



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E186 OF 2019

HU SHI WEN.....PLAINTIFF

VERSUS

DU FANG.....1ST DEFENDANT

LIU FENG YING.....2ND DEFENDANT

CYTONN INVESTMENTS MANAGEMENT LTD.....3RD DEFENDANT

DIAMOND TRUST BANK.....4TH DEFENDANT

RULING

1. Through the application dated 20th June 2019, the applicant herein seeks the following orders:

1. Spent

2. That pending the interpartes hearing and determination of this application, this Honourable court be pleased to issue orders freezing accounts 5149588001, 5149588002 and 0067148001 held jointly and severally by the 1st and 2nd respondents at Diamond Trust Bank, Prestige Plaza Branch.

3. That pending the hearing and determination of this suit, this Honourable court be pleased to issue orders freezing accounts 5149588001, 5149588002 and 0067148001 held jointly and severally by the 1st and 2nd respondents at Diamond Trust Bank, Prestige Plaza Branch.

4. That pending the hearing of the application and the suit, the Honourable court be pleased to issue a temporary injunction against the 4th respondent, its servants, agents sand employees restraining them from dealing, transferring, withdrawing or otherwise moving any monies or deposits held in accounts 5149588001, 5149588002 and 0067148001 held jointly and severally by the 1st and 2nd respondents at Diamond Trust Bank, Prestige Plaza Branch.

5. That pending the hearing and determination of this application and the suit, this Honourable court be pleased to order the 1st and 2nd respondents' or any other person in possession thereof to deposit their passports and travel documents with this Honourable court or otherwise release to the Deputy Registrar.

6. That pending the hearing and determination of this application and the suit, this Honourable court be pleased to issue an order compelling the 3rd respondent to furnish the applicant with all the statements on his investments accounts including those held in the 1st and 2nd respondent's name from the time of opening the accounts to date.

7. That the Honourable court be pleased to issue any other relief or order that it deems fit.

2. The application is supported by the plaintiff/applicant's affidavit and the affidavit of one **JACKSON MWANGI MUGO** sworn on 20th June 2019. The applicant also filed a further affidavit sworn on 1st July 2019.

3. A summary of the applicant's case is that some 15 years ago, out of philanthropy, benevolence and compassion he took in the 1st and 2nd

respondents who are a son and mother respectively into his home/residence at Shime Villa D4 apartment in Hurlingham. He states that apart from accommodating the 1st and 2nd respondents as his kin, he additionally employed the 1st respondent as a Director and a trusted assistant in his company, Fandino Limited. The applicant further states that he then opened savings accounts in the names of the 1st and 2nd respondent with the 3rd respondent bank but that he held a power of attorney on each of the accounts wherein he had exclusive access and operation. The applicant also opened Cash Management Solutions Account with the 3rd respondent in the name of 1st and 2nd respondents which he operated through power of attorney by making cash deposits which he withdrew and/or rolled over at various times but that in July 2017, he went to China where he stayed for one year thereby leaving the 1st respondent in charge of the running and management of his business but that upon his return in September 2018, he learnt that the 1st and 2nd respondents had vacated his residence and taken away all his household goods.

4. He states that he also discovered that the 1st and 2nd respondents had withdrawn a total of Kshs 71 million from the accounts he had opened in their names without his approval or consent which amount they have refused to refund. He states that the 1st and 2nd respondents are of Chinese Nationality with no known kin, relatives and place of abode and are likely to abscond or leave the courts jurisdiction if the orders sought in the application are not granted.

5. The applicant further avers that following the discovery of the 1st and 2nd respondent's fraudulent activities, he reported the matter for the police and that there are ongoing criminal proceedings against the 1st and 2nd respondents. He avers that the 1st and 2nd respondents also deposited their passports in the Chief Magistrate's Courts.

6. The applicant further states that the 1st and 2nd respondents have continued to withdraw money from their accounts and that if the orders sought are not granted, he will not be able to recover any money at the end of the case.

The 1st and 2nd respondents' case.

7. The 1st and 2nd respondents opposed the application through the 1st respondent's replying affidavit sworn on 26th June 2019 wherein he avers that the applicant is aware that criminal charges were instituted against him and the 2nd respondent after they voluntarily presented themselves in court in wherein they face charges of theft and conspiracy to commit defraud in which the amount in question was stated to be Kshs 70 million.

8. He further states that after taking plea, they were released on bond whereupon they deposited their passports in court. He further states that the prosecution obtained an order to freeze their accounts in Miscellaneous Criminal Appeal No. 573 of 2018 which order was effected by the 4th respondent but that after noting that the amount the applicant claimed had been stolen was kshs 70 million they sought and obtained an order of the court limiting the freeze order to Kshs 70 million after which they were granted liberty to access any amount over and above the amount in contention.

9. The 1st and 2nd respondents contend that in view of the already existing court order preserving/freezing the amount stated to have been stolen and ordering for the depositing of their passports in court, the instant application has as a consequence been overtaken by events and amounts to an abuse of the court's process.

10. The 1st and 2nd respondents maintain that the applicant is not a joint account holder of the accounts that they hold with the 4th respondent and that the orders sought to freeze their accounts therefore amount to a violation of their rights under Article 40 of the Constitution.

11. They further argue that the issues raised by the applicant are not civil but criminal in nature and should therefore be reserved for the criminal court handling the case.

The 4th respondent's case.

12. The 4th respondent opposed the application through the replying affidavit of its legal officer **Mr. Francis Kariuki** sworn on 28th June 2019. He states that the 4th respondent is a stranger to the applicant as he does not hold any account with them as the accounts in question which are owned by the 1st and 2nd respondents.

13. He avers that on 16th May 2019, the 4th respondent was served with a court order issued by the High Court in Miscellaneous Criminal Application No. 573 of 2018- **DCI Parliament v Diamond Trust Bank Kenya Limited** which was to the effect that:-

a. Account numbers 5149588001, 5149588002 be frozen.

b. The sum of Kshs 70 million in account number 0067148001 be frozen pending the trial in Criminal Case No. 170 of 2019; and

c. Any amount above Kshs 70 million in the said account number 0067148001 will be accessible for withdrawal;

14. He states that even though the 4th respondent did not participate in the criminal proceedings that gave rise to the said orders, the 4th respondent complied with the said orders which have neither been reviewed nor appealed against. It is the 4th respondent's position that allowing the prayers sought in the instant application will create a difficulty or conflict in court orders in view of the already existing court orders freezing of the 1st and 2nd respondent's accounts.

Analysis and determination.

15. I have carefully considered the application and the response made by the respondents together with the skeleton submissions filed by the applicant and the authorities that were cited. The main issue that falls for determination is whether the prayers sought are merited.

16. The prayers sought are for the freezing of accounts Nos. 5149588001, 5149588002 and 0067148001 held jointly and severally by the 1st and 2nd respondents with the 4th respondent bank. The applicant also seeks an order of temporary injunction restraining 4th respondent from dealing with deposits held in the accounts, and an order compelling the 3rd respondent to furnish the applicant with all statements of the applicants investments and accounts held by the 1st and 2nd respondents, and an order that 1st and 2nd respondents deposit their passports and travel documents with this court.

17. From the prayers sought by the applicant, it is clear that they are not only omnibus and not made as alternative of each other but are also governed by different judicial principles.

18. It is not disputed that sum of kshs 70 million in the 1st and 2nd respondents accounts No. 0067148001 was frozen pending trial in criminal case No. 170 of 2019 wherein the applicant is the complainant against the 1st and 2nd respondents who have been charged with theft and conspiracy to defraud him of Kshs 70 million. It is also not disputed that in the said criminal case, the 1st and 2nd respondents have already deposited their passports and travel documents.

19. This court notes that the orders in the criminal court have not been varied or set aside. This means that the funds that are subject of the alleged fraud or theft by servant have already been secured and that the fear that the 1st and 2nd respondents may escape from the court's jurisdiction has also been allayed through their submission of passports to the same court.

20. The applicant argued that there is no law barring him from pursuing both the civil and criminal cases at the same time and that the mere fact that the orders have been issued in the criminal court does not preclude this court from issuing the same orders.

21. My take however is that while it is true that nothing stops a complainant in criminal case from filing in civil suit where a civil claim arises or is related to the criminal case, in the instant case, I find that there will be a possibility of a conflict in 2 courts issuing the same orders thereby creating difficulty in the execution or compliance with the said orders. For example, as I have already noted in this ruling, 1st and 2nd respondents have already deposited their passports before the criminal court. What could be the effect of this court making another order for the depositing of the said passports in court. In the same vein, the criminal court has already issued an order of freezing the accounts but limited to the sum of kshs 70 million that is the subject of the alleged theft/fraud. What will be the effect of another court order to freeze the same accounts under different terms? Which of the orders will the bank comply with without running into the risk of being in contempt of another court order.

22. My finding is that in the circumstances of this case, granting the orders to freeze the respondents' accounts and the deposit of their passports in court is unnecessary and will create confusion and embarrassment in the execution of the said orders.

23. Turning to the prayers to compel the 3rd respondent to furnish the applicant with all the statements on his investments accounts including accounts held in the 1st and 2nd respondents name, I find that the applicant has not demonstrated that he sought the said statements on his investments and that the 3rd respondent has declined to furnish him with the same so as to warrant filing of this application.

24. Similarly, the applicant has not established that he is entitled to an order of temporary injunction to restrain the 4th respondent from dealing with deposits held in the 1st and 2nd respondent accounts Nos. 5149588001, 5149588002 and 0067148001 considering that the sum that he claims was stolen, being 70 million, has already been secured through a court's freezing order.

25. In a nutshell and having regard to the findings that I have made in this ruling, I find that the instant application is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the main suit.

Dated, signed and delivered in open court at Nairobi this 30th day of September 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Kakai for 1st and 2nd defendants

Mr. Janjo for Shah for the 4th defendant/respondent

No appearance for Rachier & Omollo

Court Assistant - Otieno