



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCC. NO. 497 OF 2011

IN THE MATTER OF HIGH COURT CIVIL CASE NO. 1728 OF 1979

BETWEEN

SPECIALISED ENGINEERING COMPANY LIMITED

-VS-

KENYA COMMERCIAL BANK LIMITED

AND

IN THE MATTER OF THE ADVOCATES ACT (CAP 16 LAWS OF KENYA)

AND

IN THE MATTER OF AN APPLICATION FOR PAYMENT OF MONEY IN THE HANDS OF AN ADVOCATE

BETWEEN

SPECIALISED ENGINEERING COMPANY LIMITED

(IN RECEIVERSHIP)PLAINTIFF

-VS-

SATISH GAUTAMA DEFENDANT

RULING

1. Further proceedings in this Originating Summons have been temporary detained pending this Court's direction and ruling in respect to the sum of Kshs.10,689,883.50 reversed on 31st December 2016 by M Oriental Bank (The Bank) in account No. 0070000472 in the names of Satish Chander Sri Ram Gautama (Deceased) and Sushila Devi Gautana (wife of the Deceased).

2. The drama surrounding this reversal has its genesis in an order issued by Hon. Gikonyo J on 27th February 2015. The order, as in relevant to the matter at hand read;

“ interest on the sum of Kshs.27,454,000 held in Oriental Commercial Bank should be held in the account and should not be disbursed unless with the order of the Court”.

3. This order by the Judge was made after the Bank had, in obedience to Court orders of 7th November 2014 and 20th January 2015, supplied the Court with a statement in respect of Account No. 0070000472. This was done through an affidavit of Irene Twala sworn on 10th February 2015. In it she explained that on 21st February 2015, the Bank was served with an order issued on 21st February 2012 in Industrial

Court Case No. 1571 of 2011 (the Industrial case) requiring the Bank to freeze and preserve the sum of Kshs.27,454,000 in the said account pending the hearing and determination of an application therein.

4. Twala further deponed that on 22nd February 2012, Sushila instructed the Bank to, inter alia, hold the said sum in the account until further notice. These instructions would presumably be in consonance with the order of the industrial Court.

5. In paragraph 7 of her affidavit, Twala makes disposition that has attracted considerable attention to the question at hand. She states on oath:

THAT in compliance with the two orders made by the Honourable Court, I hereby state as follows:-

a. Account Number 0070000472 is held jointly by Satish Chander Sir Ram Gautama (deceased) and Mrs Sushila Devi Gautama (wife of Satish Gautama), under the names Satish Chander Sri Ram Gautama & or Sushila Devi G.

b. Pursuant to the Order made in Industrial Court Cause No. 1571 of 2011 and served upon the Bank on 21st February 2012, the Bank froze and preserved the sum of Kshs. 27,454,000 in the aforesaid Account.

c. The preserved /frozen funds in the Account is held in a fixed deposit interest earning account with the Bank.

d. As at 6th February 2015, the total cleared balance in the said Account was Kshs.32,616,152.50 (credit). Annexed hereto and marked "IT-3" is a copy of the statement in respect of the said Account from 1st January 2012 to 6th February 2015, both dates inclusive.

6. Notwithstanding the statement that the said sum of Kshs. 27,454,000 was held in a fixed deposit interest earning account, the bank reversed the sum of Kshs.10,689,883.50 from the said account on 31st December 2016. That sum was supposedly interest earned on the said deposit as at that date. In an affidavit sworn on 22nd May 2017, Twala sought to explain the reversal. She explained that pursuant to a further order from the Industrial Court, the Bank remitted a sum of Kshs.27,548,000 from the said account to a joint account in the names of Kimamo Kuria Advocate and Kibe Mungai Advocate.

7. That it was upon remitting the money that the Bank noticed that it had erroneously credited interest of Kshs.10,689,883.50 in the account without instructions from the customer. For that reason the Bank proceeded to reverse the said entry. That revelation irked the protagonists in these proceedings who sought that Irene Twala attends Court on cross-examination and that this Court renders itself as to the fate of that reversal.

8. When Twala attended Court for cross-examination and thereafter re-examination, she presented somewhat conflicting positions. Hear what she says in cross-examination:-

"There was interest to be earned on Kshs. 27,454,000.00 on terms existing as at the date of the letter i.e 22nd February 2012. Neither the Bank nor the customer revoked those terms".

No intimation from Bank that we were doing the reversal. Yes the reversal was illegal

The excess sum was to go into new account. Kshs. 27,454,000.00 was to remain in Account No. 0070000472. That account was earning interest.

9. This is part of her testimony in re-examination:

"the excess of Kshs. 27,454,000.00 was to be held in a new fixed deposit account at current terms. Kshs. 27,454,000.00 was to be held until further notice. No instructions on how the money was to be held"

It was nevertheless held in a fixed deposit

"We were to freeze the account. No transactions on deposit and withdrawal. The amount would be held like in a call deposit because we would not know when we would be called upon to pay/release it. Rate for fixed deposit are higher because a bank can plan on it unlike a call deposit".

10. This Court has given due consideration to the backdrop informing the controversy herein and the explanation offered by the Bank and takes the following view of the matter.

11. To start with is the letter of instructions of 22nd February 2012 from Sushila (the customer) to the Bank in respect to the fate of fixed deposit No. 0070000472. For its importance the Court reproduces it:-

Mrs Sushila Devi Gautama

22nd February 2012

The Manager,

Oriental Commercial Bank Ltd,

Westlands Branch,

Nairobi.

Dear Sir

Re: Fixed deposit account with yourselves 0070000472

As you are aware my husband Mr. Satish Gautama has since passed away on 27.01.2012.

I would be grateful if you could open new Savings account as well as a fixed deposit account in my sole name and transfer the amount in excess of Kshs.27,454,000.00 immediately from the above fixed deposit account to the new fixed deposit account at current terms.

Please hold the remaining foresaid amount in the sum of Kshs. 27,454,000.00 until further notice.

Thankyou

Yours faithfully

Mrs. Sushila Devi Gautama

12. Her instructions are that the Bank opens a new savings account as well as a fixed deposit account. To the new fixed deposit the sum in excess of Kshs.27,454,000.00 was to be deposited "at current terms." So, in respect to the new fixed deposit, the instructions were crystal clear, no equivocation! The fate of Ksh. 27,454,000.00 was less clear. The instructions she gave was that the said amount was to be held by the bank until further notice. On this it was not clear why Sushila sought for the opening of a new savings account.

13. It must also be remembered that as at the date of giving the instructions, the sum of Kshs. 27,454,000.00 was the subject of the order of the Industrial Court. It helps to reproduce that order:

REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

CAUSE NO. 1571 OF 2011

EDWARD MWANGI NJIHIA

LYNETE NYANCHAMA OMAMBIA

STANLEY KIHICO MUTUNGU

DANIEL MUNYOLI NDONGOI

PATRICK MWANZIA MULEI CLAIMANTS

-VS-

SATISH GAUTAMA ADVOCATE RESPONDENT

(Before Hon. Justice James Rika on 17th February 2012)

ORDER

Upon reading the application dated 17th February 2012, and the supporting affidavit sworn at Nairobi by Lynette Nyanchama Omambia and the annexures thereto; IT IS HEREBY ORDERED:-

1. THAT the application is certified as urgent.

2. THAT a temporary order be and is hereby issued directing perseveration of the funds held at the Respondent's Account Number 0070000472 at Oriental Commercial Bank Limited. , Nairobi and if the same funds have been transferred to either Satish Gautama

Advocate Client Account No. 107201001 both held at Diamond Trust bank, Nation Centre Branch the said account (s) and any other bank accounts maintained by the respondent to be frozen to the tune of the sum of Kshs. 27,454,000/= being the Applicants' claim in this cause against the Respondent pending inter-parties hearing and determination of this application.

3. THAT a temporary order be and is hereby issued directing preservation of the funds held at the Respondent's Account Number 0070000472 at Oriental Commercial Bank Limited, Nairobi and if the same funds have been transferred to either Satish Gautama Advocate Client Account No. 107201001 both held at Diamond Trust bank, Nation Centre Branch the said account (s) and any other bank accounts maintained by the respondent to be frozen to the tune of the sum of Kshs. 27,454,000/= being the Applicants' claim in this cause against the Respondent pending inter-parties hearing and determination of this application.

4. THAT the application be served on respondent's Advocates who should file a replying affidavit/grounds of opposition within 7 days of service.

5. THAT the application be heard inter-parties on 23rd February 2012 alongside the application dated 7th February 2012.

GIVEN UNDER my hand and seal of this Court this 21st day of February 2012.

ISSUED at Nairobi this 21st day of February 2012.

REGISTRAR

INDUSTRIAL COURT

14. The order which was received by the Bank on 21st February 2012, a day before the letter of Sushila, required that funds in Account 0070000472 to the sum of Kshs. 27,454,000.00 be preserved pending the hearing and determination of an application therein.

15. To be fair to the Bank its explanation that when it was made subject to the preservation order, the money could be called up at any time is plausible. It is also fair to say that the Bank could not plan on it unlike money placed in a fixed deposit. Yet the Bank choose not to seek clarification from the court as to whether or not to preserve the said money outside a fixed deposit account in the face of the changed circumstances. Instead, the Bank was happy to continue holding the money in the Account No. 0070000472(a fixed deposit account) and to credit interest to the account.

16. Indeed when asked by the Court to disclose the state of the account, the Bank on 10th February 2015 (affidavit of Twala) produced a statement showing that the sum of Kshs.27,454,000 had increased to Kshs.32,616,152.00 as at 6th February 2015 on account of interest earned. This is the position presented to both the Court and the parties herein, who included, not in the least, the customer (Sushila).

17. Whilst this Court can empathise with the Bank's position that, in the absence of clear instructions from the client on interest, coupled with the possibility that the money could be called up any time by a Court order, the preserved amount should not attract interest, it cannot be as forgiving on how the Bank acted in attempting to resolve the matter. Without notice to Court and the parties, the Bank simply effected a reversal to the account. The account, it must be remembered, was now the subject of an Order of this Court and any changes that would impact on it negatively or adversely could only be effected with the leave of the Court. It is not clear to me why the Bank did not seek the permission of the Court before reversing the supposed error. Had it done so then all parties would have had a fair opportunity to present their views in respect of the matter and the court to the render itself on the request.

18. In the circumstances of this case, I reach a decision that if indeed there was an error by the Bank, then it should live with the consequences of its error because of its own conduct.

19. My order is that the debit entry of Kshs.10,689,883.50 made on 31st December 2016 in account no 0070000472 shall be reversed forthwith as though it had never been made. The Order to be implemented within 14 days hereof.

Dated, delivered and signed in open Court at Nairobi this 24th day of September 2019.

F. TUIYOTT

JUDGE

PRESENT:-

Jemutai for Bundotich for Plaintiff

Leibor for I. Oriental Bank

Gachuna for Plaintiff

Maingi for Kimamo for Defendant

