



**Ngugi v Mwihaki & another (Commercial Case E004 of 2024)
[2025] KEHC 11865 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 11865 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
COMMERCIAL CASE E004 OF 2024
DO CHEPKWONY, J
MARCH 27, 2025**

BETWEEN

ROSE WATHIRA NGUGI PLAINTIFF

AND

EMMAH WANJIRU MWIHAKI 1ST DEFENDANT

HANNAH MWIHAKI KURIA 2ND DEFENDANT

RULING

1. What is before the court is the Notice of Motion application dated 26th March, 2024 filed pursuant to Section 63 (d) and (e) of the Civil Procedure Act, Cap.21 of the Laws of Kenya, Sections 10, 12, 15 (1), (2), (3) & (5),16, L8,35 (1) (c),36, 37,40,4L,44 (1), (2),45 (2),46,47 (L) (a) and 49 all of the Partnerships Act, Chapter 29 of the Laws of Kenya and Order 37 Rule 10, and Order 40, Rules 1. (a), and 2 (1), both of the Civil Procedure Rules, 2010. The Application seeks the following orders:-
 - a. Spent.
 - b. An Order be and is hereby issued restraining the 1st Defendant whether by herself, agents, servants or otherwise howsoever from selling, leasing or in any way dealing with any of the properties of Emrose Minimatt or Emmah Com Supermarket pending the inter-parties hearing of this Application, the Originating Summons and/or further orders of the Court;
 - c. An Order be and is hereby issued restraining the 2nd Defendant whether by herself, agents, servants or otherwise howsoever from selling, leasing or in any way dealing with any of the properties of Emrose Energies or Emmah Com Energies including property title number Gatamaiyu/Nyanduma/937 pending the inter-parties hearing of this Application, the Originating Summons and/or further orders of the Court;



- d. The 1st Defendant be and is hereby restrained from withdrawing funds from Account No. 008666 of Pay Bill No. 247247, Mpesa No. 07XXXXXXXX06 or any other account Emrose Minimatt and/or Emmah Com Supermarket except with the consent and authorization of the Plaintiff pending the inter-parties hearing of this Application, the Originating Summons and/or further orders of the Court;
 - e. The 2nd Defendant be and is hereby restrained from withdrawing funds from Account No. 070XXXXXXXX49 on Pay Bill No.247247, Mpesa No.074XXXXXXXX23 or any other account of Emrose Energies and or Emma Com Energies except with the consent and authorization of the Plaintiff pending the inter-parties hearing of this Application, the Originating Summons and/or further orders of the Court;
 - f. A temporary mareva injunction be and is hereby issued freezing Account No. 008666 on Pay Bill No. 247247, Account No.070XXXXXXXX49 on Pay Bill No.247247, Mpesa No. 07XXXXXXXX06 and Mpesa No. 074XXXXXXXX23 pending the inter-parties hearing of this Application, the Originating Summons and/or further orders of the Court.
 - g. The 1st Defendant be and is hereby compelled and directed to deposit or channel all the proceeds and or payments to Emrose Minimatt or Emma Com Supermarket to Account No. 0640184008666 domiciled at Equity Bank, Kiambu Branch jointly held by the Plaintiff and 2nd Defendant pending the inter-parties hearing of this Application, the Originating Summons and/or further Orders of the Court.
 - h. The 2nd Defendant be and is hereby compelled and directed to deposit or channel all the proceeds and/ or payments to Emrose Energies or Emmah Com Energies to Account No. 18201XXXXXXXX16 domiciled at Equity Bank, Kagwe Branch jointly held by the Plaintiff and 2nd Defendant pending the inter-parties hearing of this Application, the Originating Summons and/or further Orders of the Court.
 - i. In the alternative or further to prayers No.(b), (c), (d), (e), (f), (g), and (h) above, this Honourable Court be pleased to appoint Mr. Kumali Jack Shikuku, CPA, as a Receiver and Manager for both Emrose Minimatt or Emmah Com Supermarket and Emrose Energies or Emmah Com Energies until Judgement or pending further orders of the Court.
 - j. The 1st Defendant be and is hereby compelled to forthwith avail the Statement Of Account for Account No. 008666 Pay Bill No.247247, Mpesa No.07XXXXXXXX06 and all the other accounts that have received funds from Emrose Minimatt or Emma Com Supermarket from 1st March, 2023 to date;
 - k. The 2nd Defendant be and is hereby compelled to forthwith avail the statement of account for Account No. 070XXXXXXXX49 Pay Bill No. 247247, Mpesa No. 074XXXXXXXX23 and all the other accounts that have received funds from Emrose Energies or Emmah Com Energies from 1st August 2023 to date;
 - l. An Order be and is hereby issued for reconciliation of accounts of the partnership between Plaintiff and the 1st defendant and the partnership between the Plaintiff and the 2nd Defendant and for the reports be filed in Court.
 - m. The costs of this Application be provided for.
2. The Application is based on the grounds set out on its face and the Supporting Affidavit of Rose Waithira Ngugi, the Applicant herein, sworn on 25th March, 2024. According to the Applicant, she is/



was friends with the 1st Defendant who is the daughter of the 2nd Defendant. The Applicant avers that she owned a parcel of land known as Nyakinyua Kiambaa Plot No. 1138 which belonged to her late mother through a share certificate which was bequeathed to her. However, the share transfer was done in joint names of the Applicant and the 1st Defendant owing to their close friendship.

3. That the parcel of land was then sold to a Third Party for a sum of Kshs. 8,400,000/= and the 1st Defendant floated a business idea, whereby they set up a mini supermarket in the name of EMROSE MINIMATT and opened a joint account at Equity Bank being Account No. 0640184008666. It is the Applicant's case that the monies used to set up the business was from the proceeds of sale of the parcel of land known as Nyakinyua Kiambaa Plot No.1138 and the 1st Defendant contracted suppliers and hired employees for the business.
4. The Applicant goes on to state that once the business was opened, the money was to be deposited into the joint account but the 1st Defendant set up a new account being No. 008666 on Paybill No.247247 and her Mpesa No. 07XXXXXXXX06. That she also instructed the employees not to allow her (the Applicant) into the premises. According to the Applicant, the 1st Defendant unilaterally changed the business from Emrose Minimatt to Emmah Com Supermarket.
5. The Applicant also holds that together with the 2nd Defendant, they agreed to set up a filling station and still used the proceeds from the sale of the property to finance it, she obtained requisite licenses from Kiambu County Government, purchase fuel and other expenses. The Applicant holds that the 2nd Defendant contributed the parcel of land being Title Number Gatamaiyu/ Nyanduma/1937 measuring 40 by 80ft where the filling station is situated and the same was called Emrose Energies. That they again opened a joint account at Equity Bank in their names being Account No. 18201XXXXXXXX16.
6. It is the Applicant's contention that once again, the 2nd Defendant stopped depositing money into the joint bank account but insisted that clients pay in cash or pay into her Paybill Account No.247247 on Mobile No. 070XXXXXXXX49, or her Mpesa No. 074XXXXXXXX23. She also changed the business name from Emrose Energies to Emmah Com Energies.
7. It is the Applicant's further contention that the 1st and 2nd Defendants have never shared profits of the business with her and have denied her both physical access to the business, and the business financial records as well as participation in the affairs of the said businesses. She has thus urged that their motive was to defraud her of her investment and made dissolution of the two partnerships inevitable. The Applicant holds that it would be proper for the partnership property to be valued and sold, giving the 1st and 2nd Defendants the 1st priority to purchase the respective businesses and for the proceeds to be distributed amongst them. The Applicant thus seeks to have the prayers sought to be granted.
8. The Application was opposed through a Replying Affidavit sworn by Emmah Wanjiru Mwihaki, the 1st Respondent/Defendant on 30th April, 2024 on her own capacity and with authority of the 2nd Defendant. She has deponed therein that the Applicant did not spend the sum of Kshs. 1,500,000/= towards the formation of the business as alleged. That the bank statements exhibited by the Applicant are her personal bank statements which are not related to the purchase of materials used to set up the business. She holds that the aspect of hiring the workforce was a joint effort between the Applicant and herself.
9. The 1st Defendant admits that the business initially deposited the monies into the joint account but changed after the Applicant pulled out of the partnership and she further took out the tool of trade being Motor Vehicle Registration Number KDM 923N and other assorted goods which were held in



common. This action then terminated the partnership. She holds that the Applicant has access to the joint account and can discern the balances therein.

10. The 1st Defendant/Respondent disputes that she instructed the employees to deny the Applicant access to the premises states that to the contrary, it was the Applicant who disappeared after the 1st Defendant refused to concede to her unlawful demands of money from the employees as this would subject the business to great losses. The 1st Defendant also states that the partnership was terminated due to the unlawful acts of the Applicant and she had to look for other means of livelihood by opening her own enterprise known as Emmah Com Supermarket.
11. She further holds that with respect to the filling station business, the same was earlier managed by the 2nd Defendant before they partnered and thus the Applicant did not spend the sum of Kshs. 2,500,000/= on this business for purposes of purchasing pumps, procurement of requisite licenses and purchases of petrol. She argues that in December, 2023, the Applicant unlawfully started demanding that the 2nd Respondent stops operating the filling station as it was running at a loss and instead sell the business to a third party. And because the 2nd Defendant could not yield to the unreasonable demands, the Applicant pulled out of the partnership and thus the 2nd Defendant had no option but to open another business in the name Emma Com Energies.
12. According to the 1st Defendant, all the documents regarding the partnership with the 2nd Defendant and the Applicant are with the Applicant unless she has interfered with them. She holds that since there is no existing partnership capable of being dissolved there is no partnership property to be dissolved. She also that if they were to appoint a Receiver, the same has to be agreed upon by the parties. The 2nd Defendant further holds that the application is thus frivolous, vexatious and abuse of court process and that since the Applicant has come to court with unclean hands, the application should be dismissed with costs.
13. The court directed the parties to canvass the Notice of Motion application by way of written submissions, which directions were complied with. In the Applicant's submissions dated 17th May, 2024, four issues have been raised for determination:-
 - a. Whether the Plaintiff has met the test for grant of the interlocutory injunctive reliefs sought;
 - b. Whether the Plaintiff has met the test for issuance of the mareva injunction sought;
 - c. Whether the Plaintiff has met the test for issuance of mandatory injunctions sought; and
 - d. Whether the Plaintiff has made out a case for appointment of a receiver manager.
14. On the part of the Respondents, their submissions are dated 14th June, 2024 and the main issues for determination are broken down into th
 - a. Temporary injunctions.
 - b. Mareva Injunctions.
 - c. Mandatory injunctions.
 - d. Appointment of receiver.

Analysis and Determination

15. Having read through the Notice of Motion application dated 26th March, 2024, the grounds upon which the same is premised alongside the Replying Affidavit and considered the arguments for and against the same in the written submissions filed by the parties herein and the cited statute and case



law in determination thereof, I find that in their submissions, the parties have raised similar grounds for determination and the court will adopt the same in determination of the application as follows:-

- a. Whether the Plaintiff has met the test for grant of the interlocutory injunctive reliefs sought;
 - b. Whether the Plaintiff has met the test for issuance of the mareva injunction sought;
 - c. Whether the Plaintiff has met the test for issuance of mandatory injunctions sought; and
 - d. Whether the Plaintiff has made out a case for appointment of a receiver manager.
16. On the issue of whether the Applicant has satisfied the requirements for grant of a temporary injunction or interlocutory injunction to issue, the Applicant has relied on the principles that were set out in the case of *Giella –vs- Cassman Brown & Co. Ltd* [1973]E.A 358 a landmark case in this region, requiring an Applicant to:-
- a. Show that they have established a prima facie case, which is strong enough to proceed to trial.
 - b. Demonstrate that they are likely to suffer irreparable harm, which is significant and non monetary in the sense that the Applicant cannot be compensated a monetary award if the injunction is not granted.
 - c. A demonstration of a balance of convenience in the sense that if there is a doubt in regard to the first two conditions, the court will consider which party would suffer more from either granting or denying the injunction.
17. These principles have been confirmed by the case of *Nguruman Ltd –vs- Jan Bonde Nielson & 2 Others* [2014]eKLR, and many others which have reiterated the importance of demonstrating the balance of convenience in regard to where there is doubt on the Applicant’s right or if violation of the right is disputed. Also a consideration of the provisions of Order 40 Rule 1 of the Civil Procedure Rules, which provide for the law regarding grant of interlocutory injunctions as follows:-
- “ [Order 40. rule 1] Cases in which temporary injunction may be granted.
1. 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 y g 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.
18. The purpose of temporary or interlocutory injunction is to preserve the status quo until a final decision is made. They are meant to prevent wasting, damaging or disposal of a property in dispute until the same is resolved. The Supreme Court has clarified that this application must be connected to an Appeal and a Memorandum of Appeal.



19. According to the Applicant, she was a partner in the business which she used her own money to set up and yet the Defendant has turned her away from the said business by opening separate bank accounts and changing the names of the two business accounts. She argues that she stands to suffer irreparable harm which cannot be compensated if the orders are not granted.
20. The Respondents have disputed the grant of an order of temporary injunction arguing that the ingredients set out in the case of *Giella –vs- Cassman Brown Ltd* have not been satisfied. According to the Respondent, the Applicant has not demonstrated the type of partnership they had or there is no documentation on the same that it is hard to discern each partner’s contribution, or how the partnership was to run or profit and loss sharing method. The Respondent’s also noted that the Applicant has not proved the sum of money she claims she injected into the two businesses which is contrary to the provision of Section 107 of the *Evidence Act* which provides that “he who alleges a fact must prove the same”.
21. Further, the Respondents have submitted that Emrose Minimatt and Emrose Com Energies, being businesses which the Applicant is claiming from together with the bank account are no longer in operation hence the Applicant did not contribute to the new ones.
22. In this Court’s view, in as much as the Applicant has alluded to having opened a business with the Defendants, she has not provided any evidence of their partnership, or the terms upon which the partnership was established or proof of dissolution to demonstrate that her rights have indeed been infringed upon by the Respondents/Defendants. Further, the Applicant has not produced any evidence to show that she was turned away by the employees of the said businesses as alleged. Therefore, it is this Court’s opinion that the Applicant has not demonstrated a prima facie case to warrant granting of the orders of injunction sought.
23. The Court of Appeal in the case of *Mrao Ltd –vs- First American Bank of Kenya & 2 Others*, [2003]KLR 125 considered what constitute a prima facie case and held that:-

“In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter”
24. Having found that the Applicant has failed to establish a prima facie case to warrant grant of temporary injunction, this Court finds that there is no need to consider and address that other two conditions required. This is guided by the decision in the Court of Appeal case of *Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society* [2001] 1 EA 86, cited with approval by Gitumbi, J. in the case of *Joseph Wambua Mulusya –vs- David Kitu & Another* (2014) eKLR observed as follows: -

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.
25. With regard to issue the mareva injunction, it is trite that the same is granted on in special and limited circumstances. It is a freezing order which is a remedy designed to mitigate one of the party of litigation which is the risk of an unsatisfied Judgment. It is an injunction meant to stop another party from dealing with assets such as selling or moving the same out of jurisdiction of a court before a dispute can be heard



and resolved. In the case of Central Bank of Kenya –vs- Giro Commercial Bank Limited & Another [2007]2 EA 93, the Court held as follows:-

“However, the power of a court to grant a Mareva Injunction is a discretionary one and is only used in limited circumstances.”

26. Also, in the case of Kanduyi Holdings Limited –vs- 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 Bulk carriers 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”

27. In the instant case, the Applicants submitted that a mareva injunction should be granted so as to save the assets of the business dissipating since the Defendants changed the business names and bank accounts to her exclusion. On their part, the Defendants have argued that the Applicants have failed to prove or establish an arguable case and that there is a risk that the assets will be removed from the jurisdiction of this court. In regard to this argument, the Defendants have relied on the threshold of freezing order set out in Goode in Commercial Law, 4th Edition at Page 1281 and have urged that such injunction can only issue in the clearest cases where special circumstances have been demonstrated.

28. In this particular case, having considered all the facts and circumstances thereof, the Court finds that the Applicant has not demonstrated that she has an arguable case and there is a risk of dissipating the accounts if the freezing orders are not granted.

29. There is then the issue of whether the Plaintiff/Applicant has met the test for the issuance of mandatory injunction. The circumstances under which a court can grant a mandatory injunction was well stated by the Court of Appeal in the case of *Malier Unissa Karim –vs- Edward Oluoch Odumbe* (2015) eKLR as follows:-

“The test for granting a Mandatory Injunction is different from that enunciated in the “*Giella –vs - Cassman Brown* case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of “*Kenya Breweries Ltd –vs- Washington Okeyo* (2002) EA 109” had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:-

“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, it the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant



attempts to steal a match on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.

30. According to the Applicant, she deserved mandatory injunction orders since she has already established that the Defendants opened other businesses and opened new accounts, excluding her and hence there is need to preserve the proceeds of the said businesses and have the Defendants compelled to provide their statements of accounts whereby the court would be urged to appoint a professional to conduct a reconciliation thereof for both businesses and have the report submitted to court.
31. On their part, the Defendants argue that the Applicant has not demonstrated the special circumstances to warrant the grant of the mandatory injunction. They have also contended that the partnership which the Applicant is relying on is no longer operational and thus cannot be compelled to do anything in their new businesses where she is not a partner.
32. Be that as it may, this Court reiterates its earlier findings that the Applicant has not established any special circumstances for a mandatory injunctive relief to issue.
33. Lastly, the question becomes whether the Applicant has made out a case for appointment of a Receiver Manager. In this regard, the Applicant has sought for the appointment of a Receiver Manager so that her legitimate interest in the two businesses can adequately be protected if the court is to direct that the Defendants' businesses continue running so as to ensure their continuity pending the resolution of the dispute.
34. The Defendants have reiterated this argument on the ground that since the partnership dissolved, the Applicant is no longer a partner in their new business and thus it would be an exercise in futility for the court to order for the appointment of a Receiver Manager. In view of this, the Court finds that the appointment of a Receiver Manager cannot be ordered at an interlocutory stage of a suit as this is premature and can only be granted upon determination of the main Originating Summons.
35. The upshot of the foregoing consideration is that the Notice of Motion application dated 26th March, 2024 is found lacking merit and the same is dismissed with costs to the Respondents.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 27TH DAY OF MARCH 2025.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Gaturuku holding brief for Mr. Ong'ato counsel for Plaintiff/Applicant

Court Assistant - Martin

