



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL CASE NO.238 OF 2013

PETER HUGH HARRIS.....1ST PLAINTIFF

JOSEPHINE ELIZABETH HARRIS.....2ND PLAINTIFF

-VERSUS-

EQUATORIAL COMMERCIAL BANK LIMITED.....DEFENDANT

RULING

[1] Before the Court for determination is the Defendant's Notice of Motion dated **18 June 2013**. It was brought under the provisions of **Sections 1A, 1B, 3A, 6 and 63 of the Civil Procedure Act** as well as **Order 51 Rule 1 of the Civil Procedure Rules 2010**, for the following orders:

[a] Spent

[b] That the proceedings herein be stayed pending the hearing and determination of **Industrial Cause Number 859 of 2013: Equatorial Commercial Bank Limited vs. Peter Hugh Harris**;

[c] That the costs of this application be provided for;

[d] That the Court be pleased to make and give any such further orders and give such directions as may be just and fair in the interest of these proceedings.

[2] The application was premised on the grounds that the matters in issue herein are also directly and substantially in issue in **Industrial Cause Number 859 of 2013: Equatorial Commercial Bank Limited vs. Peter Hugh Harris**, wherein orders have been issued in respect of the accounts cited in these proceedings; and that in filing the proceedings herein, the Plaintiffs were intent on engaging in a collateral attack of those proceedings. It was further asserted that the Plaintiff remains and is the principal holder of the accounts cited in the proceedings; and that there is a likelihood of two parallel and competing processes being pursued which would embarrass the process of this Court. It was thus the averment of the Defendant that these proceedings are in abuse of the process of the Court since the Plaintiffs were fully aware of the subsistence of **Industrial Cause Number 859 of 2013: Equatorial Commercial Bank Limited vs. Peter Hugh Harris**.

[3] The application was supported by the affidavit sworn on **18 June 2013** by **Dan Ameyo**, the Chairman

of the Board of Directors of the Defendant Company, together with the annexures thereto, wherein it was averred that the Defendant was served with pleadings herein on **12 June 2013**, and that before such service, the Defendant had relentlessly sought to serve the 1st Plaintiff with pleadings in **Industrial Cause No. 859 of 2013: Equatorial Commercial Bank Limited Vs Peter Hugh Harris**. According to the Defendant, the Plaintiffs had declined to receive the pleadings and it was only after they failed to obtain *ex-parte* orders in the present proceedings that they instructed their Advocates to accept service.

[4] The Defendant further averred that there is in existence an order issued in **Industrial Cause No. 859 of 2013** (hereinafter **the ELRC matter**) barring any dealings in connection with the accounts cited herein; which accounts were principally operated by the 1st Plaintiff who is the Respondent in **the ELRC matter**. Copies of the Statement of Claim, the Order and account opening documents aforementioned were annexed to the Supporting Affidavit as **Annexure "DA1"** and **"DA2"**. It was the Applicant's assertion that the proceedings herein which were filed on **12 June 2013** relate to matters directly and substantially in issue in proceedings filed on **7 June 2013** in **the ELRC matter**; and therefore that the orders sought in the present proceedings are orders which ought, for good order, to be sought in the proceedings in **the ELRC matter**. Thus, the Defendant averred that there is a real likelihood that contradictory and conflicting decisions may be made in the two matters and thus bring the court process into disrepute insofar as compliance and/or obedience with such orders is concerned; and that it is in the interest of justice that the orders prayed for herein be granted.

[5] The Plaintiffs opposed the application vide the Replying Affidavit sworn by the 1st Plaintiff, **Peter Hugh Harris**, on **13 February 2017**. The Defendants contention was that the present application is without merit as the cause of action in **the ELRC matter** is completely different from the cause of action herein. The 1st Defendant averred that whereas in **the ELRC matter** what is in issue is his alleged misconduct as the Managing Director of the Defendant Bank, and alleged breach of his employment contract, the main issue in this suit is the failure by the Defendant to adhere to its mandate in the context of a Banker-Customer relationship. The 1st Plaintiff further pointed out that there is a disparity in the number and description of the parties in the two suits which, in his view, is a further indicator that the subject matter in issue in the two suits is completely separate and distinct.

[6] The 1st Plaintiff acknowledged that the Defendant Bank, on **7 June 2013** obtained *ex parte* orders from **the ELRC** which had the effect of *inter alia*, freezing the Plaintiffs' Bank Accounts. It was therefore their contention that the Defendant Bank acted unilaterally and illegally by purporting to freeze their Bank accounts prior to the said Court Orders. With regard to **the ELRC suit**, the Plaintiffs denied the allegations that they declined to receive process. It was their assertion that the said suit papers were served upon their Advocates on **13 June 2013** as evinced by a copy of the duly stamped Statement of Claim.

[7] In response to the Plaintiffs averments, the Defendant filed a supplementary Affidavit sworn by **Josephine Musembi** on **14 June 2017**. The deponent, a Company Secretary of the Applicant Company, averred that when the parties herein appeared before **Kamau, J.** on **18 June 2013**, directions were given to the effect that the proceedings herein be held in abeyance pending the hearing and determination of an injunction application filed in **the ELRC**; and that the said application was eventually heard and determined, whereupon the ELRC issued orders restraining dealings in respect of the subject Bank accounts, but allowed access to 50% of the monies therein. According to the Defendant, the Order issued herein on **18 June 2013** as well as **the ELRC Order** remain in place pending the hearing and determination of the two suits; and that any further steps in these proceedings would defeat the import of the aforesaid Order.

[8] The Respondents filed a Supplementary Affidavit in response to the Applicant's averments above, with the leave of the Court. They sought thereby to refute the averments of the Plaintiffs and asserted that the Orders issued by the Court on **14 August 2013** did not direct that the proceedings before this Court be stayed pending the hearing and determination of the suit in the **ELRC**, as alleged in the affidavit of **Josephine Musembi**. It was reiterated that the said order was only to the effect that the proceedings before this Court be held in abeyance pending the hearing and determination of the injunction application

filed in **the ELRC**. It was further averred that this Court did, vide its Ruling of **14 June 2016** render itself exhaustively on the import and purport of the Order of **18 June 2013**; and that it is therefore imperative that this suit be proceeded with for hearing on the merits as otherwise, their right to a fair and speedy hearing will be severely compromised.

[9] The application was canvassed by way of written submissions. The Defendant filed its written submissions dated **2 August 2017** on **11 August 2017** while the Plaintiffs filed their submissions dated **19 September 2017** on **20 September 2017**. I have given due consideration to the application, the affidavits filed herein in respect thereof as well as the pleadings on record and the proceedings to date. The record does confirm that on **18 June 2013**, directions were issued herein by **Kamau, J.** which included an order that the proceedings herein be stayed. For its full tenor and effect, the order is replicated here below:

"To avoid parallel proceedings in different Courts, the proceedings herein are hereby held in abeyance pending the determination of an interlocutory application in Industrial Cause No. 859 of 2013: Equatorial Commercial Bank vs. Peter Hugh Harris, which is scheduled for hearing today 18th June, 2013 at 2.30 p.m. Thereafter, parties will be at liberty to take a mention date at the registry with a view to informing this Court of the position at the Industrial Court. Orders accordingly."

[10] Clearly therefore, it is not true that the said Order was intended to subsist for the duration of the pendency of either this suit or **the ELRC matter**. It is equally clear that the injunction application before **the ELRC** was ultimately heard and determined by **Nduma Nderi, J.** on **25 July 2013**. The formal Order was extracted and issued on **14 August 2013** and was annexed along with the Ruling, to affidavit of **Josephine Musembi**. The **ELRC** Order was thus in the following terms:

"1. THAT an Injunction be and is hereby issued restraining the Respondent, PETER HUGH HARRIS from dealing in by way of disposing, alienating, advertising for sale, charging, assigning interests in, mortgaging, removing from the immediate jurisdiction of this Honourable Court or otherwise dealing and/or interfering with their interests in his properties and bank accounts including those listed hereunder pending the hearing and determination of this suit.

(a) 50% proceeds in Bank Account numbers [...], [...], [...] and [...]with Equatorial Commercial Bank Limited;

(b) 50% of Government Bonds presently in the sum of Kshs. 4,500,000.

(c) Motor vehicle KAU 040Q Station Wagon

2. THAT the Registrar of Lands, the Registrar of Motor Vehicles and the Central Depository and Settlement Corporation Limited, the Manager Equatorial Commercial Bank Limited be enjoined to ensure compliance with the above Orders.

3. THAT the Applicant/Claimant to give an Undertaking in damages in case it fails in this Claim or the Injunction turns out to be unjustified within 30 days from the date hereof.

4. THAT the main claim to take its normal course.

5. THAT Costs be in the cause."

[11] It is manifest therefore that **the ELRC** has indeed made an Order of injunction, restraining the Defendant Bank from interfering with the funds in the aforementioned bank accounts pending the hearing and determination of that suit. Hence, the question is whether that Order has any impact on this suit, granted the principle of *sub judice* as provided for in **Section 6** of the **Civil Procedure Rules**. That provision reads:

"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

[12] From a perusal of the pleadings, it is manifest that, whereas both the Plaintiff herein and the Memorandum of Claim in **the ELRC** matter were filed in **June 2013**, **the ELRC** matter came first in time. It was filed on **7 June 2013** while the Plaintiff herein was filed on **12 June 2013**. In the **ELRC** matter, the Defendant Bank has sued the 1st Plaintiff for breach of his obligations to the Bank under his employment Contract. The instant proceedings are, on the other hand premised on a banker-customer relationship between the Plaintiffs' and the Defendant the contention by the Plaintiffs that the Defendant froze their accounts before a Court Order was issued giving the Bank such authority.

[13] It is however manifest from the reliefs sought that the Plaintiff's bank accounts with the Defendant are the common targets of the injunctive orders prayed for by the parties in each case. In **the ELRC matter**, the Bank prayed for a permanent injunction to restrain the 1st Plaintiff from dealing in, or disposing of his properties, including the funds in the four bank accounts held with the Defendant, or removing the same from the immediate jurisdiction of the Court. In the instant matter, the Plaintiffs have sought mandatory injunction to compel the Defendant to allow the Plaintiffs unlimited and unfettered access to all of the funds currently held in the four accounts.

[14] The **ELRC** has already issued an Order dated **25 June 2013** which *inter alia*, gave the Respondents access to 50% of the monies in the subject accounts. This was in recognition of the fact that the said account was jointly held by the Respondents and the 2nd Respondent; who is not a party to **the ELRC matter**. Accordingly, it is manifest that, were this Court to proceed with the hearing, find merit in the Plaintiff's case and issue the mandatory injunction as sought herein, it would result in direct conflict with the said Order of the **ELRC**. Moreover, there is indeed a possibility that the this Court may come up with a conflicting decision to that of the **ELRC** in connection with the funds that are held in the four accounts, with attendant discomfiture in terms of execution. Indeed, the mischief that is the object of **Section 6** of the **Civil Procedure Act**, as was well explicated by **Mabeya, J.** in **Barclays Bank of Kenya Ltd vs Elizabeth Agidza & 2 Others [2012] eKLR** is:

"... a likelihood of two different courts adjudicating a similar matter, with similar issues between the same parties and yet arrive at different positions. That will be embarrassing to the judicial process."

[15] Accordingly, the orders that commend themselves to me in the circumstances are those prayed for in the Notice of Motion dated **18 June 2013**. Accordingly, I would allow that application and issue orders as hereunder:

[a] That the proceedings herein be stayed pending the hearing and determination of **Industrial Cause Number 859 of 2013: Equatorial Commercial Bank Limited vs. Peter Hugh Harris;**

[b] That the costs of this application be costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF FEBRUARY 2018

OLGA SEWE

JUDGE