



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 638 OF 2015

CENTRAL DEPOSITORY AND SETTLEMENT CORPORATION LTD.....PLAINTIFF

VERSUS

HILARY G. ERCULIANI.....DEFENDANT

RULING

1. By a Notice of Motion dated 11.12.2015 the Plaintiff/Applicant seeks the following orders;
 1. *Spent*
 2. *Spent*
 3. *THAT pending the hearing and determination of this application interpartes, an order of injunction be issued to restrain the Defendant, his agents, servants or employees from transferring any monies in the account held at the Westlands Branch of Standard Chartered Bank Limited account number 0100214477100 in the name of the Defendant.*
 4. *THAT pending the hearing and determination of this suit, an order of injunction be issued to restrain the Defendant, his agents, servants or employees from transferring any monies in the account held at the Westlands Branch of Standard Chartered Bank Limited account number 0100214477100 in the name of the Defendant.*
 5. *THAT the Defendant be ordered to show cause why he should not furnish security in the sum of Kshs.2,200,000/- within seven days being the amount claimed by the Plaintiff in prayer 2 of the Plaintiff.*
 6. *THAT in default of showing Cause by the Defendant in prayer 5, an order of attachment before judgment be issued attaching all the monies in the account held at the Westland Branch of Standard Chartered Bank Limited account number 0100214477100 in the name of Defendant.*
 7. *THAT the Court be pleased to make any other such order as it may deem just.*
 8. *THAT the costs of this application be provided.*
2. The application is supported by the grounds set on the foot of the Notice of Motion and the affidavit sworn by HILDA NJERU on 11th December, 2015.
3. The application is anchored on the provisions of Sections 1A and 1B, and Section 3A of the Civil Procedure Act, Cap.21 Laws of Kenya and order 39 Rule 5(1)(a), Order 40 Rules 1,2,7,11 (1)(a) and Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of law.
4. The Plaintiff/applicant is a licensee of the capital market authority (CMA) pursuant to section 8(1) and (20) of CMA Act and is acting in interest of the Investors and the Public.
5. The core complaint is that the Defendant/Respondent engaged in criminal actions aimed at defrauding members of the public who have invested in Nairobi Stock Exchange (NSE). The act was perpetrated via the mode of impersonation and identity theft of rightful investors and there

after converting to his benefit and selling their securities. The Defendant/Respondent has been served upon with the pleadings and the application herein via substituted service but no response has been filed to oppose the application. The court therefore will treat the application as unopposed.

Applicant Case

6. Sometimes between 21.3.2011 and 1.4.2011 the Defendant/Respondent impersonated Hilary Gabrielle a lawful trader who operated CDSC Account NO.7417497 opened with NIC securities Ltd. The using American passport thereafter transferred to his use and sold securities in the account at Ksh.13,633,375. The securities transferred were Barclays of Kenya Ltd, Nation Media Group Ltd, Kenya Airways Ltd and Standard Chartered Bank of Kenya Ltd.
7. The monies received by the Defendant were banked at his account at Standard Chartered Bank of Kenya Ltd No.01002144777100. This was discovered after an investigation by the Plaintiff and CMA in Milimani Cr.CM 17/2012.
8. The NIC securities Ltd compensated the genuine trader. The NIC securities thereafter sued the Plaintiff and Gengis Capital Ltd (by of subrogation)for recovery of the value of shares vide **HCC NO.593/2012 – NIC SECURITIES LTD VS. CDSC & GENGIS CAPITAL LTD.**
9. The Plaintiff paid Ksh.2,200,200/-, pursuant to Plaintiff's statutory obligation. Thus the Plaintiff has sued to recover Public money.
10. It is the Plaintiff's contention that the Defendant act was unlawful and amounted to criminal conversion. The Defendant conspired with other persons who were charged with offence of making electronic records without authority contrary to section 357 (a) of the Act.
11. There are indications that the funds in the account are proceeds of crime as there are no other deposits on the account save the deposit from the sale of securities.
12. The Applicant is apprehensive that the monies in the account may be transferred by the Defendant in furtherance of his criminal activities and in an aim to prevent any decree that may be passed against him.
13. The Plaintiff submits that it has satisfied all conditions for the grant of the orders sought in the application. The Respondent has not responded to rebut the Applicant averment. In terms of thresh hold for grant of orders sought, the Plaintiff submits that it has established a prima facie case which is "the material presented to the tribunal (court in our case) properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".
14. The Plaintiff therefore prays for the orders sought in absence of such rebuttal.
15. After going through the materials before the court, I find the singular issue to be; *whether the Plaintiff has satisfied the conditions for grant of the orders sought?* The Applicant has established that, it has right to recover money acting in the best interests of the public under S.8(1) and (2) of the Central Depositories Act. (CDA) 2000. It has established that the Defendant impersonated the real and true trader at the NSE.
16. The Defendant's criminal actions were revealed through a lawful process through the CID and CMA. Further through impersonation, the Defendant proceeded to transfer the securities to his own use.
17. The proceeds for sale of securities were deposited to his account at Standard Chartered Bank Kenya Ltd, Westland Branch. This is the same account the Plaintiff seeks orders for injunction against.
18. The account is in Defendant's names and it is not closed. The Plaintiff compensated NIC securities Ltd to tune of Ksh.2,200,000 in settlement of the case against Plaintiff arising from the Defendant aforesaid theft activities.
19. The court therefore makes a finding that the Plaintiff has made out a prima facie case against the Defendant and thus entitled to the orders sought.
20. On damages limb of grant of the injunctions the court notes the legal obligation of the Plaintiff to open Central Depository accounts for Investors willing to invest in Kenya Capital Market (KCM) that facilitates the holdings of shares in electronic account opened by Investors and manages the process of transferring shares traded at the stock exchange.
21. All the functions are for the benefit of the general public. The orders sought are thus to prevent

any further fraudulent activities using the account taking into account that the Defendant opened. This type of fraud erodes public confidence and diminishes credibility of stock market and thus can lead to collapse of the whole system of the Stock Exchange/Stock Market with disastrous effect to the economy and thus public would suffer immense loss and damage.

22. On establishment of the above, we need not belabour on the third limb on balances of convenience. It is obvious the public and the country will be highly inconvenienced by the acts of the Defendants by defrauding the innocent members of the public and being allowed to keep proceeds of crime. On attachment before judgement, the first relief sought, the Applicant relies on the case of **KURIA KANYOKO T/A AMIGOS BAR & RESTAURANT BS. FRANCIS KINUTHIA NDERU & OTHERS (1988) 2 KLR 126** where relying in the case of **BAYUSUF GRAING MILLERS VS. BREAD KENYE LTD (2005) eKLR** the court held;

“On the material presented to court, it cannot be gain sad that the appellant deponed to facts which constitute more than plausible answer to the respondents plea for “attachment before judgement”. The burden of showing that the appellant has disposed of his properties or removed them from the courts jurisdiction or was about to abscond in either case with the object of defeating any decree that maybe passed against him, lay on the respondents. And it seems clear that on the state of the pleadings and in the view of the conflicting affidavits, that burden can only properly be discharged by testing the rival averments by evidence in the conventional way. The respondents averments only rested on information given to him by parties whom the court did not see or listen to. Our order 38 which sanctions this practice was borrowed from the Indian Code of Civil Procedure. The learned author, Mulla in his treatise on the Indian Code (13th Edn p.1502), says, inter alia, of order 38 r.5: “The object of this rule is to prevent the decree that may be passed from being rendered anfractuious...The order that is contemplated by this rule, is to furnish security or to show cause why security should not be furnished. Where the defendant offers to give security, the court should go into the question of is sufficiency before issuing a final order of attachment.”.

23. The Plaintiff has established the grounds for attachment before judgment from the materials presented to the court.

24. The Plaintiff has thus established that the orders sought are merited at this stage. The court thus makes the following order;

1. Prayers 3 ,4, 5 and 6 are granted.
2. **Costs in the main cause**

Dated, signed and delivered in court at Nairobi this 22nd day of April, 2016.

C. KARIUKI

JUDGE