Case Number:	Civil Case E472 of 2020
Date Delivered:	30 Jul 2021
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)
Case Action:	Ruling
Judge:	Margaret Waringa Muigai
Citation:	Atieno Ogot v Onsoko Limited & 5 others [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Commercial Tax & Admiralty
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. E472 OF 2020

ATIENO OGOT.....PLAINTIFF/APPLICANT

VERSUS

THE ONSOKO LIMITED.....1ST DEFENDANT/RESPONDENT

BRIAN NOBERT LOBULWA BINTUTU.....2ND DEFENDANT/RESPONDENT

RODGERS AMBERE MUSAVIRI.....3RD DEFENDANT/RESPONDENT

NICHOLAS NZIOKI MUTUKU.....4TH DEFENDANT/RESPONDENT

WILLIAM NJOROGE NDIRANGU.....5TH DEFENDANT/RESPONDENT

HENRY AMBWERE.....6TH DEFENDANT/RESPONDENT

RULING

NOTICE OF MOTION

The Applicant filed a Notice of Motion Application dated **27th October 2020** for orders that;

1. Pending hearing and determination of the suit herein, a freezing injunction to issue restraining the Defendants/Respondents by themselves, their servants, agents and/or employees from removing from this jurisdiction, disposing of, mortgaging (and/or further mortgaging), charging (and/or further charging), assigning, diminishing, transferring, disposing, alienating, operating, pledging and/or otherwise interfering and/or dealing in any manner with any of the funds held in their various bank accounts.

2. Pending hearing and determination of this suit an order to issue compelling all the Defendants/Respondents to furnish the Plaintiff/Applicant's Advocates a complete set and/or list of: -

a. All their bank account statements for the period between March 2019 to date.

b. All their assets and properties both within and outside the country.

c. All their assets and businesses within and outside the country.

Which information should include the value and location of such assets and businesses whether or not such assets or businesses are in their own names or are solely or jointly owned.

3. An order directing the Inspector General of Police and/or then Director of Criminal Investigations to assist the Plaintiff/Applicant in enforcing the Orders herein by searching for and investigating all the Bank Accounts that are owned by the Defendants/Respondents to the Advocates for the Plaintiff and the Court.

4. An order directing the Principal Secretary Ministry of Lands to assist the Plaintiff/Applicant in enforcing the Orders herein by searching for and giving the particulars of any assets and properties/assets that comprise of land that is owned by the Defendants/Respondents to the Advocates for the Plaintiff and the Court.

5. An order directing the Governor Central Bank of Kenya or any other duly authorized officer to ensure the enforcement or the Orders granted by the Court in giving particulars of bank accounts that are held by the Defendants/Respondents and/or freezing the same.

Which Application was supported by the sworn Affidavit of **Atieno Ogot** dated **27th October 2020** on the grounds that; -

1. The Applicant entered into an Investment Contract with the 1st Respondent for the allocation of shares according to the amount invested by the Applicant totaling **Kshs.15, 000, 000** deposited in the 1st Respondent's bank account.

2. On or about **29th April 2019**, the Applicant deposited **Kshs.5, 000, 000** as investment in what the 6th Respondent purported to refer to as Future Contracts Product. The Applicant was made to believe that the product would pay back a return of **21.75%** as interest and each preceding Monday of the week the Applicant would receive **Kshs.240, 000** as interest.

3. On **28th June 2019**, pursuant to a written agreement between the Applicant and the 1st Respondent, the Applicant deposited **Kshs.9, 000, 000** while on **8th July 2019**, the Applicant made a further deposit of **Kshs.1, 000, 000** to the 1st Respondent as investment.

4. According to the contract, the Applicant was made to believe by the 6th Respondent who was acting on behalf of the other Respondents that the amount invested by the Applicant would attract an interest of over **Kshs.3, 000, 000** within 3 months as long as the business subsisted, a fact that the Respondents knew was false and unachievable.

5. After payment of the abovementioned sums, the contact person who was the 6th Respondent and who fraudulently misrepresented as one of the directors of the 1st Respondent, became uncooperative, evasive and uncommunicative to the Applicant and neither did the rest of the Respondents respond to the Applicant's demands to honor the terms of the agreement.

6. The Applicant did not receive the payments due to her as per the agreement nor has the Applicant been refunded the money invested with the 1st Respondent. Despite demand being issued the Respondents have failed and/or refused to make good or settle the Applicant's claim.

7. The Applicant reported the matter to several police stations in Nairobi including at the Directorate of Criminal Investigations since invariably most of the investigation would be compromised by the Respondents forcing the Applicant to move and seek help from different police stations each time the Respondents were about to be apprehended.

8. From the intelligence gathered during various police investigations, the Respondents heavily invested in Uganda and transferred their monies to Uganda and some monies to their spouses, children, trust accounts with a view to conceal the same and perpetuate the fraud and theft against the Plaintiff and general public and continue to do so with impunity. There is real danger that the Applicant's investments and assets maybe lost and unavailable within the jurisdiction of the court unless the same is preserved within the jurisdiction.

9. It is in the interest of justice and fairness that the orders sought are granted.

1ST, 3RD, 4TH, 5TH AND 6TH RESPONDENTS' REPLYING AFFIDAVIT

The Application was opposed vide the sworn Affidavit of **Nicholas Nzioki Mutuku** dated **20th January 2021** and stated as follows; -

1. He is the 4th Respondent and the 1st Respondent's Director and swore the Affidavit on behalf of the 1st, 3rd, 4th, 5th and 6th Respondents.

2. The Applicant's Application is premature as the Applicant did not exhaust all the avenues for redress available in the investment contact between the Applicant and the 1st Respondent including but not limited to arbitration as per Clause 13 of the investment contract.

3. The Applicant's Application and the entire suit is bad in law and overtaken by events for having been settled by dint of a payment plan agreement dated 9th May 2020 before the DCI and that the 1st, 3rd, 4th, 5th and 6th Respondents have since been paying the Applicant **Kshs.100, 000** monthly without fail and the Applicant has been receiving the same without any complaint.

4. At no time did the 6th Respondent lure and/or persuade the Applicant to invest in the 1st Respondent's business but the Applicant did so without any coercion. The Applicant analyzed the business risks and made an initial purchase of tokens worth **Kshs.200, 000** which earned the Applicant a return in investment of **Kshs.280, 000** paid vide M-pesa.

5. It is dishonest and in bad faith for the Applicant to claim and/or purport fraudulent misrepresentation in investing in the 1st Respondent and at the same time claim to have been paid timely on the initial investment. Based on commercial viability of the 1st Respondent and the returns paid, the Applicant continued investing into the 1st Respondent.

6. Further, in clear evidence of dishonesty on the part of the Applicant, the amount invested by the Applicant on **29th April 2019** of **Kshs.5, 000, 000** earned a total return on the investment of over **Kshs.6, 000, 000** the same having been credited in the Applicant's account on various dates.

7. It is clear from the contract that at no point in time was the purported interest of 21.75% part of the Agreement and the 1st Respondent offered its Initial Coin Offering (ICO) platform for the Applicant to invest. Thus, the purported interest of 21.75% is the Applicant's imagination of the and was never agreed upon.

8. The Respondents are still committed to the investment contract between the 1st Respondent and the Applicant to ensure that the Applicant receives returns on the investment at the completion of the sale of the Applicant's tokens.

9. It was a term of the contract under **Clause 3.1** that the Applicant would give the 1st Respondent ample time to implement the intended projects as to be able to earn from the investment. However, the Applicant started making unsubstantiated demands through the 6th Respondent despite knowing very well that the Applicant's tokens had not been fully sold. The 1st Respondent has been able to repay a substantial amount to the Applicant but the Applicant deliberately chose to withhold this information.

10. As per the records held by the 1st Respondent, the 1st Respondent has fully paid the Applicant both the invested amount and return on investment on the initial deposit of **Kshs.5, 000, 000.** The Applicant is only invested by way of purchase of tokens through the Pan African Coin tokens worth **Kshs.10, 000, 000** which are yet to be fully sold on the 1st Respondent's platform. The Applicant could only earn returns if there is trading on the 1st Respondent's platform. The Applicant has so far received **Kshs.2, 420, 000** including tokens worth **Kshs.500, 000** and **Kshs.550, 000.**

11. The 1st Respondent put in place efforts to meet its part of the agreement despite the Covid-19 pandemic which affected crypto currency business and the Respondents had no intention of defrauding the Applicant as the Applicant knows where the 1st Respondent's office is located, provided its platform for the Applicant to invest and further continued paying the Applicant timely and promptly including the month of November 2020 when the Applicant's tokens were sold.

12. The acts and/or omissions of the 1st Respondent are distinct from that of its shareholders and the suit herein violates the principles laid down in law on the legal personality of a company as members and/or shareholders of a company cannot be sued on contract undertaken by the company.

13. If dissatisfied, the Applicant has never terminated her contract with the 1st Respondent being fully aware of the process of termination. The Applicant has continued receiving earnings on investment based on the terms of the Contract and thus cannot be heard to demand for refund of investment knowing very well that the same cannot be refunded as per Clause 3.1(d) and Clause 10 of the Investment Contract.

APPLICANT'S SUBMISSIONS

The Applicant submitted it is likely to suffer substantial loss if the assets and bank accounts of the Respondents are not frozen and now seeks orders in form of *Mareva* injunction which is mandatory in nature. It was the Applicant's contention that the Applicant has prima facie shown that the Respondents are truly indebted to her. In the case of ***UBA Kenya Bank Limited –versus- 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] E. A. 358** 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."

In light of the above, the Applicant submitted that owing to the Respondents' actions, there is real danger that the Respondents' assets may be unavailable within the jurisdiction of the Court unless the Court preserves the same within its jurisdiction. The Respondents are likely to interfere with their assets so as to frustrate the Applicant's efforts in recovering monies duly entitled to the Applicant.

It was the Applicant's submission that the Applicant has an arguable case which has high chances of success thus warranting the Court to exercise its discretion in the Applicant's favor. The definition of what an arguable case is was considered in the case of ***International Air Transport Association & Another versus Akarim Agencies Company Limited & 2 Others [2014] eKLR*** where the Court stated; -

"A "good arguable case" was defined by Mustill J in The Niedersachsen [1983] 2 Lloyd's Rep 600 at page 605 to be

'one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success.'

This in my view, is a sound principle to rely on in establishing whether a Plaintiff has a good arguable case."

The Applicant submitted the prayer for material disclosure be allowed because the information sought is relevant to the case, the Respondents intend to dissipate assets and the disposal of the assets is to defeat possible outcome of the case. There is sufficient cause to warrant the Court to order the Respondents to furnish to the Court and the Applicant particulars of their bank account statements and assets both within and outside the Court's jurisdiction given that the Respondents' investments directly affect the Applicant as an investor. The Applicant is apprehensive that if the Respondents are given room to dissipate the assets and money to third parties, the possible outcome of the case shall be defeated.

In addition, the Applicant submitted that the balance of convenience favors the Applicant whose interest ought to be protected and neither did the Respondents deny owing the Applicant money nor the existence of the Agreement between the parties whose terms were very clear. The Respondents failed to keep the terms of the Agreement.

1ST, 3RD, 4TH, 5TH AND 6TH RESPONDENTS' REPLYING AFFIDAVIT

The Respondents submitted that the parties having agreed to abide by the terms of the Investment Contract, it followed then that they had chosen to strictly adhere to the terms therein as regards their dispute resolution mechanism and hence any dispute arising between the parties ought to have been referred to arbitration.

In view of the provision of Clause 13 of the Agreement referring the dispute between the parties to arbitration, the parties had an obligation to refer the dispute to arbitration in the first instance. In the case of ***John Shantilal Malde & 9 Others vs Transmara Investment Limited & 2 Others [2018] eKLR*** the court stated;

"A party who ignores a step in a dispute resolution process which has been freely agreed will not be allowed to take advantage of his/her misfeance to avoid an arbitral agreement. Having found that the matters in dispute herein are the subject of the arbitral agreement, I further find that by commencing the Petition before attempting the amicable solution, the Petitioners overlooked that step and cannot rely on it to gain an advantage."

It was the Respondents' submission that the 1st Respondent entered into a consent agreement to compensate the Applicant the balance of **Kshs.9, 000, 000** by dint of a payment plan agreement dated **9th May 2020**, taking into consideration cumulatively paid amount and the Respondent has been making monthly repayment without fail. The claim herein ought to be dismissed for being premature as the 1st Respondent is yet to breach the terms of the consent. The 1st Respondent has since been remitting **Kshs.100, 000** and the Applicant has been receiving the same without complaint.

In the case of ***Agrafin Management Services Ltd –versus- Agricultural Finance Corporation & 5 Others [2012] eKLR*** the Court stated;

"The Consent Order is a binding agreement between the parties since it is trite law that consent is a contract in which parties make reciprocal concessions in order to resolve their differences and therefore avoid litigation or where litigation commenced, bring it to an end. That when it complies with the requisites and principles of contract, it becomes a valid agreement which has the force of law between parties."

Further, the Applicant had not proven that there exists a prima facie case; the assets and accounts in which the court is invited upon to make a determination are available, owned and in possession of the Respondents within the jurisdiction of the Court; and the Applicant has not reneged her investment contract with the 1st Defendant as to facilitate the process of termination of the same.

In the case of ***Electric Mobility Company PTY Ltd –versus- Whiz Enterprises PTY Ltd [2006] NSWSC 580*** the court in emphasizing the importance of prima facie case before granting of freezing orders stated that;

"The reference by Mustill J. 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."

The Respondents submitted that no special circumstances had been exhibited to warrant the grant of final orders and the balance of convenience as well as the question of irreparable injury were not addressed. Attachment before judgment as contained in **Order 39 Rule 5 of the CPR 2010** to apply, cogent evidence must be produced to demonstrate disposal of property. the property disposed of or is about to be disposed of or removed from the jurisdiction must be specified if an order is to issue something the Applicant failed to do.

In the case of ***ABN Amro Bank N.V –versus Kenya Pipeline Company Limited [2014] eKLR,*** the court laid down the principles which ought to be present before any order of discovery is made by stating that;

"Discovery as a compulsory disclosure, at the request of a party, of information that relates to the litigation in a civil suit is provided for in Section 22 of the Civil Procedure Act and Order 11 Rule 3(2) of the Civil Procedure Rules, and given the nature of the discovery, I would class it as a means of access to information in the sense of Article 35(2) (b) of the Constitution. It therefore serves a higher objective as the enabler of a fair hearing… but such application seeking information and documents is

measured on a new yardstick; the Applicant must;

a. identify the information and/or documents;

b. the person holding the information; and

c. show that the information and/or documents are required for the exercise or protection of a right or fundamental freedom."

The Applicant has not met the conditions for grant of freezing injunction as to benefit from the orders sought and the same ought to be dismissed.

DETERMINATION.

Having considered the pleadings and the submissions by the parties the issue for determination is whether a Mareva Injunction should be granted or not based on the pleadings and submissions filed by parties.

It is not in dispute that the Applicant entered into an Investment Contract with the 1st Respondent for the allocation of shares according to the amount invested by the Applicant totaling **Kshs.15, 000, 000.** It is also not in dispute that on **28th June 2019**, pursuant to a written agreement between the Applicant and the 1st Respondent, the Applicant deposited **Kshs.9, 000, 000** while on **8th July 2019**, the Applicant made a further deposit of **Kshs.1, 000, 000** to the 1st Respondent as investment.

The Applicant argued that she was made to believe that the product would pay back a return of 21.75% as interest. This fact has been disputed by the Respondents who stated that from the contract at no point in time was the purported interest of 21.75% part of the Agreement.

Further, the Respondents averred that the parties are bound by the Arbitration Clause in their referring the dispute between the parties to arbitration, and the parties had an obligation to refer the dispute to arbitration in the first instance.

The Applicant's Application sought a freezing injunction to issue against the Respondents. The threshold for the grant of freezing order was laid out in **GOODE ON COMMERCIAL LAW, 4th Edition** at **Page 1287** as follows; -

"***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 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"

In the case of **Central Bank of Kenya vs Giro Commercial Bank Limited & Another [2007] 2 E.A. 93** the court stated; -

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

Further, in the case of ***Rafique Ebrahim –versus- William Ochanda T/A Ochanda & Advocates [2013] eKLR*** that**:**

"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstance and only in clear cases where the Court thinks that the matter ought to be decided at once or where the injunction is directed at simple and summary act which can easily be remedied; and a mandatory injunction at interlocutory stage is merely granted, only where the Applicant's case is clear and incontrovertible."

The mareva injunction is available only in the clearest of cases' where there are special circumstances. In this Application, the Plaintiff has not made a full and frank disclosure with regard to the terms agreed upon with the Respondents in the Investment Contract. For instance, it is not clear what provision the Applicant relied on with regard to the interest rate. Moreover, the Applicant has not detailed the payments received from the 1st Respondent as evidenced by the Respondent's bundle of documents.

The other issue that Applicant stated that reported the matter to several police stations in Nairobi including at the Directorate of Criminal Investigations and to this the Respondents responded that by dint of a payment plan agreement dated 9th May 2020 (**Marked NNM -3a)** before the DCI and that the Respondents have since been paying the Applicant Kshs.100, 000 monthly without fail and the Applicant has been receiving the same without any complaint.

The Agreement at DCI has not been presented in this Court by the Defendant. This Consent would be binding if filed in Court signed by both/all parties and/or through respective Counsel and is adopted as an order of the Court.

Although Arbitration is prescribed in the Parties' agreement, Arbitration is not open to instances of alleged criminal offences as is in the instant case where the matter has been reported to various Police Stations and ended up with a gentleman's agreement to refund the funds to the Plaintiff by instalments.

The Applicant whilst detailing payments has not given this court the payments made pursuant to the Agreement and the outstanding amount.

The details of the Defendants accounts have not been disclosed nor the amounts claimed from these Accounts. It would be prejudicial at this stage to freeze all Accounts of All Defendants herein with unknown amounts held which would result in excess of the amount outstanding and inclusive of funds not related to this matter. There is scanty information on the amount, accounts and banks and the Court cannot grant blanket orders against the Defendants at this stage as these orders would be unenforceable .Courts do not issue/grant orders in vain.

The Plaintiff has not established grounds for believing that there is a risk of the assets of the Respondents being removed from the court's jurisdiction before judgment or award in this suit. In the premises the Applicant does not satisfy the basic requirements for the grant of a mareva injunction and therefore the application for the grant of a mareva injunction is disallowed.

In view of the arguments advanced by the parties in their pleadings and submissions there are issues that are to be determined at the full hearing of the suit.

DISPOSITION

1. It would therefore be pre-emptive and premature to give the mandatory injunction as prayed.

2. The court is not convinced that there is an exceptionally clear and strong case to merit a determinative order at this interlocutory stage.

3. The Application is dismissed.

4. Parties through Counsel shall file pleadings, witness Statements and Bundle of documents for CMC before DR Commercial & Tax

5. Further Mention on 28th August 2021 before DR for compliance.

DELIVERED SIGNED & DATED IN OPEN COURT ON 30TH JULY 2021. (VIRTUAL CONFERENCE DUE TO CORVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONSOF 17TH APRIL 2020)

M.W. MUIGAI

JUDGE