



Preserving the Fruits of Litigation

Order 39 Civil Procedure Rules and Mareva Injunctions

Justice demands that litigation should bear fruit; a successful claimant must not be left with a barren decree but with a judgment that can be realised in practice.

One of the greatest frustrations in civil litigation is when, after years of trial and expense, a successful party finds that their judgment is of no practical utility because the losing party has vanished or stripped themselves of assets.

The law therefore equips litigants with pre-emptive remedies designed to secure the fruits of litigation.

In Kenya, these are found both in the statutory framework of **Order 39** of the Civil Procedure Rules and in the equitable remedy of the **Mareva injunction**, sometimes referred to as a freezing order.



Order 39: Arrest and Attachment before Judgment

Arrest before judgment is a statutory protective remedy under Order 39 (Arrest and Attachment before Judgment).

Where the court is satisfied that:

- a defendant has absconded,
- is about to abscond, or
- is about to remove or dispose of property from the local limits of the court with intent to defeat or delay execution,

the plaintiff may apply by notice of motion supported by an affidavit (and, where appropriate, a certificate of urgency) for a warrant of arrest or for the defendant to furnish security.

The defendant is required to show cause why security should not be ordered; if the court issues a warrant, the defendant may avoid arrest by furnishing security sufficient to satisfy the decree if the plaintiff's claim succeeds. Any security ordered or deposited is held by the court until the suit is finally disposed of.

Practical checklist (what to file and what to expect)

1. Evidence indicating intent to abscond or dispose of assets.
2. Notice of Motion being the main Application prayers seeking arrest/security (and, if relevant, alternative relief such as attachment or freezing order).
3. Affidavit in support being the factual matrix, and annexures (documents).
4. Certificate of urgency being the document used if you need the hearing.

The Court may issue a show-cause writ; at the hearing the defendant must explain why security should not be furnished. If the security is furnished to the court, the defendant will not be arrested; the security is kept by the court pending final determination.



An order for Mareva injunction

A Mareva injunction is an equitable, injunctive relief developed in English law in the landmark case of ***Mareva Compania Naviera SA v International Bulkcarriers SA [1980] 1 All ER 213***.

In that case, the court recognised the need to restrain a defendant from disposing of assets pending trial where there was a genuine risk that such disposal would defeat the claimant's ability to enforce a judgment. The order has since become known as a **freezing order**.

It is therefore a forward-looking order, designed to prevent a defendant from frustrating the enforcement of a potential decree.

In this way, it performs a similar protective function to attachment before judgment under Order 39 of the Civil Procedure Rules, only that in the Mareva context the restraint is framed as a prohibition against dealing with assets rather than a direct attachment.

To succeed in obtaining a Mareva injunction, the applicant must satisfy the following conditions:

- that there is a good arguable case founded on an existing cause of action;
- that there is credible evidence of a real risk of disposal or dissipation of assets by the defendant;
- that the assets in question are within the local jurisdiction of the court;
- that the court itself has the jurisdiction to grant the order; and
- the applicant must demonstrate that the order is justified on a balance of convenience, meaning that the prejudice to the defendant is outweighed by the risk of injustice to the plaintiff if the order is not made.



Conclusion

The remedies of arrest and attachment before judgment and the Mareva injunction are indispensable safeguards in civil procedure. They preserve the integrity of litigation by ensuring that a successful judgment does not remain a barren piece of paper but translates into an enforceable decree. Without such protective orders, defendants intent on absconding or dissipating assets could easily frustrate the judicial process, rendering years of litigation meaningless.

Kenyan courts have consistently affirmed this principle. In **Kuria Kanyoko t/a Amigos Bar & Restaurant v Francis Kinuthia Nderu & Others [1988] eKLR**, the High Court recognised the necessity of freezing orders to prevent defendants from putting assets beyond the reach of creditors, stressing that courts must act where there is evidence of a real risk of dissipation.

For litigants, the key lies in credible, verifiable evidence: travel itineraries, hurried property transfers, suspicious bank withdrawals, or sworn investigative reports.

Courts will not issue such orders lightly, as they interfere with liberty and property rights, but where the evidence demonstrates a genuine risk of frustration, the remedies are both available and necessary.

Ultimately, these measures embody the ends of justice that litigation must bear fruit and that a successful claimant must not be left with nothing more than a hollow judgment.