



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI**

**CIVIL CASE NO.134 OF 2018**

**SHRIKESH CHANDARAKANI CHEEWALA.....PLAINTIFF/APPL**

**VERSUS**

**ELESHKUMAR CHANDRAKANT GHEEWALA.....1<sup>ST</sup> DEFENDANT/RESP**

**ASSOCIATED SECURITIES LIMITED.....2<sup>ND</sup> DEFENDANT**

**AND**

**CENTRE PARK PLAZA LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**NTYAKU LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

**ECORINVEST LIMITED.....3<sup>RD</sup> INTERESTED PARTY**

**RULING**

This a ruling on the 1<sup>st</sup> Defendant's application dated 20<sup>th</sup> April 2018 and the 1<sup>st</sup> and 3<sup>rd</sup> Interested Parties' Preliminary Objection dated 27<sup>th</sup> April 2018.

The background of this matter is that, the Plaintiff filed this suit on 5<sup>th</sup> April 2018 together with application dated even date. In the application the Plaintiff sought to restrain the Defendant from making any withdrawals or transfers from the account registered in the name Centenary Rural Development Bank Limited without the knowledge and approval of the Plaintiff. On 16<sup>th</sup> April 2018 this Court granted the order sought pending the next Court appearance. After hearing oral submissions of Counsels herein the Court declined to extend interim orders after noting that the Plaintiff failed to disclose material facts.

The 1<sup>st</sup> and 3<sup>rd</sup> interested parties filed Preliminary Objection dated 27<sup>th</sup> April 2018. Grounds raised by the Preliminary Objection are that, the Plaintiff has not made any claim against the 1<sup>st</sup> and 3<sup>rd</sup> interested parties and that this Court has no jurisdiction to entertain this matter as the subject property is in Uganda; that the Plaintiff has moved to this Court after filing and securing Court orders in Uganda but misled this Court by averring that there is no pending suit thus failed to disclose material facts.

Grounds on the face of the Defendant's application are that the property in dispute in this matter is a bank account in a bank in Uganda and the High Court of Kenya does not have jurisdiction as the mandate of this Court flows from the Constitution of Kenya and cannot be extended to the territory of Uganda.

Further, that on 15<sup>th</sup> November 2017 the Plaintiff filed a similar suit in the High Court of Uganda being Civil Suit No. 914 of 2017 Shrikesh C. Gheewala Versus Eleshkumar C. mGheewala, Centenary Rural Development Bank Ltd and Associated Securities Ltd; that parties in the Ugandan suit are the same parties herein save for the interested parties who were not included and that the issues in the Ugandan case are the same as issues herein.

That the Plaintiff has failed to disclose to this Court that there are similar and active proceedings in the High Court of Uganda.

Counsels for the parties herein made oral submissions on 30<sup>th</sup> May 2018.

Counsel for the Defendant reiterated ground on the face of the application. He submitted that the Defendant seeks to have this suit and the

application both filed on 5<sup>th</sup> April 2018 dismissed and the interim orders granted discharged on ground of material non-disclosure of previous suit filed in Uganda that raised substantially similar issues as the issues raised before this Court and that this Court does not have jurisdiction to deal with this matter.

Counsel for the Defendants submitted that the Plaintiff and the 1<sup>st</sup> Defendant are Directors of the 2<sup>nd</sup> Defendant and that they have decided on their own to trade in Uganda and opened an account which is active and that the money in the account is rent accrued in Uganda. He submitted that the subject is squarely within Uganda as can be seen in the Plaintiff in Ugandan Case No.914 of 2017 attached to the 1<sup>st</sup> Defendant's documents.

Counsel further submitted that the Plaintiff was issued interim orders in the Ugandan case but the application was later dismissed after hearing the parties. He argued that by filing the suit in Uganda the Plaintiff recognizes that the dispute in this matter should be resolved in Uganda.

Further that this Court has no jurisdiction to enforce Ugandan law. That a party should not be allowed to forum shop; he added that after Defendant filed defence in this matter, the Plaintiff went to withdraw the Ugandan case by letter dated 7<sup>th</sup> May 2018.

Counsel submitted that there is no reason to justify parallel proceedings in Uganda and Kenya and that a party who comes to Court should come with clean hands.

In submitting on the Preliminary Objection Mr. Mugisha associated himself with submissions of the 1<sup>st</sup> Defendant and restated grounds on the face of the Preliminary Objection.

Ms. Mwaniki for the Plaintiff submitted that the Plaintiff has come to Court with clean hands and that the Plaintiff has made full disclosure. She submitted that there is no other matter proceeding or that has been concluded concerning the subject matter herein. She argued that the suits are substantially different.

She further submitted that in the Ugandan case the Plaintiff seeks to change mandate of the bank which is situated in Uganda while the matter herein is to enforce fiduciary duties of the Plaintiff to the 2<sup>nd</sup> Defendant as well as securing assets of the 2<sup>nd</sup> Defendant Company which are being misappropriated by the 1<sup>st</sup> Defendant. She opposed the 1<sup>st</sup> Defendants allegation that the funds are accrued in Uganda. She submitted that the 1<sup>st</sup> Defendant has not proved that the funds are accrued in Uganda. She submitted that the account is being used to hold funds from various activities of the Defendant. She added that the Plaintiff submits to the jurisdiction of this Court as the 2<sup>nd</sup> Defendants activities and transactions are governed by the Companies Act of Kenya. She submitted that the account is held by the 2<sup>nd</sup> Defendant which is a Company registered under the Companies Act of Kenya; that the Companies Act and the Laws of Kenya should guide in fiduciary duties of Directors as well as their mandate.

Counsel for Plaintiff submitted that the Preliminary Objection is incurably defective as it does not consist a point of law which is pleaded by the Plaintiff; that the interested parties have argued points of facts. She sought dismissal of 1<sup>st</sup> Defendant's application and Preliminary Objection.

In a rejoinder, Counsel for the 1<sup>st</sup> Defendant submitted that jurisdiction of the Court is territorial and that this Court cannot exercise power in respect of properties in Uganda; that the tax payers of Uganda have paid judges to deal with Ugandan matters; that the property is subject to jurisdiction of the country where they are located.

Counsel for Plaintiff clarified that she agrees that the property being in Uganda is subject to Ugandan law but she disagree in respect of mandate that emanate from decisions made in Kenya under companies Act.

## **ANALYSIS & DETERMINATION**

1. *Whether this Court has jurisdiction to entertain this matter,*
2. *Whether the Plaintiff failed to disclose material facts.*

Counsel for the Plaintiff has argued that the 2<sup>nd</sup> Defendant is incorporated in Kenya and that the issue in dispute is a fiduciary relationship to the Company. That the quest is about the mandate of the bank account.

There is no dispute that the bank which the Plaintiff seeks to restrain the 1<sup>st</sup> Defendant from operation is located in Uganda. I have also seen Certificate of Incorporation of 2<sup>nd</sup> Defendant in Kenya.

On perusal of the documents attached to Affidavits herein I note that issues raised in this matter relate to operation of an account in Centenary Bank located in Uganda. It is evident from the documents that dispute arose concerning mandate in respect of the account which led to decision by the bank to freeze the account. Parties later agreed by letter dated 2<sup>nd</sup> June 2015 to allow the bank make statutory payments to Uganda Revenue Authority, Kampala city authority and serving of Centenary Bank loan as per schedule.

By virtue of the Company's incorporation in Kenya, the Company has presence both in Kenya and Uganda.

As a result of presence of a Company in two jurisdictions there is a possibility of decisions made in Kenya affecting the transactions in Uganda.

This may give rise to conflict as to which laws should be applied. Which country's laws should be applied in event of a dispute?

The duty of the Court would be to determine whether it has jurisdiction to entertain the matter. In making determination, the Court will be guided by the following principles:-

1. *All procedural matters must be governed by the law of the forum (lex fori),*
2. *Mandatory laws must be governed by the forum meaning a judgment from Kenya for enforcement in another jurisdiction can easily be discarded if it falls short of the mandatory laws of that country,*
3. *Public policy considerations. Decisions by one jurisdiction may not be in the interest of the public in the country of enforcement. An example is enforcement of tax laws. Enforcement can only be done if the law governing the transaction involved is provided for in the domestic law of the country,*
4. *Convenience.*

It is important for parties to make full disclosure of any matters filed in another jurisdiction to avoid issuance of conflicting orders which may be difficult to enforce. As I noted at the close of submissions, the Plaintiff herein failed to disclose presence of suit filed in Uganda and the interim orders that were issued. I however note that despite non-disclosure by the Plaintiff, this Court issued orders similar to the orders issued in Uganda High Court.

I now wish to consider the issue of jurisdiction.

Despite the Counsel for the Plaintiff indicating that decisions of the 2<sup>nd</sup> Defendant is incorporated in Kenya, I have had occasion to peruse documents attached to Supporting Affidavit by the Plaintiff and note that the Plaintiff besides filing the Certificate of Incorporation and returns for year 2012, no evidence/document has been produced to establish that key decisions of the Company or the management control is in Kenya.

All documents annexed show operations in Uganda. All statutory payments are paid by the 2<sup>nd</sup> Defendant in Uganda. There is no evidence of statutory payment made in Kenya. No mandate or resolution of Board of Management has been annexed to demonstrate that any key decisions are made in Kenya.

It cannot therefore be said that the Company has any transactions in Kenya; neither has the Applicant demonstrated that the Centre of Main Interest is Kenya (COMI). There is no proof of any key decision being done in Kenya nor any transactions being done in Kenya.

Documents attached show that the Plaintiff and the Defendant are signatories of the account in Uganda and that a conflict arose as concern management of the account resulting in the bank arriving at a decision to freeze the account. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant later authorized the bank make payments from the account in respect of loan repayment to the Ugandan bank and statutory payments which include tax to the Ugandan Government. There is no mention of any transactions in Kenya or statutory payments to the Government of Kenya. This clearly shows that though the 2<sup>nd</sup> Defendant is incorporated in Kenya but its main activities are based in Uganda. Despite the fact that the 2<sup>nd</sup> Defendant is incorporated in Kenya, it is evident that the Company's main activities are in Uganda and would best be dealt with by the Ugandan Courts under Ugandan law.

I refer to the case of **Ra Gazzani Vs KC Sethia [1994] Ltd** where the Court held as follows:-

***“Courts do not collect taxes for another country...revenue laws are meant to offer a framework within any country on generation of financial resources to support its current and development expenditures.”***

Even if this Court was to proceed to deal with the issues herein, enforcement will be done in Uganda under Uganda law as the bank herein does not have presence in Kenya either through a branch or subsidiary.

On perusal of the Plaintiff note that the Plaintiff is seeking orders in respect of mandate to the bank, it is not disputed that the suit filed in Uganda related to the said mandate. This is confirmed as earlier observed by documents filed herein. The Plaintiff first filed the suit in Ugandan seeking the same meaning he acknowledged and to submit to the jurisdiction of Ugandan High Court.

The conduct of the Plaintiff herein clearly demonstrates an act of forum shopping which should not be encouraged in any jurisdiction.

From the foregoing, I do uphold the Preliminary Objection and proceed to dismiss the application herein plus the entire suit with costs to the Defendants and the Interested Parties.

**Dated and Delivered at Nairobi this 27<sup>th</sup> day of July, 2018**

.....  
**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF**

CATHERINE: COURT ASSISTANT

MS. MWANIKI H/B FOR MR. MWANIKI: COUNSEL FOR PLAINTIFF

MR. NYAANGA: COUNSEL FOR 1<sup>ST</sup> DEFENDANT

MR. MUGISHA H/B FOR ODEDE: COUNSEL FOR INTERESTED PARTY