



**REPUBLIC OF KENYA**

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

**(CORAM:CHERERE-J)**

**CIVIL APPEAL NO. 120 OF 2018**

**BANK OF INDIA.....APPELLANT/APPLICANT**

**VERSUS**

**UDAR KUMAR (suing on his own behalf and on behalf of all representing persons interested**

**in and being account holders of Bank of India Kisumu).....RESPONDENT/PLAINTIFF**

**RULING**

**Background**

1. By a licence issued on 14th April, 2016, the Central Bank of Kenya licenced the appellant to conduct banking business.
2. Subsequently, the appellant started conducting banking business in Kisumu among other of its branches.
3. By a letter dated 15th May, 2018, the Central Bank of Kenya approved the appellant's application to permanently close its Kisumu branch.
4. The approval was restricted to two conditions: **THAT:-**
  - i. Appellant complies with Section 8(3) of the Banking Act by giving the Central Bank of Kenya the six months written notice of the intention to close the branch and the same be extended to the appellant's customers.*
  - ii. Appropriate notification be made to customers on alternative places where they can access banking services*
5. On 22nd May, 2018, the appellant issued a notice for closure of its Kisumu Branch on 30th November, 2018.
6. By the said notice, customers were notified of alternative places where they can access banking services being Kenyatta Avenue Branch in Nairobi, Westlands Branch in Nairobi and Industrial Area Branch in Nairobi Sameer Business Park Mombasa and Eldoret Branch.
7. On 18th November, 2018, the respondents filed ***KISUMU CMCC 503 OF 2018*** seeking to restrain the appellant from closing its Kisumu branch. Simultaneously with the plaint, the respondent filed a notice of motion dated 16th October, 2018 seeking mandatory orders of injunction to restrain the appellant from closing its Kisumu branch.
8. When the application came up for hearing on 8th November, 2018, the Mr. Nyagaka the respondent's counsel informed the court that the respondent had filed an amended notice of motion. Mr. Macharia for the appellant confirmed that he had been served with the said amended notice of motion and was ready to argue it out. The court directed that the application be argued by way of written submission which were to be filed by 22nd November, 2018 and granted a temporary injunction restraining the appellant from closing its the Kisumu branch pending the hearing of the notice of motion. On 22nd November, neither of the parties had filed submission and the matter was fixed for mention on 10th January, 2019 to confirm filing of submissions.

**Appeal**

9. Aggrieved by the temporary order of injunction, the appellant filed this appeal on 21st November, 2018 simultaneously with a notice of motion date 20th November, 2018 seeking orders to stay the interim order of injunction.

**Submissions by the parties**

## **Appellant's Submissions**

10. Mr. Macharia for the appellant argued that the temporary order of stay had the effect of exercising authority over the Central Bank of Kenya which had already granted approval for the closure of the appellant's branch in Kisumu.

11. Counsel argued that the appellant is at the risk of being in breach of the law since its licence for the Kisumu branch lapses on 30th November, 2018 and it cannot operate without a licence. He also contended that following the approval to close the appellant's branch in Kisumu, the appellant had given notice to vacate the premises from where it conducts its business by 30th November, 2018 and deployed its staff and was at the risk of being cited for disobeying the injunction order due to the fact that it is not practically possible to operate without a licence; premises and staff.

## **Respondent's Submissions**

12. The application is opposed on the basis of the grounds of opposition filed on 27th November, 2018. Mr. Nyagaka for the respondent submitted that the appellant had not satisfied the principles that justify the interference with the discretion of the lower court.

13. Counsel further submitted that the closure of the appellant's branch in Kisumu is likely to cause the respondents damages without the appellant providing them compensation. The respondent placed reliance on **Mrao Limited-v-First American Bank of Kenya Ltd & 2 others [2003] KLR 125** and **St Patrick's Hill School Ltd v Bank of Africa Kenya Ltd [2018] eKLR**.

## **Analysis and Determination**

14. Any discussion on temporary injunctions is not complete without a reiteration of the requirements for grant of injunction as set-out in the **Giella versus Cassman Brown**, where Spry, V.P stated as follows:

***"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."***

15. The Court of appeal in the **Mrao Limited case** (supra) interpreted the condition as to prima facie case. It held:

***"A prima facie case in a civil application includes but is not confined to a "genuine and arguable case". It is a case which on the material presented to court; a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the other party as to call for an explanation or rebuttal from the latter."***

16. I bear in mind that this in this appeal, I should not make definitive findings of fact or law in determining this first condition of whether or not the respondent has a prima facie case with a probability of success since that matter is pending determination in **KISUMU CMCC 503 OF 2018**.

17. It is trite that a court's discretion is not to be interfered with unless it is shown that it was exercised on the wrong principles. This court is therefore only concerned with the exercise of discretion by the trial court in granting a temporary injunction.

18. I have considered the notice of motion in the light of the supporting affidavit and annexures thereto, the grounds of opposition, submissions by both parties and the cited cases.

19. It is not disputed that approval to permanently close the appellant's branch in Kisumu was granted by the Central Bank of Kenya on 15th May, 2018 and that it had conditions that had to be complied with before the closure.

20. It is on record that the appellant by a notice dated 22nd May, 2018 informed the respondents concerning the intended permanent closure from 30th November, 2018 thereby complying with the 1st condition that was set by the Central Bank of Kenya.

21. It is also on record that the appellant complied with the second condition in that it notified its customers of its alternative branches where they can access banking services. I have had a chance to peruse the affidavit in support of the amended notice of motion filed on 8th November, 2018 where at paragraph 7, the deponent avers that the respondents are likely to suffer financial loss, material damage and material distress that cannot be quantified in terms of monetary value. That is however far from the truth for the reason that these losses are indeed quantifiable.

22. Equitable remedies like injunctions are generally not available where damages will be adequate compensation. The balance of convenience in this matter tilts in favour of staying the grant of the orders of temporary injunction pending the determination of the amended notice of motion filed on 8th November, 2018 in **KISUMU CMCC 503 OF 2018**.

23. Consequently, I find that the application dated 20th November, 2018 has merits and it is allowed in the following terms:-

***i. The order for interim injunction dated 8th November, 2018 issued in KISUMU CMCC 503 OF 2018 is stayed pending the determination of the amended notice of motion filed on 8th November, 2018 in KISUMU CMCC 503 OF 2018.***

***ii. Costs of this application shall abide the outcome of the Appeal.***

DATED, DELIVERED AND SIGNED THIS...30<sup>th</sup>..DAY OF...NOVEMBER.....2018

T. W. CHERERE

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - Felix

Appellant -

Respondent -