



**Ogunwusi & 4 others v Odoyo & 7 others; National Bank of Kenya Limited & 3 others (Interested Parties) (Civil Case E209 of 2023)
[2024] KEHC 3038 (KLR) (Commercial and Tax) (15 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3038 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E209 OF 2023
A MABEYA, J
MARCH 15, 2024**

BETWEEN

**ADEYEYE ENITAN OGUNWUSI 1ST PLAINTIFF
BERNARD SHIAUNDA AETE 2ND PLAINTIFF
OJAJA RESIDENCY LIMITED 3RD PLAINTIFF
SHAMIRI TECHNOLOGIES LIMITED 4TH PLAINTIFF
HELEN NKECHINYELU CHIKEZIE 5TH PLAINTIFF**

AND

**OSEWE ALPHONCE COLLINS ODOYO 1ST DEFENDANT
ODERO OSIEMO & CO ADVOCATES 2ND DEFENDANT
COLLINS GRACE & ASSOCIATES ADVOCATES 3RD DEFENDANT
PLUS FORTY LIMITED 4TH DEFENDANT
KENNEDY KIMOTHO MURAGE 5TH DEFENDANT
CATHREEN WANJIRU KIMOTHO 6TH DEFENDANT
FRANCIS OTUNDO 7TH DEFENDANT
BLOMING BLISS COMPANY LIMITED 8TH DEFENDANT**

AND

**NATIONAL BANK OF KENYA LIMITED INTERESTED PARTY
KENYA COMMERCIAL BANK INTERESTED PARTY**



ECO BANK LIMITED INTERESTED PARTY
LAW SOCIETY OF KENYA INTERESTED PARTY

RULING

1. Before Court is an application dated 16/5/2023 brought under Order 39 rule 1 and 2, Order 26 rule 1, order 40 rule 1 and 3 and order 51 rule 1 of the Civil Procedure rules & section 1A, 1B and 3A of the Civil Procedure Act.
2. The application sought that the accounts held by the 1st, 2nd and 3rd defendant at the 3rd interested party be frozen as well as the account held by the 4th defendant with the 1st interested party. The applicants further sought orders that the plaintiffs be allowed to trace the money deposited in bank account numbers 6628003244, 1296631389 and 02020259622700. That the defendants be compelled to avail the bank statements for the aforementioned bank accounts or in the alternative be ordered to furnish security of USD 610,000.
3. The application was supported by the affidavits of Adeyeye Enitan Ogunwusi And Prof. Bernard Shiaunda Aete both sworn on 16/5/2023. The applicants' case was that the plaintiffs had transferred USD 610,000 into the 1st defendant's account held at ECO Bank for onward transmission to the seller of alleged 400Kg gold. That the plaintiffs were victims of cross border gold trading scam involving the defendants.
4. According to the applicants, the 1st plaintiff through the 5th plaintiff had been approached by the 1st defendant for business involving the sale of gold. That the 1st defendant assured the 1st plaintiff that he had a genuine client who was in the business of selling gold and on 1/5/2023 an agreement was entered into for the purchase of 400 kilograms of gold. The applicants contended that through various transactions, money was deposited in the 1st defendant's accounts on diverse dates.
5. That however, the applicants never received the 400 kilograms' gold bars nor was the money refunded. That further, the documents to support the transaction such as the certificate of origin and the certificate of ownership were all forgeries. That the matter was reported to the police and investigations were ongoing.
6. The application was opposed by the 3rd defendant in a replying affidavit dated 15/6/2023 sworn by Collins A O. Osewe. It was contended that the suit and application were frivolous as there was no privity of contract between the 1st, 2nd, 3rd and 5th plaintiff and the 1st and 3rd defendant. That the plaintiffs obtained ex-parte orders freezing the 3rd defendant's account which had in turn paralyzed the operations of the law firm.
7. That only the 4th plaintiff had transacted with the 3rd defendant on account of the legal relationship. He averred that on 13/4/2023, the 4th plaintiff entered into a legal relationship with the 3rd defendant for legal services at a consideration of USD 350,000 and a deposit of Kshs 26,100,000/- was paid out. That the money claimed by the plaintiffs was wired back by the firm of Odero Osiero and Company advocates. That Kshs 43,500,000/- was not wired to the 3rd defendant's bank account and the deeds of assignments should be disregarded.
8. The plaintiffs filed an affidavit dated 5/7/2023 in response to the said replying affidavit. It was contended that the Law Society of Kenya had confirmed that the law firm of Collins Grace & Associate



- Advocates did not have an advocate practicing thereon but the 1st defendant practiced in the firm of Odero Osiemo & Co Advocates. That the 1st defendant used the two law firms to mislead the public.
9. That the 1st defendant had signed and collected money from the plaintiffs and he did not dispute the signatures and the stamp in the said documents. That the 1st defendant had produced a signed document which demonstrated that there was privity of contract between the parties
 10. The 2nd defendant filed a supplementary affidavit sworn by Davis Odero Osiemo on 10/7/2023. He contended that the funds that had been credited to the 2nd defendant's bank account were reversed to the source and received in full. That the 1st defendant had not been authorized to act or transact on behalf of the 2nd defendant. That the plaintiffs had not met the deponent and neither had they had any formal communication.
 11. The application was canvassed by way of written submissions which I have considered. The main issue for determination is whether the plaintiffs have made a case for the orders sought.
 12. On the first prayer, the plaintiffs sought to freeze the bank accounts held by the 1st to 4th defendant. The plaintiffs' case was predicated on the fact that the 1st defendant had approached the 1st plaintiff for the business of sale of 400 kilograms of gold. That money was transferred to the defendants but no gold was delivered. The 1st and 3rd defendant opposed the application on the basis that there was no privity of contract between the 1st 2nd and 3rd plaintiffs. The 1st defendant admitted receiving the money but contended that the same was for legal services between the 1st and 3rd defendants and the 4th plaintiff.
 13. The 2nd defendant stated that the transactions did not involve the said law firm and any amount paid out to the 2nd defendant was reversed to the source.
 14. Order 40 Rule 91) and (2) of the [Civil Procedure Rules](#), provides that: -

- “(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply for the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.
- (2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.”

15. 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 down 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 4th 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; -



- 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 real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted.
- e. The balance of convenience is in favor 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.”

16. Further, in *Central Bank of Kenya vs Giro Commercial Bank Limited & Another* [2007] 2 EA 93, the court stated: -

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

17. From the foregoing, it is clear that freezing orders should be issued with abundant caution owing to their likely impact on business. This was well stated *Electric Mobility Co. Pty Ltd V Whiz enterprises Pty Ltd* (2006) NSWSC 580 cited in *International Air Transport Association & Another v Akarim Agencies Company Ltd & 2 others* 2014 eKLR where the court stated that: -

“... must be proved on a balance of probabilities in the way and to the extent that is usual in interlocutory applications for restraint generally. There is no need for the case to be made out in some special way. The reference by Mustill J (Ninemias) to “solid evidence” is meant in my view only to emphasize that there must be actual evidence from which the appropriate inference may be drawn by the court. On the other hand, the appellate courts have reminded primary judges that they must always be vigilant to ensure that parties’ assets are not frozen and their business lives impeded lightly and that Mareva relief is not to be used to give plaintiffs security for the satisfaction of their judgments ...”

18. As to whether the plaintiffs have made out an arguable case, I have considered the documents attached to the affidavits in support of the application. It is noted that Kshs. 7,250,000/- was transferred to the 2nd defendant. The 2nd defendant contended that the same was reversed back to the sender.

19. With respect to the 1st and 3rd defendant, there is prima facie evidence that the 1st defendant received the funds from the plaintiffs. This is evidenced by the deeds of acknowledgement signed by him. There was indication that the monies in the accounts may not be disposed and kept beyond the plaintiffs’ reach. There is therefore need to protect the subject matter of the suit.

20. In this regard I find that the plaintiffs have demonstrated that they have an arguable case and there is a risk that if the freezing orders are not granted the funds in the said accounts would be dissipated.

21. Accordingly, I find merit in the application and the same is allowed in terms of prayers 6, 7, 9, 10 and 12 of the Motion.

It is so ordered.



DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MARCH, 2024.

A. MABEYA, FCI Arb

JUDGE

