

Enforcement of Foreign Judgments

Interim and Precautionary Measures [Kenya]

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I. APPLYING FOR INTERIM AND PRECAUTIONARY MEASURES

- 1. Is it possible to apply for an interim measure in order to ensure the effective enforcement of a court decision?**

Answer: YES

Order 40 of the Civil Procedure Rules provides for applications for temporary injunction and interlocutory orders. The order provides as follows:

Order 40 Rule 1: Cases in which temporary injunction may be granted

Where in any suit it is proved by affidavit or otherwise that any property in dispute in is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree or 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

Order 40 Rule 2: Injunction to restrain breach of contract or other injury

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 to 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. 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.

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.

Order 40 Rule 9: Power to order interim sale

The court may, on the application of any party to a suit, order the sale, by any person named in such order, and in such manner and on such terms as it thinks fit, of any movable property, being the subject-matter of such suit, or attached before judgment in such suit, which is subject to speedy and natural decay, or which for other just and sufficient cause it may be desirable to have sold at once.

Order 40 Rule 10: Detention, preservation, inspection of property

The court may, on the application of any party to a suit, and on such terms as it thinks fi:

- (a) make an order for the detention, preservation, or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein;
- (b) for all or any of the purposes aforesaid authorise any person to enter upon or into any land or building in the possession of any other party to such suit; or
- (c) for all or any of the purposes aforesaid authorise any samples to be taken, or any observation to be made, or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

Order 40 Rule 11: Deposit of money and other deliverables

Where the subject-matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the court may order the same to be deposited in court or delivered to such last named party, with or without security, subject to the further direction of the court.

2. Is it mandatory to pay court fees for this type of application?

Answer: Yes. It is mandatory that court fees be paid in all suits instituted before any court.

Order 51 rule 12 of the Civil Procedure Rules provides that all applications are deemed to have been made after filing in Court. Filing of the applications are made after assessment and payment of the requisite fees.

It is only persons who have been classified as paupers under **Order 33 of the Civil Procedure Rules** who are exempted from paying fees and costs for instituting the suit. In order to be exempted, one has to make an application under the order indicating that he is not possessed of sufficient means to enable him pay the fee prescribed by law.

The High Court in **Mombasa Cement Limited v Speaker, National Assembly & another [2018] eKLR** dismissed a petition for failure by the petitioner to pay the requisite court filing fees. The court held as follows:

“Payment of Court filing fees is a jurisdictional prerequisite to the commencement of an action...The filing of a civil case requires the payment of filing fees. It follows that failure to pay Court fees renders the suit in competent because there is no competent suit filed before the Court.”

The court has the discretionary power under **Section 96** of the Civil Procedure Act to allow a party to make payment of the fees where there is failure to do so at the time of filing of the pleading. The section provides as follows:

Section 96: Power to make up deficiency of court fees

Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the court may, in its discretion, at any stage, allow the person by whom such fee is

payable to pay the whole or part, as the case may be, of the fee; and upon such payment the document in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance.

The court in **Mombasa Cement Limited v Speaker, National Assembly & another [2018] eKLR** had the following to say with regard to exercise of its discretion under Section 96 of the Act:

The discretionary powers of this Court will 'not be exercised where the applicant's own conduct has been unmeritorious or unreasonable, or where the applicant has not acted in good faith. Examples include where (i) the failure to pay the Court fees or part thereof is willful or fraudulent aimed at denying the government revenue, (ii) where no sufficient explanation is given for the failure, (iii) or where it is evident that a party is not candid in the explanation given or there is willful concealment of material information, (iv) where there is evidence of fraud or collusion in failing to pay the Court fees, obtaining the judgment (v) where allowing the party to pay is prejudicial to the administration taking into account the time when the failure to pay was brought to the attention of the defaulting party and has failed to remedy the situation.

3. What is the ordinary/average length of time for this kind of procedure?

Order 40 Rule 4(4) of the Civil Procedure Rules, 2010 provides that all applications brought under the order have to be **heard within 60 days from the date of filing** unless the court for good reason extends the time.

Order 40 Rule 5 of the Civil Procedure Rules, 2010 provides that **rulings** in all applications for injunctions **should be delivered either at once or within 30 days of the conclusion of the *inter-partes* hearing.**

Under Order 40 Rule 6 of the Civil Procedure Rules, an interlocutory injunction once issued cannot last for more than 12 months from the date of issuance. Upon lapse of the injunction aforesaid, it can only be extended by court on sufficient grounds.

II. TYPES OF INTERIM AND PRECAUTIONARY MEASURES

- 1. For which types of interim measures are the parties allowed to apply? (e.g., injunction, freezing orders, caveat, restraining order, etc)**
 - i. Interim injunction
 - ii. Orders of detention, preservation and inspection
 - iii. Mareva injunction
 - iv. Arrest and attachment before judgment
 - v. Deposit of money and other deliverables
 - vi. Stay of execution of judgment pending appeal.
 - vii. Mandatory injunctions.

III. PROCEDURE

■ **Competent Court:**

a) Which court has jurisdiction to grant these interim and precautionary measures?

Answer:

- Generally, under the Civil Procedure Rules, the court in which the suit is filed is clothed with jurisdiction to grant interim orders.
- In the event that a party is dissatisfied with the ruling of the court in such an application, they can appeal to the higher court for grant of the orders.

■ **When can the application for interim and precautionary measures be submitted?**

Is it possible to apply for it at the time the underlying lawsuit is filed? If YES: Are there any special requirements when so doing?

Answer: Yes. An application for interim relief may be filed together with the main suit. The special requirements are normally the reasons why the Applicant requires the court to grant the interim measure. They include the following:

- (i) The reasons why the application has been filed under Certificate of Urgency in order to be heard urgently.
- (ii) The reasons as to why the Applicant cannot wait until the hearing of the main suit in order to be granted the said interim relief e.g. to preserve the subject matter of the suit, to avoid irreparable loss etc.
- (iii) If the person against whom the Applicant is seeking the interim measure has stolen or is attempting to steal a match. The above requirement is applied in the case of mandatory injunctions.

■ **Is it possible to apply for interim precautionary measures before filing the underlying lawsuit? If YES: Are there any special requirements when so doing? (e.g., deadline to submit the lawsuit)**

Answer: No. Plaintiff may only file an application for interim measures together with his plaint or at any time before judgment. The main suit therefore must be on record before an application for the interim measure is filed.

■ **Is it possible to apply for interim precautionary measures after filing the main claim? If YES: Are there any special requirements when so doing?**

Answer: Yes. A party may seek court assistance at any time when a threat that needs to be curbed through an interlocutory arises even during the pendency of the suit.

■ **Criteria used by the court for granting these measures**

(a) What requirements must be fulfilled in order to apply for an interim measure? (e.g. *periculum in mora*, *fumus boni iuris*, security, etc).

An application for interim orders has to meet the common law criteria for grant of interlocutory applications set down in the landmark case **Giella v Cassman Brown & Co. Ltd.** The three-part test is therefore that:

- (a) An Applicant must show a *prima facie* case with a probability of success;
- (b) An interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages;
- (c) If the Court is in doubt of the two above principles, it will decide an application on the balance of convenience.

Procedure

(a) Which are the main steps of the procedure after filing the interim measure application? (e.g. holding a hearing, presenting evidence, etc.)

- Once an application for an interim measure is filed in court, the file is placed before the judge/Magistrate. Ordinarily, the advocate for the Applicant ought to appear before the Judge/ Magistrate and convince him or her why an *ex-parte* injunction should be given i.e. in the absence of the Respondent. However, nowadays most courts have adopted a procedure whereby the Judge or Magistrate considers the application in Chambers alone in absence of the Applicant or his advocate. This procedure is being adopted by a majority of courts to save on judicial time.
- In the event that the application seeks *ex-parte* the judge/magistrate will consider whether sufficient reason is established from the Affidavit filed in support of the Application to warrant the grant of interim orders *ex parte*. If the judge/ Magistrate considers it necessary, he/she may order the party who has filed the application to appear before him for clarification purpose.
- The court will then direct the Applicant to serve the application on the Respondents for *inter-partes* hearing on a date given by court. *Ex-parte* orders should ideally last for a maximum of 14 days and therefore the court will give an *inter-partes* hearing date within 14 days of the *ex-parte* order.
- During the *inter-partes* hearing of the application, the court will first ensure that the following has been complied with:
 - (iv) That all parties [Respondents] have been served with the application and *ex-parte* order if any.
 - (v) That all parties have filed and served responses to the application.

If any party has not filed its responses, this is the time to seek leave of the court to file your response to the application. The Court ordinarily grants the said leave for parties to file responses within certain timelines and thereafter, the application is fixed for hearing after expiry of those timelines. The Court may order the hearing to proceed in any of the two ways namely:

- (a) Orally in court. If the parties decide to canvass the application orally, the court will grant a hearing date for the hearing of the application, by which time the Respondent ought to have put in a replying affidavit to the application.
Upon conclusion of the hearing of the application the court will give a ruling date.

- (b) By way of written submissions- The parties may decide that instead of canvassing the application orally in court, they will put in written submissions together with bundle of authorities in support of the submissions.
- (c) Once the submissions have been filed, the parties may request court for a date to highlight the filed submissions. The court may grant a date for highlighting of submissions and upon highlighting, give a ruling date. Alternatively, if parties do not wish to highlight, they can pray for a ruling date immediately instead of a date for highlighting.

(b) Is it possible for the Court to order an interim measure without hearing the other party? (in audita parte debitoris). If YES, under what circumstances can the parties apply for it?

Answer : Yes. Order 40 Rule 4 of the Civil Procedure Rules, 2010 provides that whenever the court is satisfied for reasons to be recorded in court that the object of granting the injunction would be defeated by the delay, it may hear the application *ex-parte*

An example would be where a party seeks an *anton piller injunction* to enter a premises and search with a view of collecting evidence. Such an order will be granted *ex-parte* because there is a very high likelihood that the Respondent will destroy or interfere with evidence if he gets to know of the proceedings.

Another example of an interim measure that can be granted *ex parte* is a *mareva injunction* which orders for the freezing of a Respondents assets as to tip the Defendant off would likely cause the prompt movement of the relevant assets before the court could issue its injunction.

(c) What are the main steps of the procedure in this case?

- The court will usually hear the Applicant at first instance and if satisfied issue the *ex-parte* order. The court will then direct the party to serve the order issued *ex-parte* together with the application on the Respondents. The court will also give a date for mention of the matter wherein both parties should appear for issuance of directions on how the application will be canvassed.
- The *ex-parte* injunction together with the application and the pleadings have to be served on the Respondent within 3 days. In default of service of any of the documents specified under the rule, the injunction shall automatically lapse.
- An *ex-parte* injunction will usually be issued for a maximum of 14 days.
- At the first inter-partes mention for directions, the court will usually grant the Respondent time to put in its replying affidavit if it has not already done so, and further direct whether the application will be canvassed by way of written submissions.

■ Opposition of the defendant

(a) Is it possible for the defendant to oppose interim and precautionary measures?

Answer: Yes

- **Article 50** of the Constitution guarantees parties the right to a fair hearing. If orders were issued under such an application without affording the Respondent an opportunity to respond to the Application, it would amount to condemning a party unheard.
- Under Article 50, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate another independent and impartial tribunal or body.
- Article 40 Rule 4 of the Civil Procedure Rules; *ex parte* orders are usually granted pending the hearing and determination of the application so as to afford the Respondent an opportunity to tell court why such interim measure should not be granted.
- Under Order 40 Rule 9, the Defendant can apply to court to have the interim measure vacated or set aside if there is evidence that the Applicant concealed material facts at the ex-parte stage which misled the Judge or magistrate to grant the ex-parte injunction.

(b) Is it possible for the defendant to ask the court for the substitution of the interim measure for a guarantee?

The only instance where this is possible is in cases of stay of execution pending appeal under Order 42 Rule 6 where an Applicant is required to deposit security as a condition for stay. The security is in form of the decretal amount.

Appeal

(a) Are appeals allowed from the court decision ordering the measures or rejecting the defendant's opposition to them?

Answer: Yes.

- **Order 43 Rule (1)(u) of the Civil Procedure Rules** – provides that an appeal shall lie as of right from a ruling of the court in an application brought under order.

(b) Is it possible to enforce the interim measure once an appeal is filed?

- An appeal does not usually operate as automatic stay against the orders issued in the ruling appealed from. An Applicant has to file a formal application for stay of execution of the decree or orders so issued.

Therefore, if lets say a mareva injunction had been issued to freeze

IV. EFFECTS AND VALIDITY OF INTERIM AND PRECAUTIONARY MEASURES.

1. Is it possible to enforce the interim measure when the other party obstructs it?

Where court issues an order, the party against whom such order is issued is duty bound to abide by that order. Any action to frustrate the enforcement of the order would amount

to contempt of court which is an offence punishable currently under **Section 5 of the Judicature Act** which provides as follows:

“5. (1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.”

2. Is it possible to modify a previous interim measure?

A party who is dissatisfied with an order of the order may apply for the same to be varied under **Order 40 Rule 7 of the Civil Procedure Rules** which provides as follows:

Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such orders.

3. When is it possible to raise an interim measure?

- At any time when an action arises that amount to a threat that judgment that may be given by court is likely to be defeated. The interim measure will be granted to ensure that status quo is maintained, so that a party who obtains a judgment in its favour is able to execute without difficulty.
- In the case of a stay of judgement pending appeal, the application will usually be made after judgment has been delivered and the losing party wishes to appeal. A party who applies for stay pending appeal is required to prove that: (**Order 42 Rule 6 of the Civil Procedure Rules**)
 - i. He is likely to suffer substantial loss if the order is not granted.
 - ii. The Application has been made without unreasonable delay.
 - iii. The party should provide such security as the court may order for the due performance of the decree or order as may ultimately be binding upon him.

4. Are there any rules concerning the costs (e.g., lawyers' fees, etc.) related to the application?

- Usually costs will follow the event meaning that the successful party should be awarded costs. However, there are other factors that court will consider including the conduct of the parties during the trial and eventually costs are usually awarded to a party according to the court's discretion.

- Advocates fees are usually chargeable under the Advocates Remuneration Order, 2014. The order sets out the fees chargeable by an advocate for different costs incurred at the different courts. The fees for the lower court are different from those of the High Court. At the court of Appeal, costs are set out in the Court of Appeal Rules.

V. ARBITRATION

1. **Is it possible to apply for an interim measure in order to assure the effective enforcement of an arbitration award in your country? If YES: what is the enforcement procedure?**

Section 7 of the Arbitration Act 1995 allows a party to an arbitration to apply to court for an interim measure of protection during the arbitral process.

2. **Are the arbitrators, entitled to order an interim measure?**

Answer: Yes.

- **Section 18** of the Arbitration Act, 1995 empowers the arbitral tribunal to issue interim orders as follows:

Unless the parties otherwise agree, an arbitral tribunal may, on the application of a party:

- (a) *Order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute, with or without an ancillary order requiring the provision of appropriate security in connection with such measure; or*
- (b) *Order any party to provide security in respect of any claim or any amount in dispute; or*
- (c) *Order a claimant to provide security for costs*

The arbitral tribunal or a party with the approval of the arbitral tribunal, may seek assistance from the High Court in the exercise of any power conferred on the arbitral tribunal under the above provision.

VI. FOREIGN PROCEDURE & ARBITRATION

1. **Is it possible to apply for an interim measure before your country's courts in order to assure the effective enforcement of a foreign court decision or arbitration award? If YES: how is this procedure executed?**

- The High Court of England in **U&M Mining Zambia Ltd v Konkola Copper Mines plc [2013] EWHC 260 (Comm)** stated that the local court of Zambia was well within its jurisdiction when it issued an interim order where the seat of arbitration was in London.
- From the above decision, a local court can issue interim measures where the arbitral proceedings are in a foreign seat.

- In Kenya an application for interim measure will usually be made under Section 7 of the Arbitration Act.

Procedure:

- **Rule 2 of the Arbitration Rules, 1997** provides that an application under Section 7 of the Act shall be made through Chamber Summons.

Submitted by

	Contact 1	Contact 2 (optional)	Contact 3 (optional)
Contact Name:	Allen Waiyaki Gichuhi C.Arb.	Charles Wamae	Prestone Wawire
Firm Name:	Wamae & Allen Advocates	Wamae & Allen Advocates	Wamae & Allen Advocates
Email:	allen@wamaeallen.com	charles@wamaeallen.com	prestone@wamaeallen.com
Phone :			
Website:	www.wamaeallen.com	www.wamaeallen.com	www.wamaeallen.com