



**Equity Bank Kenya Limited v Ubahashi Traders Limited & 6 others (Commercial Case E559 of 2024) [2025] KEHC 1915 (KLR) (Commercial and Tax) (25 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1915 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E559 OF 2024  
A MABEYA, J  
FEBRUARY 25, 2025**

**BETWEEN**

**EQUITY BANK KENYA LIMITED ..... PLAINTIFF**

**AND**

**UBAHASHI TRADERS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**KARIYE INVESTMENT LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**CALABASH ADVENTURES LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**FLOWERISH INTERNATIONAL LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**KARIYE SALAH ALI ..... 5<sup>TH</sup> DEFENDANT**

**HOTHO INVESTMENTS LIMITED ..... 6<sup>TH</sup> DEFENDANT**

**JAHNUR INVESTMENTS LIMITED ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling determines three applications dated 11/11/2024 by the defendants and 17/9/2024 and 26/11/2024, respectively by the plaintiff.

**Application dated 11/11/2024**

2. This application was brought pursuant to Articles 23, 24, 31 and 40 of *the Constitution* of Kenya, sections 118, 121 and 180 of the *Evidence Act*, section 3A of the *Civil Procedure Act* and Order 51 Rule 1 of the Civil Procedure Rules.
3. It sought to join the Banking Fraud Investigation Unit as an interested party to the suit. That upon admission as such, the interested party be ordered to furnish bank statements with respect to the



- defendants' accounts, witness statements recorded by the defendants and provide all investigative reports touching on the suit.
4. The defendants further prayed for the lifting of the freezing orders in respect of their accounts held in the plaintiffs' bank and the accounts held in ABSA and DTB Banks. That an order be granted declaring that the defendants were at liberty to access their bank accounts.
  5. The application was supported by the grounds set out on the face of it and the supporting affidavits of Mohamed Hashi Adan, Kariye Salah Ali, Mohamud Mohamed Arab, Abdirashid Mohamed Hassan And Mohamed Sahil sworn on 11/11/2024.
  6. They contended that one Sahil Mohammed was approached by a person known as Geoffrey Kiragu who informed him that he was a property agent and he had with him a huge amount of cash that he needed them in US dollars. That considering to be a business opportunity, Sahil approached the director of the 1<sup>st</sup> defendant wherein the defendants were amenable to the proposition.
  7. In the arrangement, the money would be forwarded to the 1<sup>st</sup> defendant's account ranging between Kshs. 3 to 9 million and the same would be transferred to the other defendant's accounts. After this, the money would be collected by Geoffrey without fail. That the defendants could not trace the origin of the money and thereafter they discovered that they could not access their respective accounts.
  8. They contended that they were strangers to the syndicate and neither were they beneficiaries and therefore there was no justification for having their accounts seized and hampering their business operations. That they had helped the police to arrest the said Geoffrey and it was clear that the defendants were being prosecuted innocently.
  9. This application was opposed by the plaintiff via grounds of opposition dated 26/11/2024. It contended that the Civil Procedure Rules did not provide for a joinder of a party as an interested party as Order 1 makes a provision for either joinder as plaintiff or defendant. That the Banking Fraud Investigation Unit was a department of the Directorate of Criminal Investigation and therefore could not be sued in its own name.
  10. That the Banking Fraud Unit was not a necessary party to the suit. That the defendants had made an admission to transacting in foreign exchange business without authorization thus offending section 33A (2) of the *Central Bank of Kenya Act*. Additionally, that the defendants did not demonstrate any legal basis or authority or justification for receiving the funds that were unlawfully transferred to them. That the defendants' actions have caused the plaintiff substantial loss and damage.

#### **Application dated 17/9/2024**

11. The application was brought under section 63(e) of the *Civil Procedure Act*, Order 39 rule 5 and 6 of the Civil Procedure Rules 2010 and the Inherent power of the Court.
12. The application sought the freezing of the following accounts: -
  - a. 1<sup>st</sup> defendant's account number 0840xxxxxxx held with the plaintiff and account number 9224xxxxxx held with NCBA bank Kenya PLC subject to a maximum of Kshs. 207,720,020/-.
  - b. 2<sup>nd</sup> defendant's account numbers 08402xxxxxxx held with the plaintiff, 2048xxxxxxx held with Absa Bank and 0480277002 held with Diamond Trust Bank subject to a maximum of Kshs. 85,740,300/-.



- c. The 3<sup>rd</sup> defendants account number 08402831xxxxx held with the plaintiff subject to the sum of Kshs. 18,000,000/- and account number 08402845xxxxx subject to a maximum of Kshs. 14,000,000/-.
  - d. The 4<sup>th</sup> defendant's account number 08402831xxxxx held with the plaintiff subject to a maximum of Kshs. 11,000,000/-.
  - e. The 5<sup>th</sup> defendant's account number 08401830xxxxxxx held with the plaintiff subject to a maximum of Kshs. 3,000,000/- and account number 05802796xxxxx subject to a maximum of Kshs. 3,000,000/-.
  - f. The 6<sup>th</sup> defendant's bank account number 0840285456692 held with the plaintiff and account numbers 20147421244 and 2047421279 held with Absa Bank Kenya Limited subject to a maximum of Kshs. 93,040,000/-.
  - g. The 7<sup>th</sup> defendant's account number 08402845xxxxx held by the plaintiff subject to a maximum sum of Kshs. 18,500,000/-.
13. That the Court do order the defendants to provide a full account of all transactions involving the converted sums including all the details of all parties to whom monies were transferred.
  14. The Motion was supported by the grounds set out on the face thereof and the supporting affidavit sworn by WAWERU MATHENGE on 17/9/2024. The plaintiff contended that on various dates between 17/5/2024 and 14/6/2024, a former employee unlawfully transferred Kshs. 207,720,020/- from the plaintiff's account number 000300010358 to the 1<sup>st</sup> defendant's account held with NCBA Bank Kenya. That the 1<sup>st</sup> defendant had no lawful claim to the funds and was not entitled to receive the same.
  15. That similarly, between 7/6/2024 and 14/6/2024, the same former employee allegedly transferred Kshs. 85,540,300/- from the plaintiff's bank account to the 2<sup>nd</sup> defendant's accounts held with Absa Kenya Limited and Diamond Trust Bank, despite the 2<sup>nd</sup> defendant having no legal entitlement to the funds.
  16. Furthermore, between 23/5/2024 and 13/6/2024, the former employee allegedly transferred Kshs. 93,040,000/- from the plaintiff's account to the 6th defendant's accounts held at Absa Bank Kenya Limited. Subsequently, additional transfers of Kshs. 9,000,000/- were made to the employee's own account held with the plaintiff, along with a further Kshs. 15,000,000/- transferred to Jahnur's account.
  17. Following these alleged unlawful transactions, the plaintiff reported the matter to the Banking Fraud Investigation Unit of the Directorate of Criminal Investigations (DCI) and investigations into the matter were still then underway.
  18. The defendants opposed the application vide a replying affidavit dated 23/10/2024 sworn by Mohamed Hashi Adan, Kariye Salah Ali, Mohamud Mohamed Arab, Abdirashid Mohamed Hassan And Mohamed Sahil. They stated that their business primarily involves imports and it was common for them to assist each other in raising the required amounts in US dollars.
  19. They explained that they were approached with a proposal to help a man named Geoffrey convert his money into US dollars. Under this arrangement, the 1<sup>st</sup> defendant would receive the funds, remit them to Geoffrey and earn a commission in return.



20. They further stated that they later discovered that the money they had been receiving had been stolen from the plaintiff. However, they claimed they were unaware of its origin at the time of the transactions. The defendants denied the allegation that the funds originated from the plaintiff's accounts, maintaining that only the plaintiff could provide clarity on how the fictitious company involved in the transactions came into existence.

#### **Application dated 26/11/2024**

21. The application was brought under section 63(e) of the *Civil Procedure Act*, Order 39 rule 5 and 6 of the Civil Procedure rules 2010 and the inherent power of the Court.
22. It sought the freezing of the account number 12902824xxxxx held with the plaintiff to the maximum amount of Kshs. 88,020,000/-. In support of the Motion, the plaintiff relied on the grounds set out on the face thereof and the supporting affidavit of Waweru Mathenge sworn on 26/11/2024.
23. He stated that this suit was instituted in order to recover amounts that had been unlawfully transferred from its general ledger account to the defendants. That on 18/9/2024, the Court issued orders freezing the defendants accounts. That the plaintiff had continued tracing the converted funds where it discovered that some of the amount had been transferred to account number 12902824xxxxx held by the plaintiff and operated by Sasa Pay Trust. That these transfers were done before the Court issued the freezing order.
24. That the proprietors of Sasa Pay Trust had requested the plaintiff to hold a lien over Kshs. 26,540,000/- but the plaintiff established that the amounts transferred to account number 12902824xxxxx was Kshs. 88,020,000/-. That unless the orders sought were granted, the plaintiff will suffer irreparable loss as it will be unable to recover the funds.
25. The application was opposed by the defendants vide a replying affidavit dated 5/12/2024 sworn by Mohammed Mohamed Hashi Adan, Kariye Salah Ali, Mohamud Mohamed Arab, Abdirashid Mohamed Hassan and Mohamed Sahil. It was the defendant's position that they did not receive any money from the plaintiff's account number 0003000xxxxx.
26. That the money was lawfully transferred to account number 12902824xxxxx operated by Sasa Pay Trust. That Sasa Pay Trust was regulated by the Central Bank of Kenya to offer mobile money e-wallet services, merchant's payments and had been used previously to do bulk payments for goods shipped on behalf of clients. That the plaintiff did not want to disclose the investigation materials thus being in violation of Article 50 of *the Constitution* of Kenya.
27. The applications were canvassed by way of written submissions which I have carefully considered. The plaintiff submitted that if a mareva injunction is not issued, the amounts held in the defendant's accounts will be disposed and dissipated thereby defeating the plaintiff's claim. That the plaintiff had an arguable case for conversion whereby the defendants had participated in the unauthorized transfer of a total of Kshs. 386,500,320/- to them from the plaintiff's account.
28. Counsel submitted that the defendants have refused to return the transferred amounts to the plaintiff although there was no lawful claim over the said funds. That the defendants were not permitted to transact in foreign exchange as they did not have a license to justify the same. Additionally, that the defendants lacked any reasonable justification on how they received the funds from the plaintiff. That the defendants' application for the lifting of the freezing orders was clear evidence that there was a risk of dissipation. That the balance of convenience laid in allowing the application for freezing orders.



29. The defendants submitted that the account number 129028224xxxxx held with the plaintiff did not belong to the defendants and the account holder was not a party to the suit. It was contended that the money received into the accounts in question came from 15 different companies. That however, the plaintiff had not demonstrated how the companies were connected to the plaintiff.
30. Counsel submitted that the money having been transferred into the defendant's accounts in a lawful process, the recipient could not be punished. That the plaintiff had failed to discharge the burden of all material matters by failing to disclose the owners of the companies and the connection to the plaintiff at all, the full disclosure of the employees who were directly involved in the processes and a link of fraud associated with the plaintiff's employees and the defendants to demonstrate that there was fraud or illegal conversion.
31. The defendants argued that the plaintiff had left out the information that money was not wired directly to the defendants but came from some companies. It was contended that they could not be accused of trying to dissipate assets which they had already demonstrated they do not belong to the plaintiff. That the defendants could not be accused of conversion since they had gained access to the plaintiff's system.
32. On the issue of joinder of parties, it was submitted that there was a close nexus between the operational and administrative decisions made by the plaintiff and which directly touched on the defendants' case and without the joinder of BFIU, the defendants right to a fair hearing will be violated.
33. I have considered the pleadings before Court and the rival submissions on record. There are three issues for determination namely; whether the plaintiff has established sufficient grounds for the issuance of a Mareva injunction, whether the freezing order against the defendants should be lifted and; whether the intended interested party should be joined to the case.
34. On the first issue for issuance of a Mareva injunction, the plaintiff contended that the defendants had received a substantial sum of money in their accounts from the plaintiff's former employee. That the funds were unlawfully transferred and that the defendants had no legal entitlement to the same. That consequently, the bank suffered significant financial loss, making it necessary to freeze the defendants' accounts to prevent the dissipation or loss of the remaining funds.
35. In response, the defendants did not deny receiving the money but maintained that they were unaware of its source. That they had been misled by one Geoffrey, who had allegedly deceived them into believing that the funds were intended for currency conversion to US dollars. The defendants further contended that they had cooperated with law enforcement agencies by assisting the police in identifying the alleged culprit and therefore, should not be subjected to the freezing of their accounts.
36. Mareva injunctions are governed by Order 39 rules 5, 6 and 7 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.

...

6.

- (1) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the court, the court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.
- (2) Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the court shall order the attachment to be withdrawn, or make such other order as it thinks fit.

7. Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree.”

37. The principles governing the grant of an order under Order 39 of the Civil Procedure Rules, commonly referred to as a freezing injunction, were outlined by the court in *Beta Healthcare International Limited v Grace Mumbi Githaiga & 2 others* [2016] eKLR, as follows: -

- “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.

38. In *Kanduyi Holdings Limited V Balm Kenya Foundation & Another* [2013] EKLR, the court held 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 Naviera 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”

39. In *UBA Kenya Bank Limited v Sylvia Mututi Magotsi* [2015] eKLR, the court outlined the threshold for the grant of a freezing order which is different from the principles set out in *Giella vs Cassman Brown & Co. Limited* [1971] EA 358 and held as follows: -

“However, a Mareva injunction is a freezing order and is an order in persona restraining or enjoining a person from dissipating an asset directly or indirectly, Goode on Commercial Law 4<sup>th</sup> Edition at page 1287 states thus;

- i) 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;
- ii) The Claimant has ‘a good arguable case’ based on a pre-existing cause of action.
- iii) The Claim is one over which the Court has jurisdiction.
- iv) The Defendant appears to have assets within the jurisdiction.
- v) There is real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted.
- vi) The balance of convenience is in favor of granting the injunction.
- vii) 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.”

40. On the first issue of whether the applicant has an arguable case, it is not in dispute that the defendants undisputedly received the funds in question. That the money they received belonged to the plaintiff. That although the money was not directly transferred to the defendants’ accounts, it was routed through other entities before ultimately landing in their possession. It is further not disputed that they were not entitled to the same.

41. While the Court is alive that by passing through other entities the money may have been mixed with others, however, the fact remains that it can be traced to the accounts held by the defendants through the common law doctrine of tracing.

42. The common law doctrine of tracing was extensively discussed in the case of *Re Cytonn High Yields Solutions (In Liquidation) (Insolvency Petition E063 of 2021)* [2024] KEHC 81 (KLR) (Commercial and Tax) (17 January 2024) (Ruling), where the Court permitted claimants to track and recover misappropriated funds from assets acquired thereby.



43. In the present case, at a prima facie level, the record demonstrates that the plaintiff's funds were successfully traced to the defendants' accounts. This, combined with the defendants' admission of receiving the money, establishes an arguable case.
44. Regarding the risk of dissipation of funds, there is no assurance that the defendants will refrain from withdrawing or depleting the funds once the freezing orders are lifted. Money is a fluid commodity that can disappear by a stroke of a pen. The Court finds that the plaintiff faces a significant risk of losing the money if the orders sought are not granted. Therefore, this case meets the threshold for the issuance of a Mareva injunction as sought in the two plaintiffs' applications.
45. The second issue is whether the freezing orders against the defendants' application should be lifted. Having allowed the application for freezing the defendants accounts, this issue is therefore determined in the negative.
46. On the third issue, the defendants have sought for the enjoinder of the Banking Fraud Investigation Unit as an interested party. Order 1 Rule 10 of the Civil Procedure Rules provides for substitution and addition of parties. Rule 10 (2) thereof provides as follows: -
- “(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 improperly 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”
47. In *Lucy Nungari Ngigi & 128 Others vs. National Bank Of Kenya Limited & Another* [2015] eKLR, the Court stated as follows when considering whether to grant leave to enjoin a party: -
- “Joinder of parties is governed by Order 1 of the Civil Procedure Rules. In law, joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally; or in the alternative, where if such persons brought separate suits, any common question of law of fact would arise. See also Order 7 Rule 9 of the Civil Procedure Rules. The court may even in its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. Therefore, joinder of parties is permitted by law and it can be done at any stage of the proceedings. But, joinder of parties may be refused where such joinder: will lead into practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit. In other word, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties.”
48. The defendants have applied for the joinder of the interested party on the basis that it possesses crucial information identifying the final recipients of the funds, some of whom had been arrested by the interested party. I have carefully considered the reasons advanced for this joinder. It is evident that



the primary purpose of the joinder is to obtain documentation and evidence that may support the defendants' case.

49. However, there are no reliefs sought against the said Unit. Additionally, I do not find that the interested party is a necessary party to this case. Nonetheless, the defendants' request for the relevant documentation and evidence can be adequately addressed through a proper and an appropriate application for the production of such materials properly identified. Therefore, the application for joinder is declined.
50. In the premises, the Court find and hold that: -
- a. The plaintiff's applications dated 17/9/2024 and 26/11/2024 are hereby allowed as prayed.
  - b. The defendants' application dated 11/11/2024 is dismissed with costs.
  - c. Due to the hardship the orders may cause the defendants, I direct that the plaintiffs do take steps to finalize pre-trials within 60 days and thereafter list the suit for trial within 90 days.

It is so ordered.

**SIGNED AT KISUMU THIS 18<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**A. MABEYA, FCI Arb**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**F. GIKONYO**

**JUDGE**

