against among others, the Appellant herein, James Onyango Josiah t/a as Nyaluonyo Auctioneers who had been instructed to sell the suit property, and the estate of the deceased seeking among others, a permanent injunction restraining the Appellant and the said auctioneers from selling the suit property or dealing with the same in any other manner whatsoever. KIE also sought a declaration that it was the owner of the suit property.

4. Together with the plaint filed in Kisumu ELC No. 308 of 2016 (subsequently transferred to the High Court at given case reference, Kisumu HCCC No. 56 of 2018) (hereinafter referred to only as "the High Court suit"), KIE filed an application for a temporary injunction to restrain the Appellant and the said auctioneer from selling the suit property pending the hearing and determination of the High Court suit. KIE's application for injunction was dismissed on 16th May 2017. KIE was dissatisfied with the said decision and preferred an appeal to the Court of Appeal against the same in Kisumu Court of Appeal, Civil Appeal No. 37 of 2019. On 21st February 2019, the Court of Appeal issued a temporary injunction restraining the Appellant and the said auctioneer from selling the suit property pending the hearing and determination of KIE's appeal. The appeal is still pending hearing.

5. Although the legality of the then intended sale of the suit property by the Appellant was under active litigation both in the High Court and in the Court of Appeal, the Appellant proceeded to sell the suit property by public auction through the said auctioneer on 5th September 2018 soon after the dismissal of the KIE's application for injunction in the High Court suit but while KIE'S application for injunction pending appeal was pending in the Court of Appeal. By the time the Court of Appeal issued an order of injunction against the Appellant and the said auctioneer restraining them from selling the suit property on 21st February 2019, the suit property had already been sold. The suit property was sold to the Respondent at Kshs. 17,000,000/-. The Respondent claimed that it incurred a total of Kshs. 1,239,140/- as disbursements in the transaction. The Respondent was however unable to take possession of the property which was in the possession of KIE.

The suit in the lower court

6. On 6th April 2021, the Respondent filed a suit against the Appellant in the Chief Magistrate's Court at Kisumu namely, Kisumu CMC ELC No. E040 of 2021(hereinafter referred to as "the lower court" or "lower court suit"). The Respondent sought judgment against the Appellant in the sum of Kshs. 18,239,140/- being a refund of the purchase price paid for the suit property together with the said disbursements. The Respondent also sought interest on the said amount at the rate of 13% per annum with effect from 30th September 2018. The Respondent contended that the Appellant had breached the agreement of sale between the Appellant and the Respondent by failing to give the Respondent vacant possession of the suit property. The Respondent averred that the said agreement of sale had been vitiated by the Appellant's failure to give vacant possession of the suit property.

7. Together with the plaint filed in the lower court, the Respondent filed an application by way of a Notice of Motion dated 6th April 2021 seeking the following orders;

    1. That this Honourable Court be pleased to certify this application as urgent.

2. That pending the hearing and determination of this Application, this Honourable Court be pleased to order the Appellant to deposit in court the sum of Kshs 18,239,140.00 as security for the principal debt claimed by the Respondent.

3. That in the alternative to prayer 2 above, this Honourable Court be pleased to issue a Mareva Injunction freezing the sum of Kshs 18,239,140.00 in the Appellant's account number 1000007524 held at Central Bank of Kenya, Head Office Branch, pending the hearing and determination of this Application.

4. That pending the hearing and determination of the suit, this Honourable Court be pleased to order the Appellant to deposit in court the sum of Kshs 18,239,140/= as security for the principal debt claimed by the Respondent

5. That in the alternative to prayer 4 above, this Honourable Court be pleased to issue a Mareva Injunction freezing the sum of Kshs. 18,239,140/= in the Appellant's Account number 1000007524 held at Central Bank of Kenya, Head Office Branch, pending the hearing and determination of this suit.

6. That costs of this Application be provided for.

8. The Application was supported by the affidavit and supplementary affidavit of Yogesh Dawda sworn on 6th April 2021 and 11th May 2021 respectively. The Respondent averred that it financed the purchase of the suit property through a loan facility from Prime Bank Limited. The Respondent averred that the suit property was transferred to it on 21st March 2019 upon payment of the purchase price and the incidental expenses. The Respondent averred that the Appellant failed, neglected and/or refused to grant vacant possession of the suit property to the Respondent even though the property had been registered in the Respondent's name. The Respondent averred that numerous attempts to take vacant possession of the property had been opposed and/or frustrated by the KIE which was also claiming ownership of the suit property.

9. The Respondent averred that it was reasonably apprehensive that it would not have possession of the suit property in light of KIE's claim of ownership, as it could well be determined that the Appellant did not have a bona fide saleable interest in the suit property. The Respondent averred that the suit property had since been leased out by KIE to a third party for five years and it was evident that the Appellant had breached its covenant as a vendor by failing to grant the Respondent vacant possession of the suit property. The Respondent averred that the auction sale of the suit property to the Respondent had been vitiated by the Appellant's failure to grant the Respondent vacant possession of the suit property. The Respondent averred that the Appellant was at all times aware of KIE's claim over the suit property before the auction sale, a fact that it failed to disclose to the Respondent. The Respondent averred that it was greatly prejudiced by the fact that it was constrained to service the loan facility it acquired for the sole purpose of purchasing the suit property, even though it was yet to get vacant possession of the suit property or get any benefit thereof.

10. The Respondent averred that the Appellant was justly and truly indebted to the Respondent in the sum of Kshs 18,239,140/- together with interest. The Respondent averred that the sale transaction having been vitiated, it was justified to seek a refund of the full purchase price and other incidental costs together with interest at court rates. The Respondent averred that the Appellant was under liquidation by Kenya Deposit Insurance Corporation (hereinafter referred to only as "KDI"). The Respondent averred that it was an undisputed fact the Appellant's liabilities exceeded its asset base. The Respondent averred that there was imminent danger that the purchase price paid by the Respondent could be utilised to offset the Appellant's other debts thereby dimming any possibility of recovering

the same. The Respondent averred that it was reasonably anxious and apprehensive that the Appellant may not have the capacity to satisfy the decree that would be passed by this Court against it. The Respondent averred that it was apprehensive that unless the Court granted the orders sought in the application which were substantially sought to secure the amount claimed in the plaint, the Appellant could dissipate the said funds to the detriment of the Respondent. The Respondent averred that the Appellant not being a going concern could not be able to raise the amount of money needed to sufficiently satisfy the decree that could be passed by this court in the Respondent's claim. The Respondent averred that it was necessary that the prayers sought be granted to preserve the subject matter of the suit.

11. The Appellant opposed the application through a replying affidavit sworn by its Senior Officer-Resolutions, Thomas E. Osama on 27th April 2021. The Appellant averred that the High Court suit between KIE and the Appellant concerning the suit property was pending determination and that the Court of Appeal had granted an injunction in the appeal proceedings arising from the said High Court suit on 21st February 2019 restraining any dealings with the suit property pending the hearing and determination of the intended appeal by KIE. The Appellant averred that for the foregoing reasons, it would be improper and even contemptuous for the Appellant to engage in any dealings with the suit property like handing over of vacant possession of the same to the Respondent. The Appellant averred that the Appellant had informed the Respondent of the pendency of the said suits in the High Court and the Court of Appeal on 2nd December 2020. The Appellant averred that it was unable to grant vacant possession of the suit property to the Respondent due to the existence of the said orders by the Court of Appeal.

12. The Appellant averred that while it was true that the Appellant was in liquidation, it was not correct as alleged by the Respondent that there was a risk of the Appellant utilising the funds claimed by the Respondent for other purposes to the Respondent's detriment. The Appellant stated that the *Kenya Deposit Insurance Act*, 2012 (Act No. 10 of 2012) had clear provisions on how claims such as the Respondent's should be dealt with. The Appellant averred that the Respondent had recourse for the recovery of its money.

13. The Appellant averred that granting the orders sought by the Respondent would cause great prejudice and undue hardship in the running of the business of the Appellant. The Appellant averred that under Section 55 (3) of the *Kenya Deposit Insurance Act*, 2012 (KDI Act), the account sought to be frozen was maintained at the Central Bank of Kenya and had a pool of funds meant for the day-to-day running of the business of the Appellant. The Appellant averred that freezing the account to the tune of Kshs. 18,239,140/- would immensely interfere with the management of the Appellant. The Appellant averred that the Respondent had sufficient recourse for the recovery of the amount due and owing to it from the Appellant. The Appellant averred that an order for freezing the account would in the circumstances jeopardise the management of the Appellant by the KDI to ensure the settlement of the claims due from the Appellant.

14. The Appellant averred further that Clause 11 of the Conditions of Sale of the suit property to the Respondent provided that the inability by the Appellant to deliver possession of the suit property to the Respondent did not make the sale void. The Appellant averred that the sale of the suit property to the Respondent was not vitiated for the non-delivery of vacant possession of the suit property to the Respondent. The Appellant averred that the Respondent had not met the threshold for granting the orders sought. The Appellant averred that the Respondent had not demonstrated that there was a real risk that the Appellant's assets would be removed from the jurisdiction of the court or otherwise dissipated if the Mareva injunction sought was not granted. The Appellant averred that the application had no basis and should be dismissed with costs. The Respondent responded to the issues raised in the

Appellant's replying affidavit in its supplementary affidavit. The Respondent averred that it would be left with no recourse for the recovery of the amount claimed from the Appellant if the orders sought were not granted. The Respondent averred further that the Appellant stood to suffer no prejudice if the orders sought were granted as it was free to use all the other monies in the account sought to be frozen as the freezing was limited to Kshs. 18,239,140/- only.

15. The lower court heard the Respondent's application through written submissions. In a ruling delivered on 7th July 2021, the lower court allowed the application and ordered the Appellant to deposit in court a sum of Kshs. 18,239,140/- within 21 days as security for the principal debt claimed by the Respondent in the lower court suit. The lower court observed that the Appellant was under liquidation and that it had not demonstrated its financial worth. The court held that in the circumstances, the Respondent had a right to move the court to protect its interest. The court held that the Respondent had satisfied the conditions necessary for the grant of an order under Order 39 Rule 5 of the Civil Procedure Rules.

The Appeal

16. The Appellant was aggrieved by the decision of the lower court and filed this appeal on 28th July 2021 in the High Court. The appeal was transferred to this court on 16th November 2022 and given its current case reference number in 2023. In its memorandum of appeal dated 27th July 2021, the Appellant challenged the lower court's ruling and orders on the following grounds;

    1. The Learned Trial Magistrate erred in law in granting the prayer for security for costs as prayed by the Respondent without appreciating the purport of the provisions of Order 39 Rule 5 of the Civil Procedure Rules, 2010 under which rule the application was anchored.

    2. The Learned Trial Magistrate erred in law and fact in failing to address himself to the conditions that a party must satisfy for the grant of a Mareva injunction as set out in the Court of Appeal case of Mareva Compania Naviera S.A. v International Bulkcarriers S.A [1975] 2 Lloyd's Rep. 509.

    3. The Learned Trial Magistrate erred in law and fact in disregarding the Appellant's submissions to the effect that the suit property was the subject of active court proceedings in Kisumu H.C. Commercial Case No. 56 of 2018, Kenya Industrial Estates Limited (KIE) v. Post Bank Credit Limited (IL) & 4 Others and Kisumu Civil Appeal No. 37 of 2019, Kenya Industrial Estates Limited (KIE) v. Post Bank Credit Limited (IL) & 4 Others and therefore making the orders sought in the application would place the Appellant in an awkward position as regards the existing restraining orders issued by the Court of Appeal restricting any dealings with the suit Property.

    4. The Learned Trial Magistrate selectively quoted and relied on the case of Beta Healthcare International Limited v. Grace Mumbi Githaiga & 2 Others [2016] eKLR in his ruling without addressing himself to the requirements stated in that case for a party to present cogent evidence before any such orders as sought by the Respondent in its application could be granted.

    5. The Learned Trial Magistrate erred in fact and law in failing to address himself to any of the provisions of the law highlighted by the Appellant in its submissions and more specifically the provisions of Section 55 (1) and (2) of the *Kenya Deposit Insurance Act* No. 10 of 2012.

    6. The Learned Trial Magistrate erred in law and fact by making a final declaration at an interlocutory stage that the Appellant was aware of a third-party claim on the suit property when this issue was a matter for trial and determination only upon a full hearing of the matter.

7. The Learned Trial Magistrate erred in failing to consider and address himself to the Appellant's submissions on the application thereby reaching a decision that was oppressive to the Appellant and totally against the public interest.

17. The Appellant proposed that the ruling of the Learned Trial Magistrate be set aside and substituted with an order dismissing the Respondent's Notice of Motion application dated 14th April 2021(sic). The Appellant also prayed for the costs of the appeal and the application in the lower court.

18. The appeal was argued by way of written submissions.

The Appellant's submissions

19. The Appellant filed its submissions dated 26th September 2023. The Appellant argued grounds 1, 2, 4, 5, and 7 of appeal together and grounds 3 and 6 of appeal alone. On grounds 1, 2, 4, 5, and 7 of appeal, the Appellant submitted that the lower court erred in failing to address itself to the relevant provisions of the law and the Appellant's submissions. The Appellant submitted that it was the liquidation status of the Appellant that informed the making of the Respondent's application the subject of the appeal. The Appellant submitted that the application was brought primarily under the provisions of Order 39 Rule 5 of the Civil Procedure Rules 2010.

20. The Appellant submitted that the Respondent had the burden of satisfying the court that the Appellant was intent on obstructing or delaying the execution of a decree that could be issued by the lower court in favour of the Respondent by disposing of or removing its property from the jurisdiction of the court. The Appellant submitted that the Respondent did not satisfy the said condition for granting an order under Order 39 Rule 5 of the Civil Procedure Rules 2010. The Appellant submitted that prayer 4 of the Respondent's application was granted in error in the circumstances.

21. The Appellant submitted that Kenya Deposit Insurance Corporation(KDI) which is the liquidator of the Appellant is a statutory body established under the *Kenya Deposit Insurance Act* No. 10 of 2012. The Appellant submitted that there was no possibility of disposal or even removal of the purchase price paid for the suit property by the Respondent out of the jurisdiction of the Court. The Appellant submitted that therefore was no need to grant the orders sought by the Respondent. In support of this submission, the Appellant cited Capricorn Freights Forwarders Limited v Victor Omondi t/a First Impex & First Westlink [2015] eKLR and Beta Healthcare International Limited v Grace Mumbi Githaiga & 2 Others [2016) eKLR.

22. The Appellant submitted that the lower court also failed to consider the provisions of Section 55 (1) and (2) of the *Kenya Deposit Insurance Act*, 2012 which was brought to its attention. The Appellant submitted that the lower court erred in granting the orders for the deposit in court of the claimed amount.

23. Concerning ground 3 of appeal, the Appellant submitted that the lower court erred in failing to take into account that the suit property was the subject of other active proceedings in the High Court and the Court of Appeal even after the same was brought to its attention. The Appellant submitted that the orders made by the lower court would place the Appellant in an awkward position as there were existing orders by the Court of Appeal restricting any dealings with the suit property. The Appellant submitted that the issue of the ownership of the suit property was live in the pending cases and until the same was determined, no liability could attach to any party.

24. Concerning ground 6 of appeal, the Appellant submitted that the lower court erred in making a final determination of the dispute at an interlocutory stage when the facts were yet to be tested at a full trial. In support of this submission, the Appellant cited Gabriel Turic Dak v Eldoret College of ProfessionaI

Studies &Another [2021] eKLR. The Appellant submitted that the facts that the lower court relied on to grant the orders sought in the Respondent's application were all yet to be tested at a full trial. The Appellant prayed that the appeal be allowed and the decision of the lower court set aside.

The Respondent's submissions

25. The Respondent filed submissions dated 18th December 2023. The Respondent submitted on the following issues;

    a. Whether the Learned Trial Magistrate failed to address the relevant provisions of the law in the ruling delivered on 7th July 2021.

    b. Whether the appeal is marred with material non-disclosure.

    c. Whether the Learned Trial Magistrate made a final decision at an interlocutory stage.

26. On the first issue, the Respondent submitted that the court's power to make an order for a security deposit before judgment is provided for under Order 39 Rule 5 of the Civil Procedure Rules 2010. The Respondent submitted that the Appellant purported to argue that the trial court in the impugned ruling did not appreciate the provisions of Order 39 Rule 5 of the Civil Procedure Rules 2010 as well as the guiding principles established in case law, including the case of Beta Healthcare International Limited Grace Mumbi Githaiga & 2Others (supra) on Mareva injunction. The Respondent submitted that in the impugned ruling, the trial court considered the grounds raised by the Respondent vis-à-vis the provisions of the law and the principles set out by courts when considering an application for Mareva injunction. The Respondent submitted that the applicable law on Mareva injunction was established in the case of Mareva Compania Naviera SA International Bulk Carriers (supra).

27. The Respondent submitted that it was not contested that the Appellant's liabilities exceeded its asset base considering the then ongoing liquidation process. The Respondent submitted that there was imminent danger that the purchase price paid by the Respondent could be utilised by the Appellant to pay its secured account holders as well as settle the Appellant's debts without any possibility of the Respondent's recovering the same through execution of the decree that could be passed against it in the lower court suit.

28. The Respondent submitted that the Appellant's attempt to invoke the provisions of the *Kenya Deposit Insurance Act*, 2012 and the Deposit Insurance Fund further confirmed that the Respondent's apprehension that the Appellant was hell-bent on utilising and/or disposing of the purchase price received on account of the frustrated auction sale was not without a basis. The Respondent submitted that such reference also confirmed that as the funds were in a pool, the same was bound to be used and/or disposed of which in essence satisfied the first requirement under Order 39 Rule 5(1)(a) of the Civil Procedure Rules aforesaid. The Respondent submitted that the lower court in its ruling acknowledged that it was untenable for the Appellant to casually aver that the Respondent had recourse under the *Kenya Deposit Insurance Act*,2012. The Respondent submitted that the Appellant had not shown what prejudice it could suffer if it abided with the said order of the lower court having conceded that it could not grant to the Respondent vacant possession.

29. On the second issue, the Respondent submitted that the Appellant's appeal was based on the existence of the High Court and the Court of Appeal cases between among others the Appellant and KIE. The Respondent submitted that the Appellant had contended that it was unable to grant the Respondent vacant possession of the suit property due to the restraining orders issued by the Court of Appeal. The Respondent submitted that the transaction between the parties having been frustrated, the Respondent had a right to rescind the same. The Respondent submitted that the said right had not

been limited or curtailed by the said orders issued by the Court of Appeal. The Respondent submitted that it had a legitimate claim for a refund of the purchase price which claim was not affected by the pending cases between the Appellant and KIE.

30. The Respondent submitted that at the time the Respondent was purchasing the suit property from the Appellant, the Appellant was well aware of the adverse claim by KIE over the suit property including the legal proceedings that were pending but failed to disclose the same to the Respondent. The Respondent submitted that it conducted due diligence before successfully bidding for the suit property but the adverse claim by KIE could not be discerned from the records at the land office. The Respondent submitted that the Appellant knew that KIE had control and possession of the suit property and that it was not in a position to grant vacant possession to the Respondent and therefore, it deliberately included Clause 11 of the Conditions of Sale as a sword rather than a shield against any possible claims by unsuspecting purchasers like the Respondent.

31. The Respondent submitted that the court has the power to intervene in unconscionable contracts such as the one in the instant case. In support of that submission, the Respondent cited LTI Kisii Safari Inns Limited & 2 Others v Deutsche Investigations-Und Enwicklungsgellschaft & 2 Others [2011]eKLR.

32. On the third issue, the Respondent cited Kanduyi Holdings Limited v Balm Kenya Foundation & Another[2013]eKLR and International Air Transport Association & Another v Akarim Agencies Company Limited & 2 Others [2014] eKLR and submitted that the lower court did not make a final determination of the dispute. The Respondent submitted that the court merely directed the Appellant to offer security pending the hearing and determination of the suit. The Respondent submitted that the trial court was yet to hear and determine the main suit and issue final orders. The Respondent submitted that having met all the conditions for granting an order for security, the trial court properly exercised its discretion in granting the order.

33. The Respondent submitted that the grounds raised in the appeal were not merited. The Respondent submitted that the appeal was another move by the Appellant to keep the Respondent from either enjoying vacant possession over the suit property or recovering the purchase price that was duly paid to the Appellant. The Respondent urged the court to dismiss the appeal with costs to the Respondent.

Analysis and Determination

34. I have carefully perused the record of appeal which contains the pleadings by the parties in the lower court, the application by the Respondent before the lower court, the response to the application by the Appellant, the submissions made before the lower court, the ruling of the lower court the subject of this appeal, and the grounds of appeal put forward by the Appellant. I have also considered the submissions of counsels together with the authorities cited in support thereof.

35. The Respondent's application in the lower court was principally brought under Order 39 Rule 5 of the Civil Procedure Rules which provides as follows:

    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."

36. The jurisdiction of the court to order the furnishing of security or production of property before judgment under Order 39 Rule 5 of the Civil Procedure Rules is discretionary. What I need to determine in the appeal before me is whether the lower court exercised its discretion properly when it ordered the Appellant to deposit in court a sum of Kshs. 18,239,140/- as security for the principal debt claimed by the Respondent in the lower court suit.

37. In Mbogo v Shah [1968] E. A. 93 the court stated as follows at page 94:

I think it is well settled that this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

38. In Royalscapes Limited & 2 others v Nyaribo & another (Civil Suit E243 of 2021) [2022] KEHC 16803 (KLR) (Civ), the court stated as follows:

(22) Accordingly, order 39 rules 5 and 6 of the CPR should operate within known dimensions of law drawing from the above case and other judicial precedents on the subject. Order 39 rule 5 and 6 of the CPR is not to be used:

1) to pressure a defendant; or

2) as a type of asset stripping (forfeiture); or

3) as a conferment of some proprietary rights on the plaintiff upon the assets of the defendant.

The purposes of any order that should be issued under order 39 rules 5 and 6 of the CPR is to prevent the defendants or would be judgment-debtor from dissipating his assets as to have the effect of obstructing or delaying the execution of any decree that may be passed against him.

(23) Given the scope and tenor of the relief under order 39 rule 5 and 6 of the CPR, the plaintiff has the onus of proving that the defendants:

a) Is about to dispose of the whole or any part of his property; or

b) Is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court."

39. In Kanyoko t/a Amigos Bar & Resturant v Nderu & 2 others[1988] eKLR, the Court of Appeal stated as follows:

" There is no rule permitting attachment of property before judgment according to English practice. Our order 38 which sanctions this practice, was borrowed from the Indian Code

of Civil Procedure. The learned author, Mulla, in his treatise on the Indian Code, says,inter alia of order 38 rule 5:-

"The object of this rule, is to prevent the decree that may be passed from being rendered infructuous. The order that is contemplated by this rule, is not an unconditional one directing attachment of property but one calling upon the defendant to furnish security or to show cause why security should not be furnished.

Where the defendant offers to give security, the Court should go into the question of its sufficiency, before issuing a final order of attachment."

... It is difficult to resist the observation that the order of the seizure of the appellant's property was made somewhat lightly. According to Mulla, when the Rules required the Judge to be satisfied:-

Vague allegations are insufficient. The power to attach is not to be exercised lightly and without clear proof of the mischief aimed."

(see Mulla on Code of Civil Procedure 18th Edn p 1502)

The respondents' hearsay assertion that the appellant was about to abscond was as vague an allegation as can be imagined. And there is no proof of any so that the appellant was minded of committing the mischief against which the rule is directed, namely the disposal of his properties.

...For authority, Counsel referred us to the English decision in Mareva Compania Naviera v International Bulk Carriers [1975] 2 Lloyds Rep 509Z where it was held that:-

If it appeared that a debt was due and owing and there was a danger that the debtor might dispose his assets so as to defeat it before judgment, the Court had jurisdiction in a proper case to grant an interlocutory injunction."

This is what has come to be known as the Mareva injunction.

As we pointed out, there is no provision under English rules of practice to order attachment before judgment. The observations made in Lister v Stubbs [1980], 45 Chd 4, suggest that the policy reason for this, is that "the Court has no jurisdiction to protect a creditor before he gets judgment." The granting of the Mareva injunction is of recent vintage and is a modern judicial innovation designed to meet a felt need where defendants beyond the jurisdiction who are sued in England, and have assets there, can quickly put these assets out of the reach of judgment creditors in England.

But that remedy is in personam and is directed at the defendant to restrain him from removing his assets out of the English Court before judgment. It is not a right in "rem authorizing the seizure of the defendant's assets before his liability was established in a judgment". Had the respondents in the instant case entertained a genuine and well grounded fear that the appellant was minded of removing or disposing his assets to defeat a possible execution, our procedural rules are not without a remedy they can usefully invoke. They could have availed themselves of Order 39 and sought an interim injunction to restrain him from alienating, removing or otherwise disposing of his assets before the delivery of judgment."

40. In Kanduyi Holdings Limited v Balm Kenya Foundation & Another(supra), the court stated that:

> " Our Order 39 Rules 5 and 6 could be said and is a statutory codification of an interlocutory relief known as Mareva Injunction or freezing order in the UK. ...
>
> Accordingly, Order 39 Rules 5 and 6 of the CPR should operate within known dimensions of law drawing from the above case [Mareva Compania Navierra SA v International Bulkcarriers SA [1975] 2 Lloyd dis Rep 509] and other judicial precedents on the subject. Order 39 rule 5 and 6 of the CPR is not to be used to: 1) pressure a defendant; or 2) as a type of asset stripping (forfeiture); or 3) as a conferment of some proprietary rights on the plaintiff upon the assets of the Defendant. The purposes of any order that should be issued under Order 39 Rules 5 and 6 of the CPR is to prevent the Defendants or would be judgment-debtor from dissipating his assets as to have the effect of obstructing or delaying the execution of any decree that may be passed against him"

41. In Beta Healthcare International Limited v Grace Mumbi Githaiga & 2 others(supra),the court cited Goode On Commercial Law, 4th Edition at Page 1287 where the author has set the threshold for granting a Mareva (freezing) injunction 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 favour 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"

42. It was on the foregoing principles that the lower court was supposed to consider the Respondent's application. Before issuing an order under Order 39 Rule 5 of the Civil Procedure Rules, the lower court had to be "satisfied" that the Appellant "with intent to obstruct or delay" the execution of any decree that may be passed against it, was "about to dispose of the whole or any part of its_____ property", or was "about to remove the whole or any part of its property from the local limits of the jurisdiction of the court". The lower court had no jurisdiction to grant orders under Order 39 Rule 5 of the Civil Procedure Rules unless it was satisfied that the Appellant was about to dispose of the whole or any part of its property, or was about to remove the whole or any part of its property from the local limits of the jurisdiction of the court with the intention of obstructing or delaying the execution of any decree that may be passed against it. The burden was on the Respondent to satisfy the lower court on the foregoing.

43. There is no dispute that the Respondent established on a prima facie basis that it had an arguable claim against the Appellant of Kshs. 18,239,140/- and that the Appellant was in liquidation. These

in my view were not sufficient reasons to grant the order that was made by the lower court. The fact that the Appellant had more liabilities than assets or was under liquidation was not a ground under Order 39 Rule 5 of the Civil Procedure Rules to order security before judgment. The Respondent never mentioned in its application or supporting affidavit that the Appellant was about to dispose of the whole or any part of its property, or was about to remove the whole or any part of its property from the local limits of the jurisdiction of the court. There was also no mention that the Appellant had the intention of obstructing or delaying the execution of any decree that may be passed against it.

44. I agree with the Appellant that the lower court failed to address itself properly on the applicable law. The lower court misdirected itself on the conditions to be met by an applicant for security under Order 39 Rule 5 of the Civil Procedure Rules. As a result, the court took into account matters that were not relevant to the application before it thereby arriving at an erroneous decision. It is therefore my finding that the lower court exercised its discretion wrongly.

Conclusion

45. In conclusion, I find that the Appellant has established sufficient grounds to warrant interference with the lower court's exercise of discretion. The appeal has merit and is allowed as prayed. The ruling and orders made by the lower court on 7th July 2021 are set aside, and in place thereof, there shall be an order dismissing the Respondent's Notice of Motion application dated 6th April 2021 filed on 14th April 2021 in the lower court. The Appellant shall have the costs of the appeal and the lower court application.

DELIVERED AND DATED AT KISUMU ON THIS 25TH DAY OF JANUARY 2024

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Arora h/b for Ms. Kavagi for the Appellant

Mr. Njiru h/b for Mr. Gitonga for the Respondent

Ms. J. Omondi-Court Assistant

ELC APPEAL NO. 1 OF 2023 JUDGMENT Page 5