



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E381 OF 2019

BETWEEN

CHARLES HENRY MANGUA..... PLAINTIFF

AND

FAMILY BANK LIMITED DEFENDANT

RULING

1. In the Notice of Motion dated 29th October 2019 made principally under **Order 40 rule 2** of the *Civil Procedure Rules*, the plaintiff seeks the following order:

[3] THAT the Defendant/Respondent be restrained by an order of temporary injunction from levying any charges, interest, demanding and or taking any action towards recovering any amounts from the Plaintiff's account Number 014*****42 in a bid to offset the unsolicited overdraft of Kenya Shillings 406,001.68/- pending hearing and determination of the suit.

2. In the grounds set out in the face of the application and his own deposition sworn on 29th October 2019, the plaintiff explained that he deposited Kshs. 200,000/- on 27th September 2019 in his account domiciled at the Cargen House branch of the defendant bank ("the Bank"). When he attempted to withdraw the same amount on 7th October 2019, he was informed that his account was overdrawn by Kshs. 207,000/- on account of an unsolicited overdraft granted on 21st September 2019.

3. The plaintiff further deponed that the Credit Officer explained to him that the Bank had accorded him an overdraft of Kshs. 406,001.68/- to enable him clear outstanding excise duty charged on the bank loan processing fees charged on the loans he took and which the Bank system failed to capture in the years 2015 and 2016. The plaintiff's position is that he did not apply for the overdraft and that there was no justification for the Bank failing to collect the 10% excise duty which is automatically charged once the transaction is completed.

4. In his supplementary affidavit sworn on 25th November 2019, the plaintiff admitted that he only applied for an overdraft in 2015 for which the Bank charged a processing fee of Kshs. 200,000/- and which attracted excise duty at Kshs. 20,000/-. He applied for an extension of the overdraft to Kshs. 40,000,000/- in 2016. According to him, the processing fee was Kshs. 200,000/- for which 10% excise duty was applicable and which ought to have been deducted at the time the transaction was done. The plaintiff complained that the overdraft processing fee was untenable. He further complained that he was not notified of the demand by Kenya Revenue Authority ("KRA") and sum had been remitted to KRA. The plaintiff also stated that he was advanced in age and that the matter caused him grave anxiety and embarrassment as he was unable to meet his financial obligations due to the overdrawn account.

5. The Bank opposed the application through the affidavit of Anthony Waweru Mbugua, the Relationship Manager based at the Bank's Cargen House branch, sworn on 14th November 2019. He explained that the plaintiff applied for and was granted an overdraft for Kshs. 200,000/- in 2015 and an increased overdraft of Kshs. 40,000,000/- in 2016. Both applications attracted 10% excise duty on the processing fees amounting to Kshs. 20,000/- and Kshs. 386,001.68 respectively hence the total excise duty payable was Kshs. 406,001.68 recoverable from the plaintiff's account.

6. Mr Mbugua further deponed that on 4th September 2019, the Bank issued a notice to all customers that it would proceed to collect all uncollected excise duties deductible between 2013 and 2018. Following the notice, the Bank deducted from the plaintiff's account Kshs.

406,000/- on 21st September 2019. When the plaintiff made a deposit of Kshs. 200,000/- on 27th September 2019, that amount went towards settlement of the excise duty and left the account overdrawn by Kshs. 207,067.17.

7. The Bank's Legal Officer, Christopher Mulili, in a supplementary affidavit sworn on 28th November 2019, stated that the Bank received a demand letter from KRA dated 29th January 2019 demanding Kshs. 170,352,101 on account of unremitted excise duty on fees including overdraft processing fees that had not been collected for the period 2016 to 2018. The Bank case that it deducted the unpaid excise duty from the plaintiff's account and subsequently remitted it to KRA.

8. Counsel for the plaintiff urged that the plaintiff had established a prima facie case with a probability of success as the debit on the plaintiff account was wrongful and without any legal basis. He pointed out that the plaintiff did not apply for the overdraft and the Bank did not issue any notice when the action of debiting the account with excise duty was taken. He further stated that as a result of the action, the plaintiff was suffering distress and was unable to access his money as he was an 80-year old man. Counsel submitted that the defendant should not be allowed to violate the plaintiff's legal rights merely because it is able to pay damages. Counsel referred to the case of ***Fina Bank Limited v Evangeline Njoka NRB HCCA No. 276 of 2016 [2019] eKLR*** where the court upheld an award of damages by the trial court where the bank failed to communicate to the customer a restriction on the account where the actual liability that had been claimed by the bank had already been discharged.

9. Counsel for the respondent submitted that the plaintiff did not have any prima facie case with a probability of success as the amount claimed from the plaintiff was excise duty payable on account of overdraft processing fee. He maintained that the amount was lawfully demanded, deducted from the plaintiff's account and remitted to KRA. That in any case, the plaintiff had not demonstrated that he would suffer irreparable damage which would not be compensated by an award of damages if the injunction was not granted.

10. As is often said the principles upon which the court acts in granting an interlocutory injunction are well settled and I will do no better than cite the case of ***Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR*** where the Court of Appeal reiterated the principles set out in ***Giella v Cassman Brown [1973] EA 358*** as follows:

In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.

11. The plaintiff admitted that he took two overdrafts in 2015 and 2016 which attracted overdraft fees. As a matter of law and virtue of the ***Customs and Excise Duty Act (Chapter 473 of the Laws of Kenya)*** and ***Part III of the Fifth Schedule*** thereof as amended by the ***Finance Act, 2012 and 2013*** and the ***Excise Duty Act, 2015***, the Bank was required to charge and collect 10 % excise duty on processing fees. This requirement is not denied by the plaintiff. The Bank has demonstrated that KRA demanded the excise duty not collected for the years 2016/2018 and the sum was deducted from customers' accounts including the plaintiff's and duly remitted to KRA. I find that the Bank has provided a justification for acting in the manner it did and as such I am constrained to hold that the plaintiff does not have a prima facie case with a probability of success on that issue.

12. Even if I accept that the plaintiff has a prima facie case, I would still have to consider whether damages are an adequate remedy. It is true that the plaintiff will suffer inconvenience of not accessing its money. He has also sued for damages for defamation which means that he accepts that money will be sufficient to compensate him. He has not shown that the Bank is incapable of compensating him in the event he succeeds at trial and since the amount collected is on account of excise duty due to KRA, it cannot be said he has suffered damage of the kind that cannot be compensated. I therefore find that damages will ultimately be an adequate remedy should the court find in favour of the plaintiff at the hearing.

13. Before I conclude this ruling, I must express my concern about the manner of drafting affidavits that had gained currency in these courts. The defendant's affidavit is replete with case citations and copious quotes from several authorities. Further both parties' affidavits contain argumentative matters which are better left to submissions. This manner of drafting affidavits is to be deprecated. It obscures the real facts in issue and offends the clear provisions of ***Order 19 rule 3(1)*** of the ***Civil Procedure Rules*** which provides that matters in affidavits should be confined as, "to such facts as the deponent is able of his own knowledge to prove, provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof."

14. I dismiss the Notice of Motion dated 29th October 2019 with costs to the defendant.

DATED and DELIVERED at NAIROBI this 19th day of DECEMBER 2019.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Kimathi instructed by Gikunda Miriti and Company Advocates for the plaintiff.

Mr Munene instructed by P. N. Wena and Company Advocates for the defendant.