



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

ACEC NO. 7 OF 2018

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF/RESPONDENT

V E R S U S

STEPHEN SANGA BARRAWAH T/A MEDISCOPE AGENCIES..... 1ST DEFENDANT

SERAH MUSYIMI..... 2ND DEFENDANT

BARRAWAH LIMITED 3RD DEFENDANT

DAVID KISOI NDUNDA T/ADANKIES AGENCIES.....4TH DEFENDANT

TIMOTHY MALINGI KOE 5TH DEFENDANT

GILBERT M. S. BAYA 6TH DEFENDANT

GABRIEL MAJALIWA MKARE7TH DEFENDANT

ALEX KITHEKA MWONGELA8TH DEFENDANT

ANDREW KITHI KOMBE9TH DEFENDANT

SOPHIA MNYAMANYI MWANDAWIRO10TH DEFENDANT

RAPHAEL KIOLI MUTISO11TH DEFENDANT

BENJAMIN KAI CHILUMO 12TH DEFENDANT

RIZIKI MATANO CHOGA 13TH DEFENDANT

MWATELA MWASEMU..... 14TH DEFENDANT

JUSTIN NDIRANGU NGURE15TH DEFENDANT

JULIUS MWAIKIZA MUNGA 16TH DEFENDANT

PAUL TEIDO MWAZO.....17TH DEFENDANT

RICHARD POLE MWASAMBU18TH DEFENDANT

EQUITY BANK KENYA LIMITED19TH DEFENDANT

BARCLAYS BANK OF KENYA 20TH DEFENDANT/APPLICANT

THE CO-OPERATIVE BANK OF KENYA LIMITED 21ST DEFENDANT

RULING

1. By a Complaint dated 15th April 2018 and filed on 16th April 2018, the Ethics and Anti-Corruption Commission herein referred to as the Plaintiff/Respondent commenced a suit against the 21 Defendants seeking various reliefs against each of them. Among the Defendants is Barclays Bank of Kenya now referred to as ABSA Bank.

2. The suit is anchored on the Plaintiff's mandate pursuant to Section 11(j) of the EACC Act which empowers them to institute and conduct proceedings in court for purposes of recovering or protection of public property, confiscation of proceeds of corruption and payment of compensation.

3. Based on the said mandate, the Plaintiff commenced investigations into allegations that the County Government of Kilifi had irregularly paid public funds of Kshs. 26,460,000/- to Mediscope Agencies purportedly in respect to procurement of 6000 pieces of long lasting insecticide – treated nets during the financial year 2015-2016.

4. Among the beneficiaries of the said amount obtained from Kilifi County Government allegedly through fraudulent means is the 11th Defendant who received Kshs. 2,805,603/- which money he deposited with Barclays Bank in his Account No. 2022803568.

5. It is on the ground that the said amount was deposited in Barclays Bank that the bank was enjoined in these proceedings with the Plaintiff basically seeking reliefs No.(j) (k) and (l) against them as the 20th Defendant. The reliefs sought against Barclays Bank are:-

(k) A permanent prohibitory injunction to restrain the 11th and 20th Defendants, by themselves or through their agents, servants or assigns from transferring, disposing or, wasting, or in any way dealing with the funds including Kshs. 2,805,603.05 held in bank Account No. [xxxx] at Barclays Bank in the name of the 11th Defendant.

(l) A mandatory injunction against the 20th Defendant to compel it to release to the Plaintiff, the funds including Kshs. 2,805,603.05 held in bank Account No. [xxxx] at Barclays Bank in the name of 11th Defendant and any other property held by the said Defendant in satisfaction of the Plaintiff's recovery claim.

6. Aggrieved by their joinder into these proceedings on grounds that there is no cause of action against them as they were only rendering their normal and routine banking services to a customer, they filed a Notice of Motion dated 29th November 2019 seeking orders that:-

(a) That the suit against the 20th Defendant / Applicant be struck out.

(b) That in the result the Plaintiff's suit against the 20th defendant/Applicant be and is hereby dismissed with costs to the 20th Defendant.

(c) That the 20th Defendant be at liberty to apply for such other and or further orders and or directions as this Honourable Court may deem fit and just to grant.

(d) That costs of this application be provided for.

7. The application is premised upon grounds set out on the face of it and an affidavit sworn on 29th November 2019 by one Gilbert Pemba a Branch Manager working with 20th Defendant (Applicant). According to Gilbert Pemba, the 20th defendant is a stranger to the suit as its relationship with the 11th Defendant is that of Bank – Client based on the money deposited by the 11th Defendant as a normal customer enjoying their banking services. He averred that there are no orders sought against the 20th defendant.

8. He further averred that the suit against the 20th Defendant is ill advised, bad in law, vexatious and an abuse of the court process. He stated that it was fair and just that the 20th Defendant's name be struck out of the pleadings as there is no cause of action disclosed against them.

9. In response, the Plaintiff/Respondent filed a replying affidavit sworn on 16th March 2020 by Tabu C. Lwanga the Investigating Officer stating that the joinder of the 20th Defendant was deliberate in view of prayers (j) (k) (l) in which they have sought for an injunction restraining the 11th and 20th Defendant not to transfer, dispose or in any way deal with the funds contained in the 20th Defendant's account in respect of a sum of Kshs. 2,805,603.05.

10. That it is necessary for the 20th Defendant to be a party to the suit so as to be properly bound by orders of the Honourable Court from dealing with the money in question held in their bank in the name of the 11th Defendant.

11. During the hearing, Mr. Mogi appearing for the 20th Defendant orally submitted basically reiterating the prayers, grounds on the face of the application and the content in the affidavit in support. He submitted that the suit herein relates to a tender contract to which Barclays

Bank was not a party. That the 20th Defendant is incurring costs to defend a suit to which it has no interest. He contended that the money in question does not belong to the bank but their client and that any order directed against the Defendant not to withdraw or deal with such money in any way is automatically binding on the 20th Defendant. That the bank is ready and willing to abide by the court orders at all times.

12. On his part Mr. Mogi submitted that there are specific reliefs against the 20th Defendant hence the cause of action is sustainable. He basically adopted the averments contained in the affidavit in reply to the application. He further relied on a statement of Grounds of Opposition dated 16th March 2020 in which it was argued that the application before court is bad in law as it is framed as a Notice of Motion instead of a Chamber Summons pursuant to Order 1 rule 14 and Order 1 rule 25 of the Civil procedure Rules.

13. Mr. Mogi submitted that orders only bind parties to the suit and that orders which are personal in nature do not affect 3rd parties. That in any event Order 1 rule 7 of the Civil Procedure Rules does support the inclusion of the 20th Defendant.

14. Counsel contended that the application is frivolous, vexatious and a complete waste of court's time. He opined that misjoinder of a party can be dealt with after the hearing of the main suit.

Determination

15. I have considered the application herein, response thereto and oral submissions by both counsel. The only issue that fall for determination is whether there is a cause of action against the 20th Defendant and if not, whether the suit should be struck out.

16. There is no dispute that the 20th Defendant is holding a sum of Kshs. 2,805,603 in the name of the 11th Defendant in their capacity as a bank rendering banking services. It is also an undisputed fact that the Plaintiff has no claim against the 20th Defendant save for being a custodian of the money alleged to have been obtained from the County Government of Kilifi by the 11th defendant. What wrong did the bank commit in rendering its banking services to its customer the 11th Defendant without knowledge that the money banked with them was fraudulently obtained?

17. Is there a cause of action against the 20th Defendant in the circumstances of this case? What does a cause of action entail? In the case of **Langat v Co-operative Bank of Kenya Ltd (2017)eKLR** the Court of Appeal defined a cause of action as:-

“... a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”

18. Further in the case of **Time Magazine International Ltd and Another v. Michael Rotich and Another (2000)eKLR** the Court adopted the definition of a reasonable cause of action as meaning a cause of action with some chances of success.

19. It is incumbent upon the Applicant to convince the Court that the suit against it is actually hopeless with no probability or chances of success. That on a prima facie basis no reasonable Court could waste it's time to wait upto the end by entertaining a suit that on the face of it is not sustainable. It will be a waste of Court's time and parties' resource to embark on a trial that is not going anywhere from the word go.

20. However, I am alive to the fact that striking out proceedings on grounds of non-disclosure of a cause of action is within the discretion of the trial court which must be exercised with extreme caution. See **Crescent Construction Co. Ltd v. Delphis Bank Ltd (2007)eKLR & Dobie and Company (Kenya) Ltd v Joseph Mbaria Muchina & Another (1980)eKLR** where the Court held that:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

21. In the instant case, the 20th Defendant has not been accused of any wrong doing. Their alleged mistake is that of holding money purported to have been obtained fraudulently. Should banks be held culpable for the wrongs committed by their customers? Obviously the answer is no. If banks were to be drag to court for every amount of money deemed to be stolen but banked with them, they will be permanent parties and litigants in Court for no wrong doing.

22. Banking institutions should not be penalized by incurring unnecessary legal fees for claims which can be litigated without their participation yet they will be bound by the orders of the Court. For instance, in this case prayer (k) barring the 11th Defendant from transferring, disposing or dealing in any way with the amount in question in the 20th Defendants bank account is sufficient enough to secure the money without necessarily enjoining the bank and the orders should automatically be binding on the bank.

23. It was therefore not necessary to sue the bank simply because they are rendering banking services to their clients without any knowledge that the money was fraudulently obtained. I do not see any reasonable claim against the bank. Even if the suit was to go to full trial, nothing will change. The Plaintiff has no claim against the bank.

24. As regards whether the application is properly filed as it is brought as a Notice of Motion, the law is clear. Under Order 1 rule 14 applications for striking out suits shall be filed by way of Chamber Summons and not Notice of Motion as it is the case here. However, this is a curable error under Article 159(2)(d) of the Constitution which provides that Courts shall determine disputes without undue regard to technicalities. The description of an application as a Notice of Motion and not Chamber Summons is not prejudicial to the Respondents. I

do not find this to be a good ground to dismiss the application.

25. It is in the interest of justice that suits be determined on merit rather than on mere technicalities. I do not think there was any doubt as to which party to sue so as to apply Order 1 rule 7. It is crystal clear that the 20th Defendant had not committed any wrong hence no doubt as to which party was the right one to sue.

26. The general rule of practice is, where there is a dispute involving money in a bank, the bank is served with an order to either freeze the account and not to allow any transfer or withdrawal or in any money dealing with such monies. All that the bank is served with is an order barring any transaction relating with monies in question. A bank does not become an automatic litigant whenever money held in its custody is the subject of litigation. To do so will amount to crippling down bank operations by making their personnel attend unnecessary court sessions and hiring lawyers to defend frivolous suits.

27. Accordingly I am satisfied that the suit herein against the 20th Defendant is unmeritorious, frivolous and an abuse of the court process and the same is struck out as against the 20th Defendant with costs. Order accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2020.

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J. N. ONYIEGO

JUDGE