



Advancly Embed Technologies Limited v Corrolton Trading Limited (Commercial Case E184 of 2023) [2023] KEHC 18237 (KLR) (Commercial and Tax) (26 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18237 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E184 OF 2023**

DAS MAJANJA, J

MAY 26, 2023

BETWEEN

ADVANCLY EMBED TECHNOLOGIES LIMITED PLAINTIFF

AND

CORROLTON TRADING LIMITED DEFENDANT

RULING

1. The court is called upon to determine the Plaintiff's Notice of Motion dated May 2, 2023 filed, *inter alia*, under order 40 rules 2, 3 and 4 of the Civil Procedure Rules. The Plaintiff primarily seeks restraining the Defendant from accessing and or withdrawing funds from three accounts; one domiciled at the Community Supreme Branch of Equity Bank Limited and two accounts domiciled at the Nkrumah Branch of ABSA Bank pending the hearing and determination of the suit. The application is supported by the affidavit of Roselyne Omanga sworn on May 2, 2023 and her further undated affidavit. It is opposed by the Defendant through the affidavit of its director, Josiah Muoka, sworn on May 5, 2023 and grounds of opposition dated May 4, 2023. The parties filed written submissions supplemented by brief oral arguments by their counsel.
2. The Plaintiff's case is set out in the Plaint dated May 2, 2023 and the depositions in support of the application. The Plaintiff issued to the Defendant an Aggregator Capital Offer Letter dated December 7, 2022 ("the Offer Letter") which the Defendant accepted whereupon the parties entered into a Service Agreement dated December 13, 2022 ("the Agreement") in which the Plaintiff was to provide the Defendant with funds to finance the defendant's business operations on terms and conditions therein including payment of the loan advanced. It was also agreed that the parties would maintain a joint bank account with the Plaintiff's representative being a signatory to the account for the purpose of receiving payments from the Defendant.



3. The Defendant contends that the Defendant failed to make repayments as agreed whereupon the entire amount advanced became due and payable as well as interest at the agreed rate of 5% per month. The Plaintiff further states that the Defendant opened another account at Equity Bank in order to divert payments receivable to the Plaintiff's accounts at ABSA Bank to which the Plaintiff is not a signatory. It therefore claims USD 325,225.00 as the amount due to it and an injunction restraining the Defendant from accessing and or withdrawing money from the three accounts. The Plaintiff contends that it is apprehensive that in the event the preservation orders are not granted pending the hearing of the main suit, it is likely that the Defendant will continue to withdraw and divert funds as a result it will suffer loss and engage in tedious recovery process to its loss and prejudice.
4. The Defendant does not dispute the Offer Letter and the Agreement but adds that the Plaintiff executed and issued the Defendant with a Deal Slip on December 14, 2022 which set out the facility terms as follows; the principal amount of USD 240,000.00 was to attract interest at a monthly rate of 5% and that the disbursement date was to be December 15, 2022 with the first interest payment due on January 14, 2023 and maturity date being February 13, 2023. Thereafter, the Plaintiff's representative Rose Omanga, was introduced as signatory of the ABSA Bank accounts.
5. The first disbursement was not drawn down in accordance with the Deal Slip but in two tranches; USD 135,000.00 on December 21, 2022 and USD 105,000.00 on January 3, 2022. The Defendant avers that due to the late draw down, it could not pay the first interest payment on its due date and that in accordance with Clause 7.8 of the Agreement, the interest payment would fall due a month from the last date of dispensing the loan facility and upon receipt of funds into the joint account.
6. The Defendant denies that it opened an account at Equity Bank to divert funds as alleged by the Plaintiff as the account was opened on March 3, 2022 before December 8, 2022 when the Plaintiff was introduced as a signatory to the joint accounts. The Defendant has no objection to freezing the joint accounts since the Plaintiff has a stake in them but urges the court to lift the order on the Equity account which is its account and in which the Plaintiff lacks any stake.
7. In the further affidavit, the Plaintiff states that the purpose of the joint account was to enable the Plaintiff recover its loan through payments made by Kenya Power to the Defendant. That in addition to the Deal Slip of December 14, 2022, additional Deal Slips for USD 132,000.00 and USD 105,000.00 to be disbursed on December 21, 2022 and December 30, 2022 were signed by the parties and which superseded the earlier Deal Slip and the money disbursed on 21st and December 28, 2022 and not January 3, 2023 as stated by the Defendant. The Plaintiff avers that it did not interfere with the Plaintiff's business and that there was no unpredictable disbursement. That in any case, the Defendant was to make any payment after the lapse of 30 days from the date of disbursement.
8. The Plaintiff avers that the Defendant through its director, Mr Muoka, forged the signature of Ms Omanga and authorized the transfer of Kshs 9,755,000.00 to the Equity Bank account which is against the agreement between the parties and that the action deprived the Plaintiff from benefitting from the disbursement. That although Ms Omanga attempted to reverse the entry through ABSA Bank, Equity Bank declined to reverse the entry on account of the Defendant.
9. Based on the facts I have outlined, the parties submitted on the issue whether the court should grant the injunction. Since the Plaintiff has invoked order 40 rule 2 of the *Rules*, it rests its case on the principles for the grant of an interlocutory injunction settled in *Giella v Cassman Brown* [1973] EA 348 where the court held that in order to succeed, a party must demonstrate that it has a *prima facie* case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in their favour.



10. On its part, the Defendant contends that what the Plaintiff seeks is in reality a freezing order or a *mareva* injunction which ought to have been sought under Order 39 rule 1 of the Rules. It urges that the Plaintiff has not made out a case for the grant of such order and refers to several cases among them Kanduyi Holdings Limited v Balm Kenya Foundation and Another BGM HCCC No 5 of 2013 [2013]eKLR, Beta Healthcare International Limited v Grace Mumbi Githaiga and 2 Others [2016]eKLR and International Air Transport Association and another v Akarim Agencies Company Limited and 2 others [2014]eKLR.
11. Since the application is made by the Plaintiff, I will consider it on the basis it is urged. In Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No 77 of 2012 [2014] eKLR the Court of Appeal held that the conditions an applicant must meet as set out in Giella v Cassman Brown (supra) are separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. Thus if an applicant does not establish a *prima facie* case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a *prima facie* case is established, the court will consider the other conditions.
12. The first hurdle the Plaintiff must surmount is to establish a *prima facie* case with a probability of success. The Court of Appeal in Mrao Ltd v First American Bank of Kenya Limited and 2 others [2003] eKLR explained that it 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.”
13. The Plaintiff’s case as set out in the Plaintiff is that the Defendant diverted payments from the joint accounts in ABSA to its account at Equity Bank. In response to this averment, the Defendant states that this account was opened way before the parties entered into a relationship. I hold that there is nothing in the Letter of Offer or Agreement that prevents the Defendant from opening a bank account in any other bank. As I understand the joint account was for purposes receiving monies received in line with the Agreement.
14. As to whether there is money diverted, the Plaintiff does not plead when the Defendant diverted monies for the joint accounts at ABSA. Likewise, the supporting affidavit is vague and lacks any particulars of the diversion and it states as follows:
 - (6) That in further breach of the obligation set out at clause 7.8 of the service agreement the defendant opened an account at Equity Bank Limited No to divert payments receivable to the plaintiff to accounts held at ABSA Bank accounts number to which the plaintiff is not signatory thus has no access with regard to receipt of the repayments.
15. It is only in the further affidavit that the Plaintiff introduces the allegation that the Defendant’s director forged her signature and transferred money from one of the joint account at ABSA to the Equity Bank account. This transfer took place late April 2023 yet it was not disclosed in the Plaintiff or deposition in support of the application. There is no evidence that the Plaintiff reported such a serious allegation to the police. I am not convinced on the basis of what is pleaded in the Plaintiff and the material in the depositions that the Plaintiff has made out a *prima facie* case with a probability of success.
16. Even if I were to accept that the Plaintiff has made out a *prima facie* case with a probability of success, I would still decline the injunction as the breach can be remedied by payment of damages which in this case is the debt. The Plaintiff has not shown that the Defendant lacks the ability to pay the debt should



the court find that it is due. Nothing of the sort is suggested in the deposition or evidence provided in support.

17. I would be remiss if I did not deal with the Defendant's submission that what the Plaintiff seeks is a *mareva* injunction in the nature of what is provided under Order 39 of the Rules. The Plaintiff's claim is that the Defendant is indebted to it in the amount of USD 325,225.00 and in that regard seeks to freeze the subject accounts. The Defendant is right that in substance the Plaintiff seeks to an order of attachment before judgment without following the procedural rigours.
18. I would only reiterate what the Court of Appeal stated in *Kuria Kanyoko t/a Amigos Bar and Restaurant v Francis Kinuthia Nderu, Helen Njeru Nderu and Andrew Kinuthia Nderu* [1982-88] KAR 1287 that,

“The power to attach before judgement must not be exercised lightly and only upon clear proof of the mischief aimed at by order 38, Rule 5, namely that the Defendant was about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him.”

From the totality of pleadings and depositions, I hold that the Plaintiff has not discharged its burden of showing the Defendant is taking steps to dispose of its property or remove it out of reach of the court with intent to obstruct or delay any decree that may be passed against the Defendant.

19. For the reasons I have outlined, I am constrained to dismiss the plaintiff's application dated May 2, 2023. The interim orders issued on May 2, 2023 are discharged forthwith. The Plaintiff shall pay the costs of the application.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Echessa instructed by Echessa and Bwire Advocates LLP for the Plaintiff.

Mr Makau instructed by S. S. Malonza Advocates LLP for the Defendant.

