



**REPUBLIC OF KENYA**  
**EMPLOYMENT & LABOUR RELATIONS COURT**  
**AT NAIROBI**

**CAUSE NO. 350 OF 2015**

SUSAN MUMBUA.....1<sup>ST</sup> CLAIMANT  
LORNA TSISIGA.....2<sup>ND</sup> CLAIMANT  
TIVENDER KAUR JUTTILA.....3<sup>RD</sup> CLAIMANT  
JOHANESS OLUOCH.....4<sup>TH</sup> CLAIMANT  
JOAN WANGUI KARIUKI.....5<sup>TH</sup> CLAIMANT  
HARRISON NDWIGA MURIUKI.....6<sup>TH</sup> CLAIMANT  
DANIEL MUEMA MUTANGILI.....7<sup>TH</sup> CLAIMANT

**VERSUS**

NAVITAS LIMITED.....1<sup>ST</sup> RESPONDENT  
**AUSTRALIAN UNIVERSITY STUDIES**  
INSTITUTE (AUSI).....2<sup>ND</sup> RESPONDENT  
AUSEDKEN LIMITED.....3<sup>RD</sup> RESPONDENT

**RULING**

1. The Application before me is the Claimants/Applicants notice of motion dated 8<sup>th</sup> June 2015. The application is brought under S.12 and 13 of Industrial Act, Rules 16, 18 and 32 of the Industrial Court (Procedure) Rules 2010, Order 39 Rule 5 of Civil Procedure Rules 2010. In a nutshell the Claimants seek a *mareva* injunction. The grounds were on the face of the application as well as the supporting affidavit of the 3<sup>rd</sup> Claimant Kaur Jutla. He submitted that on the 23<sup>rd</sup> of March 2015, the Court made a Ruling and ordered the Respondent to deposit a sum of 75,025,220.50 or bond for equivalent sum to secure Claimant's dues. To date Respondent has not deposited any amount nor have they provided any bond as directed by this Court and in an effort to compel compliance, the Claimants instituted garnishee proceedings, which were pursuant to an application of 1<sup>st</sup> Garnishee in respect of the garnishee, were held to have been taken without jurisdiction. The

Court also disallowed the application for review of orders and on the same day the Court also dismissed an application for stay of proceedings pending appeal. He submitted that the Respondent are keen on frustrating any award to be given by this Court and that the Respondents have not disclosed any other assets they hold in this country. The only assets they disclosed are funds at the 2<sup>nd</sup> and 1<sup>st</sup> Garnishee. Despite Claimants severally stating the Respondents are keen to flee from this jurisdiction they have confirmed that assertion by failing to make any payment for the uncontested sums and also by refusing to comply with orders of 29<sup>th</sup> March 2015. He submitted that the Garnishee *nisi* was neither set aside nor was it discharged by a ruling of this Court. He submitted that the Claimants had made the application to ensure they do not lose out. He submitted that it is clear there are sums held at the banks and that the Claimants had satisfied the Court for grant of *mareva* injunction. He relied on the case **International Air Transport Association & Another v. Akarim Agencies Ltd. [2014] eKLR** where Gikonyo J. gave what the grounds for grant of *mareva*. In this present case the Respondent intends to abscond, secondly they intend to dissipate assets and thirdly this is to defeat the court action. He submitted that this Court has the mandate to arrest the actions of the Respondent by stopping them from removing from this jurisdiction any sums held in these banks. He submitted that Order 35(9) is couched in clear terms and this Court has already made an order for deposit of 75 million to secure Claimants dues. He submitted that from the grounds filed, the former 1<sup>st</sup> Garnishee states the funds held in that account have since been transferred to some undisclosed account and that there is no better confirmation of the fears the Claimants had. He submitted that there is total intent to frustrate the Claimant by going to all lengths. He stated that it was important to point out the amounts were moved on 26<sup>th</sup> May 2015 after the orders of 22<sup>nd</sup> May 2015. He submitted that the Counsel for the 1<sup>st</sup> Garnishee wrote to Claimant's advocate on 27<sup>th</sup> May 2015 requesting consent to set aside the Garnishee order *nisi*. He submitted that it was clear that as of 8<sup>th</sup> June the Respondents were of the view the accounts were frozen, the 1<sup>st</sup> Garnishee was aware the account was frozen and they needed consent or a Court order to unfreeze the account. He submitted that the 3<sup>rd</sup> Claimant is among the signatories to the accounts and the Claimants were comfortable there would be no access of the accounts without her involvement. He submitted that the Claimants were shocked to note there was removal of cash without her involvement and the 3<sup>rd</sup> Respondent has applied for the unfreezing of the Standard Chartered Account. He stated that the 1<sup>st</sup> Garnishee on its own motion or on instructions of the Respondent or through collusion of both of them are acting to frustrate the orders of Court and are acting in contempt. He thus submitted that the Claimants have met the threshold of grant of *mareva*. He relied on case of **Central Bank of Kenya v. Giro Commercial Bank & Another [2007] eKLR**.

2. Mr. Mituga submitted that the orders sought by the Claimants cannot issue against 1<sup>st</sup> and 2<sup>nd</sup> Respondent in light of supporting affidavit and evidence disclosed by the Respondents on the accounts the Claimants intend to attach. He stated that the accounts they intend to attach belong to the 3<sup>rd</sup> Respondent and therefore Court cannot issue orders in vain against the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's accounts. He opposed the application on grounds that it is a disguised garnishee application which the Court said it did not have jurisdiction given the facts of the case. He submitted the present application amounts to a prejudgment of what belongs to the judgment debtor that is in the hands of a third party. That is ideally what the Claimant's application seeks to achieve and being in substance the same as the application the Court says it had no jurisdiction to handle he urged the Court to disallow the application. He submitted that the application is premature particularly in respect of accounts held in Standard Chartered Bank. The 3<sup>rd</sup> Respondent had sought the lifting of Garnishee order *nisi* when the Court directed a formal application be filed. To file this application when Court has not heard the said application was in his view premature and an abuse of the court process. The Court is yet to lift the order and the order is still in place and thus he urged the Court to dismiss the application.
3. Mr. Ochwo submitted that he had filed grounds on 24<sup>th</sup> June 2015 in response to the Claimant's application. He associated himself with the submissions made by Mr. Mituga and submitted that the understanding of 3<sup>rd</sup> Respondent of the Ruling of 22<sup>nd</sup> May 2015 is that the said Ruling was in

respect of the application brought by the 1<sup>st</sup> Garnishee. At page 20 of the Ruling the Court stated the garnishee proceedings were taken without jurisdiction which in the 3<sup>rd</sup> Respondent's view means that all prior proceedings taken in the garnishee proceedings were null and void and of no legal effect once this Ruling was delivered. That is the reason why on 8<sup>th</sup> June 2015 he made an oral application for lifting of garnishee order *nisi* in respect of Standard Chartered Bank. The record shows that he made the application for the Standard Chartered Bank only and not Commercial Bank of Africa (CBA) as their understanding was that the Ruling related to CBA only as they were the applicant therein. In his view, the need to set aside the garnishee order *nisi* applies to Standard Chartered Bank and not CBA as the court had made its Ruling that the Garnishee proceedings had been taken without jurisdiction and in his view, the withdrawal of funds in CBA was not in breach of any Court order as they took it that both the decree *nisi* and absolute were discharged by the Ruling that said the garnishee proceedings were taken without jurisdiction. He submitted that is what informed the mind of 3<sup>rd</sup> Respondent as he made the application on 8<sup>th</sup> June. He stated that the authorities relied on by the applicant on attachment before judgment, he did not think mere withdrawal of funds from an account would be a demonstration of a Respondent who wishes to abscond or frustrate the Claimants. He submitted that the Claimants need to show this is outside the ordinary course of business to withdraw funds from an account. Mere allegations without proof by the Claimants will not be sufficient to obtain an order for attachment before judgment. He submitted that it was uncontested the 3<sup>rd</sup> Respondent is a company actually registered in Kenya and that the issue of running away from jurisdiction is not well established. He submitted that on the issue of funds and properties, it is not for the Respondent to demonstrate there are other properties and it is for the Claimants to state the properties they know and that they fear the Respondents may dispose of them or are attempting to dispose of them. The filing of a suit by Claimants does not of itself act as a bar to the Respondents in dealing with their property. He submitted that the mere withdrawal of funds is not bad faith on part of Respondents. Finally, he submitted that at the time the 3<sup>rd</sup> Respondent was withdrawing funds, there was nothing stopping the Respondent from doing so and the *bona fides* are demonstrated by the application for the funds in Standard Chartered to be unfrozen as the Respondent understood these to be under garnishee and not the other funds.

4. Mr. Fraser for CBA submitted that the CBA has no interest in the litigation by the parties and is ready to comply with any valid orders that the Bank was not involved in any collusion or attempts by Respondents. He submitted that it is clear that there is attempt to attach the funds in the accounts and that at time of the order *nisi*, those monies no longer lie with his client. He relied on the affidavit of James Murage and the affidavit confirms withdrawal of the monies in May 2015 and the affidavit of Jackson Kingori sworn on 16<sup>th</sup> July 2015 to explain his letter annexed to the affidavit that was merely trying to tidy up the record. He submitted that the funds had been withdrawn by the time the letter was sent. He submitted that his learned friend, counsel for the Claimants, never had courtesy to respond. He submitted that there are valid signatories and they signed and that it is incorrect to say funds cannot move if the 3<sup>rd</sup> Claimant does not sign. The Ruling of 22<sup>nd</sup> May was that Garnishee proceedings were taken within jurisdiction. He referred to **Omega Enterprises (Kenya) Limited v. Kenya Tourist Development Corporation & Others Civil Appeal 53 of 1993** (unreported) and particularly the decision of Tunoi JA's (as he was) and Justice Pall's decision. He submitted that an order made without jurisdiction is void *ab initio* and the Court's decision was proper. He submitted that the garnishee *nisi* merged with order absolute and that the order *nisi* ceased to exist once the order absolute was given. The order *nisi* ceased to have any effect and any order made can only related to the funds held as of 9<sup>th</sup> June 2015.
5. Mr. Kirimi in response to Mr. Mituga's submissions that the orders cannot issue submitted that the order was served upon the banks which were holding the sums of money and that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are one and the same as the 3<sup>rd</sup> Respondent. Parties argued on this and the Court gave a Ruling on it. He submitted that the person who swears the affidavit on behalf of 1<sup>st</sup> and 2<sup>nd</sup> Respondent is a director and one of the signatories and the parties are interlinked and interrelated. He stated that no order was given on 8<sup>th</sup> June that no application could be filed before the

Respondent filed the application to set aside order *nisi*. There is no way that the Claimants can be told to have moved prematurely and why did the Respondents wait 15 days before filing an application? The Respondents have not filed any affidavit and relied on grounds and thus any representation of any facts other than those before Court is superfluous. The Court record bears out what occurred in court and he did not recollect Mr. Ochwo making an application in respect of Standard Chartered account only. He submitted that it is assert the Respondents will run bankrupt if they deposit the funds into Court and that the withdrawals at CBA are a clear demonstration of a Respondent who is running away from jurisdiction of the Court. He submitted that the Respondents asset it is not for them to show they are not running away. He submitted that he had discharged the burden and it is the Respondents burden to prove they are not running away. It was no mere withdrawal but was a clean sweep. On Mr. Fraser's submissions, he reiterated that the CBA is acting in collusion with Respondent. The application filed on 23<sup>rd</sup> April sought various orders and prayer 5 of application was for setting aside of garnishee order absolute. There was no order for setting aside of Garnishee order *nisi* and the entire garnishee proceedings. The Court did not grant the order setting aside order *nisi* and the withdrawal was without mandate. He submitted the instructions have not been attached and that the instructions point out the contact person is the 3<sup>rd</sup> Claimant and she was not contacted when withdrawal was made. He submitted that the CBA acted on collusion and was out to frustrate orders of Court. Lastly he submitted that the **Omega** case supports the authority of Lord Diplock in **Isaacs v. Robertson** stating there is an obligation to obey court orders and if in doubt, one should seek alteration or clarification. He submitted that Counsel's letter was seeking clarification of the order and that they cannot state they interpreted order to suit their whims. No authority has been cited to show garnishee order *nisi* merged with garnishee order absolute. He thus urged the Court to allow application.

6. The application before me seeks what is in the nature of Mareva injunction. Arrest and Injunction are under Order 39 and 40 of Civil Procedure Rules 2010. Order 39 of the CPR is titled – ARREST AND ATTACHMENT BEFORE JUDGMENT. Rule 1 deals with instances where the defendant may be called to furnish security for appearance and provides as follows:-

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

- a. that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him—
  - i. has absconded or left the local limits of the jurisdiction of the court; or
  - ii. is about to abscond or leave the local limits of the jurisdiction of the court; or
  - iii. has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof; or
- b. that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance:

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

7. Rule 5 of Order 39 of the Civil Procedure Rules provides as follows:

Where the defendant may be called upon to furnish security for production of property

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—

- c. is about to dispose of the whole or any part of his property; or
- d. 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.

8. Order 40 of the CPR is titled – TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS. Rule 1 provides as follows:-

- i. Where in any suit it is proved by affidavit or otherwise—
  - a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
  - b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

ii The court may, on the application of any party to a suit, order the sale, by any person named in such order, and in such manner and on such terms as it thinks fit, of any movable property, being the subject-matter of such suit, or attached before judgment in such suit, which is subject to speedy and natural decay, or which for other just and sufficient cause it may be desirable to have sold at once.

7. The decision in the case of **International Air Transport Association & Another v. Akarim Agencies Ltd.** Gikonyo J. was on an application for *mareva*. In that case the learned judge declined to grant an order of *mareva* against a party who was alleged to have dissipated and/or was dissipating assets and attempting to flee jurisdiction of the Court but the judge however granted other relief.

8. In Vol. 24 Halsbury's Laws (4th Edition) para 918 there is provision as follows:-

... now, therefore, whenever a right, which can be asserted either at law or in equity, does exist, then, whatever the previous practice may have been, the Court is enabled by virtue of this provision, in a proper case, to grant an injunction to protect that right.

9. Mareva injunctions are so called because of the case of **Mareva Compania Naviera SA v International Bulkcarriers SA [1980] 1 All ER 213** where Lord Denning held as follows:-

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 by getting judgment 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 judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets. It seems to me that this is a proper case for the exercise of this jurisdiction. There is money in a bank in London which stands in the name of these charterers. The charterers have control of it. They may at any time dispose of it or remove it out of this country. If they do so, the shipowners may never get their charter hire. The ship is now on the high seas. It has passed Cape Town on its way to India. It will complete the voyage and the cargo will be discharged. And the shipowners may not get their charter hire at all. In face of this danger, I think this court ought to grant an injunction to restrain the charterers from disposing of these moneys now in the bank in London until the trial or judgment in this action. If the charterers have any grievance about it when they hear of it, they can apply to discharge it. But meanwhile the shipowners should be protected. It is only just and right that this court should grant an injunction. I would therefore continue the injunction. (Underline mine)

10. From the record before me and affidavits filed by the Claimants, there is some evidence that the Respondents have removed their property (money) from the jurisdiction of the Court. The Civil Procedure Rules require cogent evidence to be produced to demonstrate there is absconding or disposal of property or a very real possibility of absconding or dissipating of property. Property which has been dissipated or otherwise disposed of, or is about to be dissipated or disposed of or is under threat of removal from jurisdiction of the Court must also be specified for an order is to issue under the law and the Claimant has demonstrated that the Respondents are keen to move the money. While I agree that the Respondent is not bound to prove anything, there is an indication that funds have been secreted. The applicant thus has demonstrated that there is basis for the grant of the order of injunction. This is different from the earlier orders sought to garnish the accounts of the Respondents.

11. I hereby order the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to furnish the Court within 14 days of this order a list of assets and funds held in Kenya. The Claimants must also each furnish to Court within 14 days of this order details of all payments received from the Respondents as dues whether terminal or salaries from January 2015 to date and clearly indicate their respective claims against the Respondents. Further orders will be made on 12<sup>th</sup> October 2015 after parties comply.

Orders accordingly.

Dated and delivered at Nairobi this 24<sup>th</sup> day of **September** 2015

**Nzioki wa Makau**

**JUDGE**