



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. E060 OF 2021**

**CHUI BING SUN.....1<sup>ST</sup> PLAINTIFF**

**CHECKMATE CAPITAL LIMITED.....2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**CHIEN HOE YONG.....1<sup>ST</sup> DEFENDANT**

**HENCO MANAGEMENT LIMITED.....2<sup>ND</sup> DEFENDANT**

**BRUNO OTIENO OLIENDE**

**(alias ELIJAH MURENZI MALIBA.....3<sup>RD</sup> DEFENDANT**

**JOSEPH LUGANSA.....4<sup>TH</sup> DEFENDANT**

**GLOBAL FREIGHT MANAGEMENT LIMITED.....5<sup>TH</sup> DEFENDANT**

**BRIAN ODHIAMBO.....6<sup>TH</sup> DEFENDANT**

**ODHIAMBO, TALAM & CO. ADVOCATES LLP.....7<sup>TH</sup> DEFENDANT**

**OSEWE ALPHONCE COLLINS ODOYO.....8<sup>TH</sup> DEFENDANT**

**ODERO OSIEMO & CO. ADVOCATES.....9<sup>TH</sup> DEFENDANT**

**JONATHAN OKOTH OPANDE.....10<sup>TH</sup> DEFENDANT**

**KENEDY ANYANGA.....11<sup>TH</sup> DEFENDANT**

**TITUS KAMAU NGUNJIRI MWANGLI.....12<sup>TH</sup> DEFENDANT**

**AND**

**NATIONAL BANK OF KENYA LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**UNITED BANK FOR AFRICA KENYA LIMITED...2<sup>ND</sup> INTERESTED PARTY**

**CREDIT BANK KENYA LIMITED.....3<sup>RD</sup> INTERESTED PARTY**

**STANBIC BANK KENYA LIMITED.....4<sup>TH</sup> INTERESTED PARTY**

**RULING**

1. Before me for determination are four (4) applications: the first is the Amended Notice of Motion dated 26<sup>th</sup> February, 2021 (“the first

application”) brought by the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs herein and supported by the grounds set out on its face and the facts stated in the affidavit of the 1<sup>st</sup> plaintiff. The plaintiffs essentially sought the issuance of freezing orders in respect to various accounts belonging to the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 11<sup>th</sup> defendants and held with the interested parties; they further sought orders for the discovery of documents, interrogatories and disclosures by the interested parties in respect to the specific accounts listed in the first application, and an order permitting the plaintiffs to trace the monies deposited into the listed accounts. This court however notes that no copy of the supporting affidavit was in the court file at the time of writing this ruling.

2. In opposing the first application, the 4<sup>th</sup> interested party filed the replying affidavit sworn by its Senior Legal Counsel-Legal and Governance Department, Elisha Nyikuli. Also opposing the first application is the 3<sup>rd</sup> defendant, who swore a reply on 26<sup>th</sup> April, 2021.

3. The second application is the Notice of Motion dated 15<sup>th</sup> March, 2021 (“the second application”) brought by the 6<sup>th</sup> and 7<sup>th</sup> defendants and supported by the grounds presented in its face as well as the facts stated in the affidavit of the 6<sup>th</sup> defendant. Therein, the aforesaid defendants sought an order discharging, setting aside and/or lifting the ex parte orders issued earlier by this court on 3<sup>rd</sup> March, 2021 against the said defendants, by unfreezing the 7<sup>th</sup> defendant’s bank account with the 1<sup>st</sup> interested party held at Wilson Airport Branch Account No. [xxxxxxx] and a further order directing the plaintiffs to deposit security for costs in the sum of Kshs.80,000,000/ pending the hearing and determination of the suit, failing which the suit be dismissed with costs.

4. The second application stands opposed by the plaintiffs, who have filed the replying affidavit sworn by the 1<sup>st</sup> plaintiff on 20<sup>th</sup> April, 2021.

5. Subsequently, the 1<sup>st</sup> interested party filed the Notice of Motion dated 14<sup>th</sup> April, 2021 (“the third application”) which is supported by the grounds set out on its face and the facts stated in the affidavit of advocate Samuel Mundia. The second application sought the orders hereunder:

(i) Spent.

(ii) Spent.

(iii) Spent.

(iv) THAT this Honourable Court be pleased to order the plaintiffs to submit a draft interrogatories questionnaire for the court’s interrogation, to determine the necessity, appropriateness and relevance of the intended questions to be addressed to and by the enjoined interested party banks.

(v) THAT costs of the application be awarded to the 1<sup>st</sup> interested party.

6. The plaintiffs opposed the third application by putting in Grounds of Opposition dated 21<sup>st</sup> April, 2021.

7. The fourth application is the Notice of Motion dated 14<sup>th</sup> April, 2021 lodged by the 8<sup>th</sup> and 9<sup>th</sup> defendants in the suit. The same is supported by the grounds set out on its face and the facts stated in the affidavit of the 8<sup>th</sup> defendant. The 8<sup>th</sup> and 9<sup>th</sup> defendants sought an order discharging and/or setting aside the ex parte orders made on 3<sup>rd</sup> March, 2021 by this court against the 8<sup>th</sup> and 9<sup>th</sup> defendants being to unfreeze the bank account held with the 1<sup>st</sup> interested party at Wilson Airport Branch Account No. [xxxxxxx]; a further order directing the plaintiffs to deposit security for costs in the sum of Kshs.50,000,000/ pending the hearing and determination of the suit failing which the suit be dismissed.

8. Going by the record, it remains unclear whether any documents were filed in response to the fourth application.

9. When the respective Motions came up for inter partes hearing before this court, the parties were directed to file and exchange written submissions.

10. I have considered the grounds set out on the body of the respective Motions, the facts deponed in the affidavits supporting and opposing the respective Motions, the Grounds of Opposition, and the rival submissions and authorities cited.

11. I will begin by addressing the first application. It is clear that the orders sought therein are three-fold: the issuance of freezing orders in respect to the respective accounts listed therein, the discovery of documents relating to those accounts, and permission to trace the money deposited in those accounts. I will address the three (3) orders contemporaneously.

12. In the absence of a copy of the supporting affidavit to the first application, I relied on the grounds thereto. In essence, the plaintiffs state and submit that they are victims of a cross-border gold trading scam involving the defendants and that on various dates the plaintiffs transferred large sums of money into the various accounts particularized in the plaint and first application. The plaintiffs similarly state that there has been fraud, collusion and misrepresentation by the defendants in the suit, thereby necessitating a granting of the orders sought.

13. It is the averment of the plaintiffs that a large portion of the funds held in the respective accounts has been withdrawn by some of the defendants and that unless the orders sought are granted, the balance thereof is at risk of being misappropriated by the defendants.

14. In response, the 3<sup>rd</sup> defendant denies having entered into any agreement with the plaintiffs and further denies the allegations of fraud and

misrepresentation. The 3<sup>rd</sup> defendant further avers that the move by the plaintiffs to have his account frozen will be detrimental to his business.

15. Also in response, Elisha Nyikuli in his replying affidavit on behalf of the 4<sup>th</sup> interested party states that on 31<sup>st</sup> December, 2019 the 11<sup>th</sup> defendant opened two (2) personal accounts with the 4<sup>th</sup> interested party, namely Kenya Shillings Account No. [xxxxxxx] and USD Account No. [xxxxxxx] and that the 4<sup>th</sup> interested party would debit and credit the aforementioned accounts in accordance with the instructions of the 11<sup>th</sup> defendant. The deponent goes on to state that the 4<sup>th</sup> interested party ought to be discharged for the reason that no orders are being sought against it.

16. I note that the 6<sup>th</sup> and 7<sup>th</sup> defendants put in written submissions in respect to the first application, essentially arguing they are innocent third parties and ought not to bear any liability for the actions of the 1<sup>st</sup> and 2<sup>nd</sup> defendant. The 6<sup>th</sup> and 7<sup>th</sup> defendants are of the view that a granting of the freezing orders would prejudice them since the relevant accounts also hold monies belonging to other clients, and go further on to submit that all monies received on account of the 1<sup>st</sup> and 2<sup>nd</sup> defendants have since been disbursed and hence the 7<sup>th</sup> defendant does not hold any funds belonging to those defendants.

17. Upon perusal of the orders sought in the first application and pleadings, I note that contrary to the averments made in the replying affidavit of Elisha Nyikuli, some of the orders are directed at the 4<sup>th</sup> interested party hence there is no basis on which to have the 4<sup>th</sup> interested party struck out at this stage.

18. On the subject of freezing of the accounts in question, the court in the case of **International Air Transport Association & Another v Akarim Agencies Company Limited [2004] eKLR** held as follows:

***“Freezing order is not an interim injunction and the threshold to be attained for it to be issued is also distinct from those attending a temporary injunction set out in GIELLA V CASSMAN BROWN. Freezing order is an order of the court which is usually issued in personam restraining or enjoining a person from dissipating an asset directly or indirectly. It is ordinarily issued ex parte for it is intended to serve a useful purpose of preservation of assets...The basis for freezing order is the inherent jurisdiction of the court although some jurisdictions have enacted freezing-order statutes...”***

19. Furthermore, in the case of **Andrew Chege Wainaina v David Karanja Mwangi & another [2017] eKLR** the court referenced **Goode on Commercial Law 4<sup>th</sup> Edition** at **page 1287** on the principles for the granting of a freezing order, in the manner hereunder:

***“.....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.”***

20. On the first principle, upon perusal of the pleadings placed before me, I am satisfied that the plaintiffs have established an arguable case with reasonable chances of success. Under the second principle, I am satisfied that this court has jurisdiction over the claim in question. In respect to the third principle, save for the funds purportedly deposited in the accounts held with the respective interested parties, it remains unclear whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants have additional assets within the jurisdiction of this court. Nonetheless, in the absence of any evidence to the contrary, I have no reason to find that the assets belonging to the remaining defendants are not within the jurisdiction of this court. This brings me to the fourth principle touching on the risk. From perusal of the pleadings and material placed before me, I am of the view that the plaintiffs have reasonably demonstrated that the assets in question are at a real risk of being removed from their reach; this is reinforced by the arguments brought forth by the 6<sup>th</sup> to 9<sup>th</sup> defendants herein that they previously received instructions for disbursement of the funds held on behalf of their clients to other accounts. I have also weighed this against the position that some of the defendants are merely enjoined in the proceedings by virtue of their role as advocates for other defendants and that some of the accounts in question are general client accounts. For the foregoing reasons collectively, I am therefore convinced that in the circumstances of this case, the balance of convenience tilts in favour of the plaintiffs, to entitle them to the granting of freezing orders. I however note that given the nature of the dispute and in the interest of justice, it would be important for the hearing of the suit to be expedited.

21. In respect to the orders touching on discovery of documents relating to those accounts, and permission to trace the money deposited in those accounts, upon consideration of the arguments by the parties, I am satisfied that there is nothing to lead me to decline to grant these orders. Consequently, the first application succeeds in respect to prayers 3, 5, 7 and 9.

22. I will address the second and fourth applications contemporaneously since it is apparent that the orders sought therein are similar. I note therefrom that, save for the orders for deposit of security for costs, the remaining orders touching on the varying of the ex parte orders of 3<sup>rd</sup> March, 2021 are now spent.

23. In their respective supporting affidavits to the second application, the 6<sup>th</sup> and 8<sup>th</sup> defendants echoed each other's submissions that, at no point did the plaintiffs transact directly with the 6<sup>th</sup> and 7<sup>th</sup> defendants and more importantly that, the plaintiffs are foreigners and non-residents of Kenya.

24. In response, the 1<sup>st</sup> plaintiff states that the aforementioned defendants have not placed any evidence before this court to justify the security for costs sought and that in any event, the sums sought are exaggerated. The 1<sup>st</sup> plaintiff urges that, should this court be inclined to award security for costs, then the same should not exceed a sum of Kshs.2,000,000/.

25. Order 26, Rule 1 of the Civil Procedure Rules stipulates as follows in respect to security for costs:

***“In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party.”***

26. It is clear from the foregoing provision that an order for security for costs is purely discretionary. Moreover, security for costs can be ordered in the following circumstances, espoused in the case of **Jayesh Hasmukh Shah v Narin Haira & another (2015) eKLR** cited with approval in the case of **Aggrey Shivona v Standard Group PLC [2020] eKLR**:

***“It is now settled Law the order for security for costs is a discretionary one as long as that discretion is exercised reasonably, and having regard to the circumstances of each case. Such factors as absence of known assets in the Country, absence of an office within the jurisdiction of the court, inability to pay costs; the general financial standing or wellness of the plaintiff; the bonafides of the plaintiff's claim, or any other relevant circumstances or conduct of the plaintiff or defendant may be taken into account.”***

27. It is clear from the foregoing that in order for an applicant to succeed in his/her application, he/she ought to demonstrate that the respondent will be unable to pay the costs as a result of poverty. This position was reaffirmed by the Court of Appeal in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** when it held that the onus is on the applicant to prove that the respondent will be unable to pay the costs due to poverty, should the proceedings terminate against such respondent.

28. In the present instance, while I note that the plaintiffs are foreigners, I equally note that the respective defendants did not furnish this court with any evidence or material to show the inability of the plaintiffs to pay the costs of the suit in the event of a dismissal. I am not convinced to exercise my discretion in favour of the aforementioned defendants. Consequently, the second and fourth applications are hereby dismissed for lack of merit, with no order on costs.

29. I am now left with the third application which was brought by the 1<sup>st</sup> interested party. The substantive order sought is for the submission of a draft interrogatories questionnaire, with advocate Samuel Mundia averring in his supporting affidavit that the interrogatories questionnaire and notice to produce documents availed by the plaintiffs does not comply with legal principles and is oppressive of the 1<sup>st</sup> interested party's duty of confidentiality. More specifically, the deponent avers that the interrogatories carry irrelevant questions and tend to incriminate the account holders. This was echoed at the submission stage and which submissions were reaffirmed by those of the 6<sup>th</sup> and 7<sup>th</sup> defendants, with the defendants adding that the plaintiffs are on a fishing expedition with the aim of diminishing their defence.

30. In contrast, the plaintiffs contend that the interrogatories and notice to produce are clear and unequivocal and in compliance with the law.

31. The purpose of discovery was enunciated by the court in the case of **Concord Insurance Co. Ltd v NIC Bank Ltd [2013] eKLR** quoted in the plaintiffs' submissions in the following manner:

***“According to Halsbury's Laws of England, Volume 13 para 1, the learned authors detail;***

***“The function of the discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to see before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation.”***

32. The court went on to state that discovery does not serve the aim of enabling a party fish for information to enable him/her frame a new case or find new witnesses or exploring irrelevant allegations. A similar finding was made in the case of **Rafiki Microfinance Bank Ltd v Zenith Pharmaceuticals Ltd [2017] eKLR** cited by the 6<sup>th</sup> and 7<sup>th</sup> defendants in their submissions.

33. From my perusal of the interrogatories and notice to produce which were filed by the plaintiffs, I observed that some of the questions listed therein are an attempt to fill gaps in the plaintiffs' case and are a mere fishing expedition. Moreover, it is apparent therefrom that some of the questions would trigger a breach of confidentiality on the part of the 1<sup>st</sup> interested party, which will in turn be detrimental to the interest of the 6<sup>th</sup> and 7<sup>th</sup> defendants. In the premises, I am satisfied that the third application succeeds in terms of order (iv).

Consequently it is hereby ordered:

a) Freezing orders be and are hereby issued with immediate effect against the account held by the 7<sup>th</sup> defendant with the 1<sup>st</sup> interested party at its Wilson Airport Branch and with Account Number .[xxxxxxxx] prohibiting any and all withdrawals, outgoing transfers and any and all dealings with the money in the account by the 6<sup>th</sup> and 7<sup>th</sup> defendants, their agents, nominees or any person

claiming any right of interest under or through them, pending the hearing and determination of the suit.

b) Freezing orders be and are hereby issued with immediate effect against the account held by the 8<sup>th</sup>, 9<sup>th</sup> and 11<sup>th</sup> defendants with the 2<sup>nd</sup> interested party at its Upperhill Branch and with Account Number .[xxxxxxxx] and Chiromo Branch and with Account Number .[xxxxxxxx] prohibiting any and all withdrawals, outgoing transfers and any and all dealings with the money in the account by the 6<sup>th</sup> and 7<sup>th</sup> respondents, their agents, nominees or any person claiming any right of interest under or through them, pending the hearing and determination of the suit.

c) Pending the hearing and determination of the suit, the discovery of documents, interrogatories and disclosures by the interested parties is hereby allowed in respect to the respective accounts, in line with the legal principles.

d) In respect to c) above, the plaintiffs be and are hereby ordered to submit a draft interrogatories questionnaire for the court's interrogation, to determine the necessity, appropriateness and relevance of the intended questions to be addressed to and by the interested parties.

e) Pending the hearing and determination of the suit, the plaintiffs be and are hereby allowed to trace the money deposited into the abovementioned accounts with a view to tracing the assets purchased by and proceeds of funds deposited into the said accounts.

f) For purposes of expediting the hearing and determination of the suit, the parties shall appear on a date to be fixed by this court for a mention to confirm compliance with pre-trial directions.

g) The Notice of Motions dated 15<sup>th</sup> March, 2021 and 14<sup>th</sup> April, 2021 filed by the 6<sup>th</sup> and 7<sup>th</sup> defendants, and the 8<sup>th</sup> and 9<sup>th</sup> defendants respectively, are hereby dismissed with no order on costs.

h) Costs of the Amended Notice of Motion dated 26<sup>th</sup> February, 2021 to abide the outcome of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY, 2021.**

**A. MBOGHOLI MSAGHA**

**JUDGE**

In the presence of:

Ms. Mburu and Mr. Obonyo for the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs

N/A for the 1<sup>st</sup> Defendant

N/A for the 2<sup>nd</sup> Defendant

Mr. Waswa for the 3<sup>rd</sup>, 4<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants

Ms. Maina and Mr. Koceyo for 6<sup>th</sup> and 7<sup>th</sup> Defendants

N/A for the 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Defendants

Mr. Andrew Mwangi for the 1<sup>st</sup> Interested Party

Ms. Kiiru for the 2<sup>nd</sup> Interested Party

N/A for the 3<sup>rd</sup> Interested Party

Mr. Kiragu h/b for Mr. Kigata for the 4<sup>th</sup> Interested Party