

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 13 OF 2014

HABILHALIM COMPANY LIMITED..... PLAINTIFF

V E R S U S –

BARCLAYS BANK OF KENYA LIMITED..... DEFENDANT

RULING

1. The subject matter of this ruling is the motion dated 23rd March 2016 taken out by the plaintiff seeking for an order to direct the defendant to deposit the aggregate sum of **ksh.6,000,000/=** as anticipated damages or in the alternative **USD29,127/20** being the value of the bounced bankers' cheque dated 24.9.2013. The motion is supported by the affidavit of Adam Dahir Ibrahim. When served, the defendant filed the replying affidavit of Waweru G. Mathenge to oppose the motion. When the motion came up for interpartes hearing learned counsels recorded a consent order to have the same disposed of by written submissions.

2. I have considered the material placed before this court and the rival written submissions. The background of this dispute is that on 24th September 2013, the plaintiff purchased bankers' cheque no. 10072049 from the defendant bank's Nkurumah Branch for **USD29,127/20** in favour of **Bollore Africa Logistics Ltd**. When the bankers cheque was presented for payment the same was dishonoured on the basis that there was no sufficient funds in the plaintiff's account yet there was evidence showing that funds were available in the aforesaid account. The plaintiff felt aggrieved hence this suit. The defendant filed a defence. The plaintiff successfully applied for the defence to be struck out and for entry of summary judgment. What is pending, is, for the suit to be fixed for hearing of the formal proof. It is the plaintiff's submission that in early 2016, the multinational **Barclays Bank PLC** which owns 62.3% stake in **Barclays Africa Group Ltd**, the parent company of the defendant bank while **Absa Group Ltd of South Africa** owns 38% announced to all and sundry of its intention to close down its operations due to various reasons. On its part, the defendant's holding company, **Barclays Africa Group Ltd** has intimated in both print and electronic media that it intended to close its operations in Kenya and to relocate to South Africa. The plaintiff pointed out that as a result of those media reports, some sacked employees filed an action before **Nairobi Employment & Labour Relations Court Petition No. 25 of 2016** seeking for orders to restrain the closure of the defendant's operations in Nairobi. The plaintiff argued that it is now clear and beyond peradventure that the defendant will soon relocate to South Africa which is not one of the countries envisaged by the Foreign Judgements (Reciprocal Enforcement) Act, Cap 43 of Laws of Kenya. It is for these reasons that the plaintiff is praying for attachment before judgment.

3. The defendant on the other hand is of the contrary view. The defendant was emphatic that it is not leaving Kenya. The defendant further argument is that the plaintiff's applicant was malicious, alarmist, misguided, reckless calculated to damage the defendant's reputation with its clientele. The defendant further argued that the defendant a company which is listed in the Nairobi securities exchange is a highly profitable bank with assets worth ksh.220B.

4. The principles to be applied in an application for attachment before judgement are well settled. In the case of **Kanyoko T/A Amigos Bar vs= Nderu (1988)2KAR, 1287-1334** the Court of Appeal stated *inter alia* as follows:

“The power to attach before judgment must not be exercised lightly and only upon clear proof of the mischief aimed at Order XXXVII Rule 5, namely, that the defendant was about

to dispose of his property or to remove it for jurisdiction with intent to obstruct or delay any decree that may be passed against him.”

5. The plaintiff has urged this court to issue the orders to prevent the decree being rendered infructuous by the defendant removing its property from the jurisdiction of the court and to safeguard the substratum of the instant suit. The defendant has argued that it is not necessary to issue the order because it is a solvent and profitable company.

6. After a careful consideration of the rival arguments, certain facts have remain uncontested. First, the defendant has not denied the media reports that the defendant bank’s holding company intends to relocate to South Africa. Secondly, that South Africa, is not one of those countries envisaged by the Foreign Judgments (Reciprocal Enforcement) Act. This piece of legislation makes provision in Kenya for the enforcement of foreign judgments given in Kenya which accord reciprocal treatment to judgments given in Kenya. In the instant application, the plaintiff is seeking for an order to direct the defendant to deposit in court an approximate global sum of ksh.6 million as anticipated damages. The defendant has complained that if the order is issued it would curtail its rights under Articles 48 an 50 of the constitution of Kenya, 2010. The defendant also argued that to grant the order would be like predetermining the amount of quantum before being heard. I have considered the defendant’s concerns. However, I do not think that if the order is given the defendant’s right of hearing will be taken away. The defendant still retains the right to participate in the formal proof proceedings to ascertain quantum of damages. The fact that a global figure of kshs.6,000,000/= has been floated does not mean that the same will influence the court’s assessment of damages. In any case the amount of deposit will be kept in a neutral place where the parties can easily access when required. Though the defendant lamented about the figure suggested by the plaintiff, it did not propose an alternative figure to enable this court weigh which figure is appropriate to order to be deposited.

7. In the end, I find the motion dated 23.3.2016 meritorious.

Consequently I grant an order directing the defendant bank to deposit in court a sum of kshs.6,000,000/= within 30 days from the date hereof pending the hearing and determination of the formal proof. Costs of the motion to abide the outcome of the formal proof.

Dated, Signed and Delivered in open court this 25th day of November, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant