



**Junction Forex Bureau Limited v Rafique (Cause E484 of 2022)
[2023] KEELRC 599 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 599 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E484 OF 2022
K OCHARO, J
MARCH 9, 2023**

**BETWEEN
JUNCTION FOREX BUREAU LIMITED CLAIMANT
AND
WALID MOHAMMED RAFIQUE RESPONDENT**

RULING

1. Through a notice of motion application expressed to be pursuant to the provisions of section 12 of the *Employment and Labour Relations Court Act*, section 1A, 3, 63 [b] and [e] of the *Civil Procedure Act*, order 39 rule 1, 5 and 6 and order 40 rule 11 of the *Civil Procedure Rules, 2010* and rule 17 of the *Employment and Labour Relations Court [Procedures] Rules 2016*, the claimant/applicant seeks for a temporary freezing order, freezing with immediate effect any dealings or restrain the respondent whether by himself or by anyone claiming under him from trading, selling, transferring, disclosing or anyway dealing with shares, withdrawing and or receiving Kes 5,000,000 or any such proceeds of such trade, sale or disposal of the said shares held by FX EGM Security Limited, Westlands Nairobi under FX Account Number xxxxx in the name of Walid Rafique pending the hearing and determination of the suit herein.
2. The claimant/applicant further seeks that pending the hearing and determination of the suit herein, the respondent be ordered to deposit in court a sum of Kes 16,500,000 and or furnish security as may be sufficient to satisfy the decree that may be passed against him in this suit.
3. The application is anchored on the grounds on the face of the application, and the supporting affidavit sworn by Anne Ngiana Rama, the claimant's managing director.
4. The application is opposed upon basis of the grounds obtained in the replying affidavit sworn by the respondent on the August 1, 2022.



5. When the application came up for hearing, this court directed that the parties file their written submissions for and against the application. Their submissions are on record.

The application

6. The claimant/applicant contended that at all material times until May 24, 2022, the respondent was its employee, under the terms of employment of contract dated September 8, 2018. His monthly gross salary was Kes 100,000.
7. The claimant/applicant stated further that it is a Forensic Bureau undertaking money transfer and exchange business. The respondent was stationed at its Junction Mall Branch.
8. It was the claimant's case that on the May 8, 2022, in breach of his employment contract, the respondent misappropriated unjustly enriched himself and or irregularly took, its money for his own use without its authority thereby causing it a loss of Kes 16,500,000. The loss was revealed by an audit that was done by Kimani & Associates for the period 1/10/2021 to May 8, 2022.
9. The respondent admitted having unjustly enriched himself with the stated sum, and that he converted the money to his own use. Following the discovery and admission, the claimant reported the matter to the police. He was arraigned and charged in court with the offence of stealing by servant, of the said amount and falsifying the claimant's books of accounts, in Kibera, Chief Magistrate Criminal Case No. E747/2022.
10. Subsequently, the claimant terminated the respondent's employment on account of gross misconduct.
11. The claimant contended that the respondent is a man of no known attachable assets, means or earnings to satisfy any such decree that may be passed against him in this claim. The respondent is currently dissipating the amounts of the suit, trading and disposing of his shares reasonably suspected to have been acquired with the stolen money, held by a company known as FX EGM Security Limited, Westlands, Nairobi under FX Account No. xxxxx in the names of the respondent. All these with intent to render the decree that may be passed against him nugatory.
12. The claimant alleges that she has information from an officer of the said FX EGM Security Limited Westlands, whose identity she cannot disclose because any such disclosure shall subject his employment to peril, that the respondent's account in the said company has shares and or money worth Kes 5000,000. The respondent is currently hurriedly withdrawing and dissipating the account.
13. The intent by the respondent is to defeat execution of any decree that may be passed against him in recovery of the decretal sum.

The response

14. Through his replying affidavit herein above mentioned, the respondent admitted that at all material times he was employed by the claimant/applicant. He too confirmed that he was charged following a complaint by his employer, the claimant.
15. The respondent asserts that he does not own any shares with FX EGM Security Limited amounting to Kes 5,000,000 or any other amount.
16. He asserts that the claimant has not put forth any proof by way of a document to demonstrate that he owns the shares alleged.
17. The applicant's Application is ill prompted, only intended to harass him. It is an abuse of the court process.



The claimant's /applicant's submissions

18. The claimant/applicant submits that by dint of the provisions of order 39 of the [Civil Procedure Rules 2010](#), the Court has power to grant order[s] for attachment before judgment. The power is exercised at any stage of the suit where;
- a. The defendant with intent to delay the plaintiff, or avoid any process of the Court, or obstruct or delay the execution of any decree that may be passed against him;
 - i. Has absconded or left the local limits 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.
19. The claimant/applicant submitted that the court has powers under order 39 rule 2[1] to require such a defendant to furnish security sufficient to answer the claim against him.
20. To support this submission, the claimant/applicant placed reliance on the case of [International Air Transport Association and another v. Akarim Agencies company Limited and 2 others](#) [2014] eKLR.
21. The respondent failed totally to rebut the claimant's assertion that he owns shares with FX EGM Security Limited amounting to Kes 5,000,000. All that he did was to make general denials.
22. The applicant further submitted that the power of court under order 39, is only exercisable where the party seeking the orders thereunder is able to establish the conditions that were set in the case of *Giella v Cassman*. That party has to demonstrate that he or she has a *prima facie* case with a chance of success. Second, that if the orders sought are not granted he or she will suffer an irreparable injury, and that the balance of convenience tilts in his or her favour.
23. It was argued that there is ample evidence that the time of termination of his employment, the respondent made an admission that he failed to account for the money, the subject matter herein. Further that the respondent has not filed any response to the claim herein. These factors taken together can only be indicative that the applicant has a *prima facie* case with a chance of success.
24. On the second condition, the applicant submits that it faces a threat of being denied the fruits of the decree that might be entered herein in its favour, if the orders sought are not granted. It was further submitted that in any event where an applicant has established the first limb, there is no need to prove the 2nd limb, the applicant sought to fortify this submission by the holding in [Olympic Sports House Limited v School Equipment Centre Limited](#) [2012] eKLR, thus;
- “As regards the second limb of *Giella v Cassman Brown*, I have always held the view that once a party establishes that a defendant has breached an express provision of the law, an injunction should issue to aid the law.”



25. On irreparable loss, the claimant put further reliance on the judicial decision in *Heiga Habmann v Charles Mumba mwagandi* [2008] eKLR, where the court stated:

“It seems to me that the amount of money sent by the applicants to be respondent is quantifiable, and that on the face of the record, if that money could be paid back, then the applicant would not suffer irreparable injury. The issue therefore narrows down to whether the respondent would be in a position to refund that money. In *Mureithi v City Council of Nairobi* [1976 – 1985] EA. 331, borrowing from the speech of Lord Danniell in *American Cynamid Co v Ethicon Limited* [1975] 1 ALL ER 504, madan JA. as he then was, said at P. 332;

“The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action If the uncertainty were resolved in his favour at the trial If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted however strong the Plaintiff’s claim appeared to be at that stage.”

Is the respondent in this matter in a financial position to pay the damages which would be recoverable at common law? On the basis of the depositions on the record, and without making any definite finding at the stage, the respondent has not been candid about his financial means. I doubt that the respondent would be in a financial position to pay them.”

26. Submitting on the third limb, the applicant contended that considering the circumstances of this matter, the balance of convenience tilts in its favour.
27. On whether the respondent’s FX Account No. xxxxx held at FX EGM Security Limited should be frozen pending this suit, the claimant/applicant asserted that the circumstances of this matter are that the order shall be merited. Its application herein meets the requisite threshold. To buttress these submissions, reliance was placed on the decision in *International Air Transport Association & another v Akarim Agencies Company Limited & 2 others* [2014] eKLR where the court stated;

“..... Freezing order is not an interim injunction and the threshold to be attained for it to be issued is also distinct from those attending a temporary injunction set out in *Giella v Cassman Brown*. Freezing order is an order of court which is usually issued in *personam* restraining or enjoining a person from dissipating an asset directly or indirectly. It is ordinarily issued *ex parte* for it is intended to serve a useful purpose of preservation of assets. See opinion of Lord Denning in the case of *Mareva Compania Naviera Sa v International Bulkcarriers Sa*. The basis for freezing order is the inherent jurisdiction of the court although some jurisdictions have enacted freezing – order statutes and others have codified it under civil procedure laws. Freezing order may be issued alone or with other injunctive orders or orders calling for security for satisfaction of an existing or a judgment which may be issued by the court in the case. However, and I stated earlier, freezing order is not to be used to:

- (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 purpose of any order that shall be issued under Order 39 Rules 5 and 6 of the Civil Procedure Rules 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

28. Counsel for the claimant/applicant further submitted that according to the learned authors. In *Goode on Commercial law* 4th Edition page 1287, an applicant seeking a freezing injunction must satisfy the court that:
- a. “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.
 - e. There is a balance of convenience in favour of granting the injunction:
29. Courts have defined “arguable case in the context of freezing order. In the case of *International Air Transport Association & another v Accarim Agencies Company Limited & 2 others* the court stated:
- “32. “Arguable case” has been assigned a meaning within the context of freezing order and has been adopted with approval of many courts in Kenya. See the case of *African Banking Corporation Limited v Netsatar Limited & 6 others* Nairobi Milimani HCCC No 299 of 2009 [42] where the court observed:
- “A good arguable case” was defined by Mustil J. in *Niedersachsen* [1983] 2 Lloyd’s Rep. 600 at page 605 to be;
- “One which is more than barely capable of serious argument, but not necessarily one which the Judge considers would have a better than 50 per cent chance of success.”
30. It was contended that the claimant/applicant has established all the conditions necessary for grant of a freezing order.

The respondent submissions

31. The respondent argued that the claimant/applicant did not place any sufficient evidence before this court establishing that he owns shares in FX EGM Security Limited Westlands. Only a share certificate or CR12 can be basis for one to assert that so and so is a shareholder in a certain company.
32. According to the respondent, instead of proving ownership of the shares, the claimant has attempted to shift the burden of proof to him. This state of affairs cannot be countenanced, as pursuant to the provisions of section 107[1] of the *Evidence Act* cap 80 Laws of Kenya, the burden lies on the person who asserts.
33. To buttress this submission, the respondent relied on *Halsbury’s Laws of England*, 4th Edition Volume 17, at paragraph 13 and 14, thus;
- “The legal burden is the burden of proof which remains constant throughout a trial: It is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus, a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the



party for whom substantiation of that particular allegation is essential for the case. There may therefore be separate burdens in a case with separate issues.”

(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the Appellant, the evidential burden may shift in the course of the trial, depending on the evidence adduced. As the weight of evidence given by either side during trial varies, so will the evidential burden shift to the party who would fail without further evidence.”

34. In criminal case No. E749 of 2022, the court directed therein that he deposits his passport in court and stop orders issued against his travel. He cannot therefore be able to travel outside the jurisdiction of this court.

35. The claimant/applicant stated in his application that the respondent has no known attachable assets. This being the case, the court cannot allow itself to issue an order of attachment before judgment, order which cannot be enforced. Reliance was placed on the holding in *Kalya Soi Farmers Cooperative Society v Paul Kirui & another* [2013] eKLR, that:

“..... the maxim that equity would not grant its remedy if such order will be in vain. As said, “Equity, like nature, will do nothing in vain.” On the basis of this maxim, courts have held again and again that it cannot be stultify itself by making orders which will be ineffective for practical purposes.”

Analysis and Determination

36. The applicant’s application herein is twofold, for a freezing order, and an order for attachment for before judgment. This court shall consequently render itself on the two, distinctly. However, it should be pointed out that the purpose for a freeze order or an attachment before judgment is to prevent the defendants or would be judgment-debtor from dealing with his assets as to have the effect of obstructing or delaying the execution of any decree that may be passed against him or her. They are all aimed at preservation.

37. The claimant/applicant urges this court to invoke the jurisdiction accorded under order 39 of the *Civil Procedure Rules* and grant limb 6 of the notice of motion application herein. Order 39 of the *Civil Procedure Rules* provides for arrest and attachment before judgment. Rule 1 thereof deals with instances where the court may call upon the defendant to furnish security for appearance, it provides:

1. Where at any stage of a suit other than a suit of the nature referred to in paragraph [a] to [e] 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 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 jurisdiction of the court his property or any part thereof.



- 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 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.”

38. Rule 5 of order 39 stipulates:

Where the defendant may be called upon to furnish security for production of property [5][1] where at any state of a suit the court is satisfied by affidavit or otherwise, that the defendant with intent to obstruct or delay the execution of and decree that may be passed against him –

- 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.

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 referred, 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 estimated value thereof.

(3)

39. The jurisdiction under the provisions of order 39, is one that is invoked sparingly, for good purpose, and only when the specific conditions set out thereunder are satisfied by the party seeking invocation of the jurisdiction. In BGM HCCC No. 5 of 2013, *Kanduyi Holdings Limited v Balm Kenya Foundation & another* [2013] eKLR, the court stated, and I agree:

“..... Our order 39 rule 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 rule 5 and 6 of the *Civil Procedure Rules* should operate within the dimensions of law drawing from the above case [*Mareva Companca Navierra SA v International Bulk Carriers SA* [1975] 2Lloyd dis Rep 509] and other judicial precedents on the subject. Order 39 rule 5 and 6 of the *Civil Procedure Rules* is not to be used to:

1. Pressure the 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 purpose of any order that should be issued under order 39 Rules 5 and 6 of the *Civil Procedure Rules* 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.”

40. From the material placed before me by the claimant / applicant, there is no cogent evidence that the respondent has absconded or is about to abscond or has disposed of or removed his property from the jurisdiction of this court. Under the Rules, cogent evidence is required to demonstrate absconding or disposal of property or a real possibility of absconding or disposing of the property – see *International Air Transport Association & another v. Akarim Agencies company Limited & 2 others* [2014] KLR.
41. Further I have considered the stop order that the learned trial magistrate issued in the criminal matter hereinabove mentioned, the respondent was prohibited from leaving the jurisdiction of that court which is the jurisdiction of this court. It has not been asserted by the claimant/applicant that, the respondent has disobeyed the stop order or intends to. By reason of this, I hold that the applicant has not demonstrated that the respondent has absconded or is likely to abscond the jurisdiction of this court.
42. The applicant must without only making bald allegations, establish the property that is being disposed of or likely to be, by the respondent, with an intention of obstructing or delaying execution of any decree that may be passed against him. The claimant didn't offer any evidence that was geared towards establishing this in the affidavits and other material placed before the court.
43. In the supporting affidavit paragraph 8 the deponent states that the respondent has no known property, this being so, what is this property that the claimant wants the Court to ask the respondent provide as security, then? I ask this question well aware that if this court were to make any order for security as sought by the claimant, it must be specific in the order calling upon the respondent to furnish as security. The claimant/applicant has not satisfied the stipulations of order 39 rule 5 [2].
44. In sum I decline to invoke the authority bestowed upon this court under order 39 of the *Civil Procedure Rules*. Limb 6 of the application is declined consequently. This court cannot give orders in vain. See *Kalya Soi Farmers' Cooperative Society v Paul Kirui & another*. [supra].
45. I now turn to consider the freezing order sought under limb 5 of the application. A freezing order is an equitable order issued by court usually in personam restraining a person from dissipating an asset directly or indirectly, with an aim of preventing that person from dissipating his or her property in order to defeat the Judgment that may be passed against him or her.
46. The court in *International Air Transport Association v. Accam Agencies Company Limited* [supra]. Defined dissipation, thus:

“Dissipation, therefore, in the context of the law refers to any action that the respondent takes with regard to his asset or assets which is aimed at defeating satisfaction of an existing or future judgment including;

- a. Selling, removing, alienating, transferring, assigning, encumbering or similarly dealing with the asset;
- b. instructing, requesting, counselling, demanding or encouraging any other person to take an action in [a]; and
- c. facilitating, assisting in aiding, abetting, or participating in an action described in paragraph [a] or [c].....”



47. The threshold for the grant of freezing order are as enunciated by the learned authors in *Good on Commercial Law* 4th Edition at page 1287 [supra]. Considering the circumstances of the instant matter and the material placed before this court, this case is perfect for consideration of a freezing order.
48. The claimant/applicant contended that by an audit report, which it has placed before this court, it was revealed that the respondent in the cause of his employment with it, misappropriated its funds to a tune of Kes 16,500,000. One sees no challenge or attempted challenge on the audit report, its contents and outcome or the assertion on the admission of the misappropriation, by the respondent.
49. It was the claimant's / applicant's assertion that the respondent misappropriated its money and resorted to trade with the same for his own benefit. The respondent placed statements of account to demonstrate the trading. The statement[s] shows the respondent as the trader. In my view, upon demonstrating and showing these, the respondent bore the duty to adduce evidence in rebuttal. The evidential burden shifted to him. The *Hulsbury's Laws of England*, 4th Edition, Volume 17, at paragraphs 13 and 14 on evidential burden states:
- “..... the legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the Appellant, the evidential burden may shift in the course of the trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.”
50. Considering the foregoing premises, and the fact that the court is here dealing with an interlocutory application, it has to be measured in expressing itself and hereby go not beyond stating that the claimant / applicant has an arguable case.
51. The claimant / applicant contended that the respondent is dissipating at an alarming rate, the money that he misappropriated and invested in forex trading; whether there is any risk of dissipation of the money, I am inspired by the writing in Smith, I et al [editors] *Asset Recovery*: 2003 Lexis Nexis Butherworths – United Kingdom] thus:
- “Risk of dissipation can be show in a number of ways. In most cases, the risk will be inferred from evidence and unlawful conduct which has led to the investigation or charge.”
52. I have carefully considered the circumstances of this matter, *prima facie* they point towards dishonesty and unlawful conduct on the part of the respondent regarding money had and received for the claimant / applicant, by him.
53. This court has further with keenness interrogated the forex trading statement that the claimant placed forth, the statement of account that the respondent has not reasonably disputed or challenged and the downward trend of the balances obtaining and find no difficulty in being persuaded by the claimant's / applicant's position that the respondent is dissipating the money at a worrying rate.
54. By reason of the premises foregoing, I am convinced that the justice of this matter demand for issuance of a freezing order. Consequently, the claimant's/ applicant's application dated July 7, 2022 is allowed only to the extent that:
- a. Pending hearing and determination of this suit, a freezing order is granted, freezing with immediate effect any dealings and or restraining the respondent whether by himself or whosoever, claiming under him, from trading, selling, transferring, disposing or anyway



dealing with shares, withdrawing and or receiving Ksh. 500,00 00 [Five Million] or any such proceeds of such sale, trade or disposal of the said shares held by FX EGM Security Limited, Westlands, Nairobi under FX account number xxxx in the name of Walid Rafique.

- b. Costs of this Application be to the claimant / applicant.

READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF MARCH 2023.

OCHARO KEBIRA

JUDGE

Ms. Otiga for the respondent.

Mr. Olala holding brief for Litolo for the Claimant/applicant.

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

