



Chovondo & 3 others v Ultimate Engineering Ltd; Omido & another (Intended Respondent) (Cause E080 of 2021) [2023] KEELRC 1269 (KLR) (22 May 2023) (Ruling)

Neutral citation: [2023] KEELRC 1269 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E080 OF 2021**

JK GAKERI, J

MAY 22, 2023

BETWEEN

**JAPHETH AYIEKO CHOVONDO 1ST CLAIMANT
ALEX ANYIKA 2ND CLAIMANT
DENNIS LUMASIA 3RD CLAIMANT
KENNETH AKARA MAKUKUNI 4TH CLAIMANT**

AND

ULTIMATE ENGINEERING LTD RESPONDENT

AND

**WILL MASIZA OMIDO INTENDED RESPONDENT
JANET ASAMBA OMIDO INTENDED RESPONDENT**

RULING

1. Before the court for determination is a Notice of Motion by applicant dated 1March 7, 2022 seeking orders that:-
 1. Spent.
 2. Leave be granted for the 1st and 2nd Intended Respondents to be enjoined in this suit.
 3. Spent.
 4. The court be pleased to order the Respondent to deposit the sum of Kshs 8,000,000/= and or furnish such security as may be sufficient to satisfy the decree that may be passed against the defendant in this suit within 7 days from date of this order pending hearing and determination of this suit.



5. The court be pleased to issue a warrant of arrest against the Intended 1st and 2nd Respondents and bring them to court to show cause why they should not furnish/deposit security for the sum of Kshs 8,000,000/= being the amount claimed by the applicants for their appearance in court anytime when called upon during the pendency of the suit and until satisfaction of the decree as may be passed in favour of the applicants.
 6. In the alternative, warrants of attachment and sale do issue against all that property known as Plot No 214/425 and Land Reference No 209/68/2 situated in Muthaiga registered in the name of the 1st and 2nd Intended Respondents and any such other attachable properties of the Respondents that may be sufficient to satisfy the judgement/decree that may be passed against the defendants jointly and severally in this suit pending the hearing and determination of this suit.
 7. A Mareva Injunction do issue restraining the defendants/Respondents, its agents, servants, employees or whatsoever name called from selling and or disposing of its assets and in particular Plot Number 214/425 and Land Reference No 209/68/2 pending the hearing and determination of this Application and suit.
 8. A temporary injunction to restrain the defendants or by their servants, or agents or otherwise howsoever from selling, transferring or in any other manner dealing with any shares they own in any listed company in the Nairobi Stock Exchange and the Central Depository and Settlement Corporation, and freeze any or all of such accounts held by the defendants.
 9. A restraining order be issued against the 1st and 2nd Intended Respondents from leaving the jurisdiction of the court either through the Jomo Kenyatta International Airport and or any border point and the same be supervised by the Director Immigration, Ministry for Immigration and Registration of Persons.
 10. The costs of this application be provided for.
2. The Notice of Motion is based on the grounds set forth on its face and the Affidavit by Dennis Lumasia dated March 17, 2022 who deposes that the Respondent employed the Claimants as follows;

Termination		Duration	Position	Date	Salary per month
8/2/2020	12 years	1 st Claimant	Day Guard	27/3/2008	45,000
8/2/2020	11 years	2 nd Claimant	Senior Technician	-	45,000
8/2/2020	11 years	3 rd Claimant	Welder	19/7/2011	700 per day
8/2/2020	11 years	4 th Claimant	Security Officer	1/2/2013	25,000

3. The termination letter was signed by one John M. Mwai, the Human Resource Manager and copied to Janet Omido, the Executive Officer.
4. That they were neither given the one (1) months notice nor paid the January salary and were not consulted about the redundancy.



5. The affiant states that the Intended 1st and 2nd Respondents were former directors and shareholders of the Respondent and the registered owners of Plot Number 214/425 and Land Reference 209/68/2 and the Intended Respondents were not enjoined in the suit or application even though the injunction granted are on the titles that he is the registered owner.
6. That the Intended Respondents had initiated the process of winding up and striking out of the Respondent from the Register of Companies and the 2nd Respondent has already resigned from the company.
7. That the Respondent, through the Intended Respondents has initiated the process of disposing of all the said suit properties, withdrawing all the cash and funds in the company's account and travelling outside the country with the intention to occasion a miscarriage of justice and escape liability from the Kenya Revenue Authority who have been looking for 1st and 2nd Intended Respondents to appear and answer charges of tax evasion.
8. The affiant states that as at the date of redundancy, the Respondent owed the Claimants salary arrears amounting to Kshs 146,000/= and the law firm of R.O. Nyamweya & Co. Advocates demanded the sum of Kshs 8,000,000/= as outstanding dues.
9. That the Intended Respondents travelled out of the country without notifying the company's employees and had engaged agents to dispose of its assets and withdraw monies from its accounts with a view to relocating to the United States of America with a view to occasioning miscarriage of justice and evading tax which is being investigated by tax agencies estimated at Kshs 200,000,000/=.
10. That the Intended Respondents had other pending suits and have been unable to satisfy the decree/ judgement of the court.
11. That since the relocation to the United States of America, the Intended Respondents have visited the Country to dispose of Plot No 214/425 and Land Reference No 209/68/2 and the Claimants fear that the claim will be rendered useless unless the orders are granted.
12. That the Intended Respondents were in the process of winding up the Respondent company and striking its name from the Register of Companies.
13. The affiant depones that the Intended Respondents are disposing of property to evade attachment or payment of the would be judgement or decree in the event of the claim being successful and evade tax in which case the Claimants will be deprived of the fruits of any judgement permanently.
14. That if an injunction is not issued, the Claimants stand to loss their initial investment of Kshs 15,000,000/= and rent from 31st December, 2019 to date amounting to Kshs 45,194,500/= and the Intended Respondents will withdraw any money in any accounts they may have with any banks and lead to irreparable loss.
15. It is unclear to the court what the foregoing paragraph means or what it is referring to.

Response

16. In a Replying Affidavit sworn by Janet A. Omino of Creekwood Georgia, Atlanta, USA on November 29, 2022, the affiant depones that she is the sole shareholder of the Respondent and the Claimants were accorded a one month notice as the termination took effect on February 8, 2020 and was copied to the Ministry of Labour.
17. That the salaries and February were paid in full as the company was closed down.



18. That the Certificate of Incorporation on record establishes the fact of incorporation of the company only.
19. The affiant states that Land Reference 209/68/2 was not jointly owned but belonged to the 1st Intended Respondent who is neither a shareholder nor a director of the Respondent.
20. That the Intended Respondents are unaware of injunctive orders issued against the titles of properties they owned.
21. The affiant denies having commenced winding up proceedings of the Respondent company. That winding up was a complex process regulated by the law.
22. That inclusion of the 1st Intended Respondent was actuated by ill-motive and malice.
23. The affiant further states that the Respondent company closed because the Kenya Revenue Authority issued an Agency Notice on December 16, 2019 which remains in force and the directors of the Respondent cannot access the company's accounts.
24. The affiant denies that the Intended Respondents were on the run on tax evasion or disposing off assets.
25. That the property was jointly owned with Sidian Bank Ltd which sold vehicles to recover amounts owed by the company.
26. The affiant denies owing the Claimants Kshs 146,000/= or Kshs 8,000,000/= and did not receive the demand letter from the Claimants' counsel.
27. The affiant states that she was a citizen of the United States of America which is also her domicile and the 1st Intended Respondent is a permanent resident of the USA.
28. That they have the right to dispose of their property as they so desire and relocation to the USA did not arise.
29. The affiant further states that they opted not to defend the claim as they could not access the Respondent's accounts.
30. That information extracted from the social media cannot be verified and in any case LR No 209/68/2 was charged to Standard Chartered Bank which advertised the same for public auction sale by Legacy Auctioneers on more than three occasions and it did not belong to the Respondent company or the 2nd Intended Respondent.
31. That LR No 214/425 is a family home charged to the bank and registered in the names of the Intended Respondents.
32. That the affiant is unaware of the investment of Kshs 16,000,000/= alleged by the Claimants.
33. That by virtue of the Kenya Revenue Authority's Agency Notice in 2019, the company has not carried on business and clients cancelled contracts.
34. In their grounds of opposition, the Intended Respondents argue that the application is frivolous, vexatious and an abuse of the court process.
35. That since the Respondent company is incorporated, it can be sued in its name and does not require participation of the Intended Respondents and the orders sought were against the Intended Respondents not against the Respondent company and the 1st Intended Respondent is neither a shareholder nor director of the Respondent.



36. That most of the prayers sought had been overtaken by events and thus unenforceable and the Intended Respondents migrated to the USA in 2019.

Submissions

37. By May 12, 2023 when the court retired to prepare this ruling, none of the parties had filed the two (2) page written submissions as directed by the court on April 18, 2023.

Determination

38. Before delving into the issues for determination, it is elemental to indicate that the applicants have not demonstrated any urgency in prosecuting the application herein.

39. Although the Application was scheduled for inter partes hearing before the duty judge on 7th April, 2022 that did not happen and on 26th April, 2022, hearing was pushed to 4th May before the duty court and service was directed.

40. On 4th September, 2022, neither of the parties was present as was 18th October, 2022 service appear to have been a challenge.

41. Strangely, counsel for the applicants was absent on 8th December, 2022, 8th February, 2022, 28th February, 2023 and 23rd March, 2023 and although counsel for the Intended Respondents prayed for dismissal of the application, the court did not grant the prayer.

42. The singular issue in the court's view is whether the applicants have made a case to merit the orders sought.

43. It is common ground that the Claimants were employees of the Respondent until early 2020 when the company terminated their employment after the Respondent had received an Agency Notice from the Kenya Revenue Authority and could not access its accounts.

44. It is however unclear as to when the Intended Respondents relocated to the USA.

45. Documentary evidence reveals that the Respondent was incorporated on 2nd April, 1997.

46. That the rates due on plot No 214/425 as at 9th March, 2021 was Kshs 181,833/=, payable by the 1st and 2nd Intended Respondents and the two are listed as the plot owners on a payment receipt dated 4th February, 2019. A document from the Business Registration Service dated 18th March, 2022 shows that the 2nd Intended Respondent was the only shareholder and director of the company as her affidavit attests.

47. The applicants also attached unauthenticated copies of a Notice of Motion application by one Henry Kaverenge Kisali V Ultimate Engineering Ltd, Cause No 16 of 2016 dated 4th February, 2022 seeking orders to pursue the directors of Ultimate Engineering Ltd, the Respondent herein.

48. There is no evidence on how the application filed under Certificate of Urgency was determined.

49. Finally, the applicants attached printouts from the internet showing that LR No 209/68/2 had been advertised for sale by auction and was registered in the name of the 1st Intended Respondent.

50. The documents lack authentication, the purported advertisement lacks a date though the auction was scheduled for 25th November, 2021.

51. The documents on record are not accompanied by the requisite certificate and are of no evidential value.



52. It is essential to emphasize that the law of evidence requires the party alleging that a certain state or affairs existed to adduce sufficient evidence to prove the alleged facts. In this application, it is clear to court that the Supporting Affidavit by Mr. Dennis Lumasia contains many allegations with no supportive evidence.
53. Needless to gainsay, the provisions of the *Evidence Act* are unambiguous on the burden and standard of proof.
54. Have the Applicants made a case to merit the orders sought?
55. As regards the leave to enjoin the 1st and 2nd Intended Respondents, the applicants' only evidence is the Certificate of Incorporation and the list of directors and shareholders of the Respondent.
56. Whereas the 1st Intended Respondent admitted that she is a director and shareholder of the Respondent, the applicants tendered no evidence to prove that the 2nd Intended Respondent was connected with the Respondent company nor the relationship between the Intended Respondents.
57. The law relating to joinder of parties is fairly clear under Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 that;
- 2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party joined, whether as plaintiff or defendant, be struck out and that the name of any person who ought to have been joined, whether as plaintiff or defendant or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added. (See *Habiba W. Ramadhan & 7 others V Mary Njeri Gitiba* (2017) eKLR).
58. The party seeking to be joined or ought to be enjoined must have an interest in the subject matter which interest must be legal, identifiable or a demonstrable duty as captured by *Mativo J. (as he then was) in Kenya Medical Laboratory Technicians Board & 6 others V Attorney General & 4 others* (2017) eKLR.
59. Similarly, in *Communications Commission of Kenya & 4 others V Royal Medial Services Ltd & 7 others* (2014) eKLR, the Supreme Court of Kenya stated;
- “In determining whether the applicants should be admitted into these proceedings as an interested party, we are guided by this court’s ruling in the *Mumo Matemu* case where the court (at paragraphs 14 & 18) held:
- “An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the court when it is made, either way such a person feels that his or her interest will not be well articulated unless he himself appears in the proceedings and champions his or her case. . .”
60. Similarly, in the case of *Meme v Republic* (2004) 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that;
- i. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
 - ii. Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;



- iii. Joiner to prevent a likely course of proliferated litigation.”
61. The salient issue is whether the applicants have demonstrated that the 1st and 2nd Intended Respondents have a stake in the proceedings, legal or equitable right or could be affected by the decision of the court.
62. In the court’s view, since the 2nd Intended Respondent has admitted that she is the only shareholder and director of the Respondent company and documents on record attest to this fact and is thus the only person well versed with the affairs of the company as evidenced by the Replying Affidavit, the court is satisfied that the applicants have demonstrated that the 2nd Intended Respondent has a stake in the proceedings and will be affected by the decision and should thus be enjoined as a Respondent in this suit.
63. As regards the deposit of security of Kshs 8,000,000/=, the applicants urge that their claim against the Respondent was close to Kshs 8,000,000/= with interest should the claim be successful.
64. This prayer is informed by the fact that the applicants are apprehensive that the Intended Respondents were relocating to the United States of America to escape legal obligations.
65. Similarly, the 2nd Intended Respondent has confirmed that she was an American Citizen and the 1st Intended Respondent was a permanent resident of the USA.
66. It is also not lost to the court that the Respondent company ceased to carry on business in early 2020 owing to the Agency Notice by the Kenya Revenue Authority, as deponed by the 2nd Intended Respondent.
67. In sum, the company’s accounts are inaccessible and it is unclear how much is in the accounts and how long the Agency Notice will remain outstanding pending resolution by the Respondent company and its director.
68. The jurisprudence on the provision of security by a litigant is well settled.
69. In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* (2014) eKLR, the court stated;
- “The principles applicable in an application for security of costs are clearly enunciated in a number of cases but to cite a few, *Lalji Ganji Nathoo V Nathoo Vas Sanje* (1960) EA 315, *Boor Mohammed Abulla V Reinchodbhal J. Patel & another* (1962), *Musera & another V Stallion Insurance Co. Ltd* (2005), that of *Kearly Development V Tamal Construction* (1995) 3 ALL ER 534 and *Ocean View Beach Hotel V Salim Sultan Moloo & another* (2012) eKLR.”
70. Further, in *Aggrey Shivona V The Standard Group PLC* (2020) eKLR, L. Njuguna J. stated;
- “The test in an application for security for costs is not whether the plaintiff has established a prima facie case but whether the defendant has shown a bona fide defense. This was the holding in the case of *Shah V Sheti Civil App No 34 of 1981*.”
71. Finally, in *Jayesh Hasmukh Shah v Navin Hira & another* (2015) eKLR, the court held that;
- “It is now settled law, the order for security for costs is a discretionary one as long as that discretion is exercised reasonably and having regard to the circumstances of each case. Such factors as absence of known assets in the country, absence of an office within the jurisdiction of the court, inability to pay costs, the general financial standing or wellness of the plaintiff;



the bona fide of the plaintiff's claim or any other relevant circumstances or conduct of the plaintiff or defendant may be taken into account.”

72. In the instant case, the financial position of the Respondent and its ability to meet the claim, if successful remains unknown. Similarly, the 1st Intended Respondent has not filed a defense to the suit and her Replying Affidavit makes no reference to the Respondent's ability to make good the claim, if successful.
73. The Respondent has no office in Kenya and the only director and shareholder of the company is a citizen of the United States of America where she lives.
74. The Claimants have no official or office or assets to resort to if successful.
75. In view of the foregoing, the court is of the considered view that the Claimant's prayer for the Respondents to deposit security is merited. However, the court is persuaded that the sum of Kshs 2,000,000/= is sufficient as security.
76. As regards the prayer for Mareva Injunction, the applicants pray for the freezing of the 1st and 2nd Intended Respondents credit balances in Account Numbers xxxx and xxxx.
77. The applicants tendered no evidence that indeed these accounts have funds and belong to the Intended Respondents.
78. The principles that govern the issue of Mareva Injunction are well elucidated in Order 39 Rules 5 and 6 of the Civil Procedure Rules, 2010 and judicial decisions as held in Kanduyi Holdings Ltd V Balm Kenya Foundation & another (2013) eKLR.
79. In Mareva Campania Naviera SA v International Bulkcarriers SA (1980) 1 ALL ER 213, Lord Denning stated;

“In my opinion, that principle applies to a creditor who has a right to be paid the debt owing to him even before he has established his right to getting judgement for it. If it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before judgement, the court has jurisdiction in a proper case to grant an interlocutory judgement so as to prevent him from disposing of those assets.”
80. The specific principles applicable were enumerated by the court in Beta Health International Ltd v Grace Mumbi Gitthaiga & 2 others (2016) eKLR, and include a good arguable case based on pre-existing cause of action, court has jurisdiction, respondent appears to have assets within the court's jurisdiction, real risk that the assets will be removed from that jurisdiction and the balance of convenience is in favour of granting the injunction.
81. In this case, there is no dispute that the applicants case is grounded on the allegation that the Intended Respondents are in the process of migrating to the USA to evade their obligations to the Kenya Revenue Authority and occasion miscarriage of justice.
82. The 2nd Intended Respondent depones that she is not a Citizen of Kenya and is domiciled in the USA and that LR No 209/68/2 was being auctioned by a chargee and as correctly argued, the question of relocation does not arise. With regard to the bank accounts, the applicants, as adverted to above led no evidence that the two accounts belong to the Intended Respondents or were the Respondent's account and had funds.



83. As regards the other assets, no evidence of ownership has been adduced save for the Rates payment invoice from the Nairobi City County and receipt which identifies the Intended Respondents as owners of the plot.
84. Significantly, this application was filed in more than 1 year ago and no new evidence has been adduced to update the court on the current status. Similarly, and as adverted to earlier, the applicants have not demonstrated urgency of the matter as evidenced by their absence from court from 8th December to 18th April, more than 4 months.
85. In the end, the court is of the considered view that the prayer for Mareva Injunction is not merited.
86. Finally, the alternative prayers of warrants of attachment, injunction on selling or transfer or dealing in any shares of any listed company and restrain the intended respondents from leaving the country lack supportive evidence and justification and are unmerited.
87. In conclusion, the Notice of Motion dated March 17, 2022 is successful to extent that;
- a. The Applicants are granted leave to enjoin the 2nd Intended Respondent in this suit.
 - b. The Respondents to deposit Kshs 2,000,000/= as security within 45 days.
 - c. Costs shall abide the outcome of the suit.
- It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 22ND DAY OF MAY 2023

DR. JACOB GAKERI

JUDGE

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 March 15, 2020 and subsequent directions of April 21, 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 Civil 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.

DR. JACOB GAKERI

JUDGE

