



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 558 OF 2015

SOROYA INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

BARCLAYS BANK KENYA LIMITED.....DEFENDANT

RULING

[1] The Notice of Motion that is the subject of this Ruling is dated **10 November 2015**. It was filed herein by the Plaintiff pursuant to **Sections 3 and Section 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, and Order 51 Rule 1 of the Civil Procedure Rules, 2010** for the following orders:

[a] spent

[b] That the Defendant be compelled to submit for the Plaintiff's inspection and records all the transactions, deposits, withdrawals, statements, ownership details and signatories of the **Bank Account No. 2027341686** within 7 days;

[c] That all monies held in the **Bank Account No. 2027341686** be frozen pending the hearing and determination of this application;

[d] That the Defendant be ordered to indemnify the Plaintiff for all monies fraudulently transferred through the **Bank Account No. 2027341686** since it was opened; and

[e] That the costs of the application be borne by the Defendant.

[2] The application is supported by the affidavit of **BRIAN DE SOUZA** annexed thereto, in which it was deposed that when the Plaintiff's Internal Audit discovered that the Plaintiff's tenants had been making payments to the aforementioned account, an account that the Plaintiff was unaware of, the Plaintiff promptly had a meeting with the Defendant's Branch Manager, one **Peter Maweu**, to bring its concerns to the attention of the Defendant for immediate action. It further reduced its complaint to writing in the form of the letter dated **30 January 2014** (marked **Annexure "BD2"**), and thereupon requested for the freezing of the suspect account pending investigations, which request was declined by the Defendant.

[3] It was further deposed that on **16 September 2015**, after several pleas to the Defendant were ignored, the Plaintiff's Advocate wrote a demand letter to the Defendant to release the full and particular details of the suspect account, **Number 2027341686** that had been allegedly opened in the Plaintiff's name, and

without its knowledge; but that even this request was declined by the Defendant vide its letter dated **24 September 2015** (marked "BD4") on the ground that the Defendant was bound by customer confidentiality and therefore could not release any customer information to a third party. The Plaintiff accordingly took counsel and resorted to filing this suit for the Court's intervention.

[4] In a Further Affidavit sworn and filed on **19 April 2016**, the Plaintiff's Accountant, **Brian De Souza** deposed that on perusing the Account Opening Aide Memoire dated **4 February 2013** annexed to the Defendant's Replying Affidavit, it noted that the suspect account was opened in the name of **Soroya Investments Company Limited**, which was allegedly incorporated on **29 January 2012** by three directors/shareholders, namely: **Feisal Naeem Farooki, Mubashar Khurshid and Zardad Khan**; all of Pakistani nationality. It was further deposed by the Plaintiff that two of these three individuals aforementioned were actual employees of the Plaintiff, who were tasked with the responsibility of collecting rent from tenants of the Plaintiff, a real estate company.

[5] The Plaintiff also faulted the Defendant for having approved the opening of the suspect account without carrying out due diligence checks; and for negligently approving transactions involving cheques that had been issued in the Plaintiff's name without detecting the discrepancy, and yet it acknowledged in its Replying Affidavit at paragraph 5 that the Plaintiff (**Soroya Investments Limited**) and the Defendant's customer (**Soroya Investments Company Limited**) were two different entities. It was thus prayed that the Defendant be compelled to release all the records including all signed withdrawal slips and cheque instruments pertaining to the account, more so the transactions that occurred in respect of the subject account from **January 2013** to date.

[6] Having carefully considered the Plaintiff's application dated **10 November 2015**, the Supporting and Replying Affidavits filed herein as well as the annexures thereto in the light of the Plaintiff's cause of action as expounded in the Plaint and the written submissions filed herein by Learned Counsel, it is manifest that what the Plaintiff seeks by way of relief in the interim, is two-fold; firstly that the Defendant **"... be compelled to submit for the Plaintiff/Applicant's inspection and records..."** all transactions, deposits, statements, ownership details and signatories of **the Bank Account No. 20273431686**. Secondly, it was sought that all monies held in the aforesaid bank account be frozen pending the hearing and determination of this application. I note that the Plaintiff also asked for an order for indemnity, but this being one of the substantive prayers in the Plaint, it would be inappropriate to consider or grant the same at this interlocutory stage.

[7] Thus, the prayer for inspection appears to be in the nature of an **Anton Piller Order**, (though this was not explicitly stated in the prayers, or in the submissions filed herein by Learned Counsel), about which **Lord Denning MR** stated thus in the case of **Anton Piller KG vs. Manufacturing Processes Ltd and Others [1976] 1 All ER:**

"...the order sought in this case is not a search warrant. It does not authorize the plaintiffs' solicitors or anyone else to enter the defendants' premises against their will. It does not authorize the breaking down of any doors, nor the slipping in by a back door, nor getting in by an open door or window. It only authorizes entry and inspection by the permission of the defendants. The plaintiffs must get the defendants' permission. But it does do this: it brings pressure on the defendants to give permission. It does more. It actually orders them to give permission - with, I suppose, the result that if they do not give permission, they are guilty of contempt of court..."

[8] There is no gainsaying that an **Anton Piller** order would be most efficacious as an *ex parte* measure of intervention, more so in a situation where there is danger of the targeted property, things or documents being destroyed or vital evidence destroyed. There is no indication herein that there is such an apprehension on the part of the Plaintiff. Indeed when it approached the Court *ex parte* under Certificate of Urgency on **10 November 2015**, no request for an inspection order was made by the Plaintiff; what appeared to be urgent then, and which was considered and granted *ex parte* was a freeze order in respect of **Bank Account No. 2027341686**.

[9] Be that as it may, I take the view that it is permissible for such an order to lie, if sufficient cause is shown, even after service and hearing *inter partes*. In the **Anton Piller Case** (supra), the Court appeared to be of this same view when it stated that:

"...the question is in what circumstances ought such an order be made. If the Defendant is given notice beforehand and is able to argue the pros and cons, it is warranted ... but it is a far stronger thing to make such an order ex parte without giving him notice. This is not covered by the rules of court and must be based on the inherent jurisdiction of the court..."

[10] It is now trite that for an **Anton Piller** order to be granted *ex parte*, three conditions must be fulfilled, namely:

[a] There must be an extremely strong prima facie case;

[b] The damage, potential or actual, must be serious for the applicant;

[c] There must be clear evidence that the Defendant has in his possession incriminating documents or things, and that there is a real possibility that they may destroy such material before any application *inter partes* can be made.

[11] Granted that the Plaintiff has since served the Defendant, and is not seeking *ex parte* orders, it would suffice, in my consideration, for it to simply prove a prima facie case demonstrating the justification for the inspection; and that the documents in issue are in the possession of the Defendant and are necessary to enable it prosecute its case, noting that it was not the Plaintiff's case that the documents are in danger of being destroyed or removed from the bank.

[12] The Plaintiff provided the background to the application in the Supporting and Further Affidavits filed herein on its behalf, sworn by **BRIAN DE SOUZA**, namely, that upon its Audit Team unearthing the suspected fraud by its former employees that is the subject of these proceedings, and that in addition to reporting the matter to International Life House Police Post, the Plaintiff promptly brought the issue to the attention of the Defendant and requested it for information pertinent to the suspect account through which the Plaintiff's cheques were processed and paid. The Plaintiff needed this information to enable it determine a suitable way forward, but that its requests were initially ignored and later declined on the grounds that the information sought was confidential.

[13] The Plaintiff further demonstrated that this back and forth in the form of communication between the parties went on from **January 2014 to 16 September 2015** when in response to a Demand Notice issued by the Plaintiff's lawyers, the Defendant made it clear, vide a letter dated **24 September 2015**, that they were bound to maintain the principle of customer confidentiality and therefore could not release any customer information to a third party. The Plaintiff thus contends that it had no option but to seek the Court's intervention, hence the instant suit and application.

[14] The Plaintiff exhibited documents that show, prima facie, that **Faisal Naeem Farooqi** and **Mubashar Khurshid** were its employees/former employees; and that they registered a company in the name of **Soroya Investments Company Limited** while still in the employ of the Plaintiff and that cheques issued by the Plaintiff's customers through the aforementioned individuals in the course of their employment were diverted and paid into the account of their newly formed company. Copies of two of the diverted cheques were also exhibited as **Annexures BDS 6**, indicating that though issued in the Plaintiff's name, they were banked and paid into **Bank Account No. 2027341686** in the name of **Soroya Investments Company Limited**. The Court is therefore persuaded that the Plaintiff has made out a prima facie case to warrant the issuance of the inspection orders sought. In arriving at this conclusion, due consideration has been given to the authorities cited by Learned Counsel, and I noted that the majority of them are Judgments that were rendered after full hearing and therefore did not specifically address the sort of interlocutory situation that is the issue herein.

[15] As to whether a freezing order should issue, the Court was referred to the case of **International Air**

Transport Association & Another vs. Akarim Agencies Company Limited [2004] eKLR, in which **Gikonyo J** expressed himself thus:

"Freezing order is not an interim injunction and the threshold to be attained for it to be issued is also distinct from those attending a temporary injunction set out in **GIELLA V CASSMAN BROWN**. Freezing order is an order of the court which is usually issued in personam restraining or enjoining a person from dissipating an asset directly or indirectly. It is ordinarily issued *ex parte* for it is intended to serve a useful purpose of preservation of assets...The basis for freezing order is the inherent jurisdiction of the court although some jurisdictions have enacted freezing-order statutes..."

[16] I would agree entirely with the aforesaid elucidation by **Gikonyo J** and note that, whereas in prayer (c) of the Plaintiff's Notice of Motion, the freeze orders were sought to subsist "**...pending the hearing and determination of this Application...**" which prayer was granted *ex parte* on **10 November 2015**, and therefore leading one to the irresistible conclusion that the prayer is spent; that prayer was accompanied by the request for the Court to make a determination that the said monies be transferred to the Plaintiff's legitimate account. This is an aspect that cannot be disposed of at the interlocutory stage, and is subject to proof and a determination on the merits. In any event, it seems to be intertwined with the prayer for indemnity, which is one of the substantive prayers in the Complaint filed herein.

[17] Thus, it has been demonstrated that the Plaintiff has an arguable case and that there is a real risk that if the freezing order is not maintained in place, the funds in the subject account will be dissipated. Accordingly, the interests of justice would require that the freeze orders issued on **10 November 2015** be extended pending the hearing and final determination of this suit, or until further orders of the Court, pursuant to the inherent powers of the Court as stipulated in **Sections 3 and Section 3A as read with Section 63(e) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya**

[18] In the result, I find merit in the Plaintiff's Notice of Motion dated **10 November 2015**, and would grant orders compelling the Defendant to forthwith permit an inspection by the Plaintiff of **Bank Account No. 2927341686** in the name of **Soroya Investments Company Limited**; and to provide any documents that the Plaintiff may need for the purpose of prosecuting this case; and that in the interests of justice, and pursuant to **Section 63(e) of the Civil Procedure Act**, the freeze order issued *ex parte* on **10 November 2015** be extended pending the hearing and final determination of this case or further orders of the Court.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY 2017

OLGA SEWE

JUDGE