



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC. NO 502 OF 2015

**ORTHODOX TOWERS MANAGEMENT COMPANY
LIMITED.....1ST PLAINTIFF**

**ORTHODOX ARCHBISHOPRIC OF KENYA,
IRINOUPOLIS.....2ND PLAINTIFF**

VERSUS

**PRIME BANK (KENYA) LIMITED.....
1ST DEFENDANT**

**THE AFRICAN ORTHODOX CHURCH OF KENYA REGISTRERED TRUSTEE...PROPOSED
INTERESTED PARTY**

RULING

1. By a Plaint dated 15.10.2015 the Plaintiff seeks mandatory reliefs, special damages Ksh.45 million and other damages inter-alia against the Defendant.
2. Contemporaneously, the Plaintiff filed a motion dated 15.10.2015 seeking mandatory interlocutory reliefs confined to the access to funds in the account at the Defendant branch. The matter was brought before me on 15.10.2015 but the court directed the same to be served for direction on 21.10.2015.
3. On 21.10.2015, the court mentioned the matter and the Defendant appeared via Mwangi advocates who had by then lodged an interpleader application dated 19.10.2015. The court directed that the matter be served upon the disclosed interested party for hearing on 22.10.2015. On 22.10.2015 the parties agreed that the interested party be enjoined as a party to canvas the application dated 15.10.2015 and the defendant was excused from the matter as they had no interest on the amount held.
4. The Respondent appeared via Ingutia Advocate and they filed 2 Affidavits sworn by Father Moses Ngugi Gichuhi on 21.10.2015. The interested party also filed grounds of opposition dated 21.10.2015.
5. The Plaintiffs application is supported by the grounds on that face of the motion which are to the effect that, the Plaintiffs risks losing Ksh.45 million deposited for the purchase of a property in Nairobi Upper Hill area and that the 1st Plaintiff's operations have been crippled by the freezing of the account.

6. The Applicants' case is that the 2nd Plaintiff incorporated the 1st Plaintiff for the purpose of its investment thus it opened an account with the Defendant where proceeds were deposited from the sale of shares by the 2nd Plaintiff through Standard Investment Bank.
7. On 8.10.2015 the second Plaintiff entered into agreement with a third party to purchase a commercial building at a price of Ksh.598,800,000/= and a deposit of Ksh.45,000,000 was made. The completion date is 1.11.2015. In event of breach of the agreement, the Applicants are to lose 10% of the purchase price which is equivalent to the deposited amount or thereabout.
8. The balance of the purchase price was to be paid by 16.10.2015 though the advocate indicated that the vendor indulged the Plaintiffs up to 23.10.2015.
9. The Applicants via their advocate submitted that the property being bought is a very prime asset and the denial of orders sought will not only occasion loss of the deposited amount, but also very valuable property which is intended to benefit the Plaintiff and their beneficiaries.
10. The Plaintiffs filed a bundle of the authorities to support their application. The Applicants relying on the case of **OKWIRI VS. CONSOLIDATED BANK LTD (2008) eIKR** submitted that, for a mandatory injunction to issue at interlocutory stage, it must be established that there exists special circumstances that would compel the court to grant the same. The court must be convinced that the case before it is clear and ought to be determined at once so as to avoid any hardship or injustice being occasioned to the Plaintiff. The court must also further be convinced that in granting the mandatory injunction at the interlocutory stage, the court must feel a high degree of assurance that at the trial it would appear that the mandatory injunction was rightly and justifiably granted.
11. See also **K.B.L LTD AND ANOTHER VS. WASHINGTON OKEYO CA 332/2000** (unreported). The Applicants also relied on viable **DECOSOLUTION LTD VS. COOP BANK LTD HCC 175/2014 NAIROBI** and also **HCC 16/2013 PAVIWA LTD VS. COOP BANK LTD (unreported)**.
12. The Applicants submitted that the circumstances of their case meets the threshold set by the cited authorities in grant of the mandatory interlocutory injunction. The Applicants further submitted that the 2nd Plaintiff is the overall head of the interested party and its priests, employees inter alia draw their salaries from the same 2nd Plaintiff. Infact the African Orthodox Church in Kenya is under the 2nd Plaintiff.
13. The Plaintiffs also submitted that **ELC Case No.525/2015** is over the properties held by either the 2nd Plaintiff or the interested party. Thus the sale transaction can be undertaken and the purchased property be enlisted as subject of any claim the interested party may desire to raise over it.
14. Further it was submitted by the Applicants that, the account subject herein has been in operation for over 10 years and gets money sourced by the 2nd Plaintiff and the interested party has never laid any claim thereof. The sourced funds are invested in the various investments and activities by the 2nd Plaintiff.
15. The Applicants submitted that the interested parties have not demonstrated the existence of the elements of prove of a trust namely;
- a. Certainty that the donor intended to create a trust;
 - b. Certainty of the subject matter;
 - c. Certainty of the object of the trust.

It must be clear who the beneficiaries are.

16. The Applicants also submitted that the deponent of the supporting affidavits had requisite authority and it is not fatal to have fled the case without attaching the company's resolution authorizing the same.

The case of **KIVIDU AND ANOTHER VS. SYOKIMAU B. HOLDINGS LTD HCC.462/2012** was relied on.

17. The interested party's case is that the 2nd Plaintiff is a limited company which acts as a liaison between the interested party and the donors abroad in the said capacity. The 2nd Plaintiff has been for years receiving funds for the interested party church. The 2nd Plaintiff invested funds received in the same capacity in shares and on sale of same, Ksh.600 million was raised and deposited in the account subject herein. Subsequently same amount was transferred to the 1st Plaintiff incorporated by the 2nd Plaintiff to defeat Industrial case **NO.47/2015** where the SACCO was enjoined claiming some deductions.

18. The 2 courts including Industrial courts held that the money held by the 1st Plaintiff was so held on behalf of the 2nd Plaintiff. The 2nd Plaintiff holds same money for the benefit of the African Orthodox Church. The 2 Plaintiffs are one and the same thing. The Plaintiffs are not entitled to the orders sought because;

- The suit is incompetent as it is not properly authorized.
- The funds subject herein is trust fund.
- The transaction being undertaken is done away from the interested party.
- The orders sought will consume the substratum of the suit leaving nothing to litigate on.
- There is a breach of Trust as interested parties were not consulted in the sale deal.
- The subject matter is in issue in ELC CASE NO.525/2015 and there was no such a disclosure in the interested party's submission.

19. The court was referred to paragraph 6 of the 2nd Plaintiff Defence in ELC 525/2015 where it pleaded that it has overall authority in Kenya and obtains donations from Europe and America for the benefits of African Orthodox Church. The African Orthodox church employees drew their salaries from 2nd Plaintiff and that the 2nd Plaintiff has built schools, seminaries, centres and clinics and other development projects for the benefit of Kenya communities.

20. The Interested party submitted that the money is held in trust of the African Orthodox Church and thus subject matter is a trust fund. Mr. Ingutia submitted that the mandatory injunction cannot be granted in the circumstances of the case. He also took issue on the want of authority in Applicants' Affidavit sworn by the Bishop and also for want of resolution of companies in the filing of the instant suit. He submitted that the minutes and resolution authorizing lodging of the suit and swearing documents for the company ought to be there. He relied on case of **BUGERE COFFEE GROWERS LTD VS. SEBEDUKA & ANOTHER 1970 EA, AFFORDABLE ITEMS AFRICA LTD & HEDERSON & 2 OTHERS (2004) 2KLR**. He relied on the case of **EAST AFRICAN SPINNERS LTD VS. BEDI INVESTMENT LTD 1994 KLR** in his submissions that mandatory injunction will not issue at the interlocutory injunction stage but only in simple issue which can be rectified later. Also on special circumstances he further submitted that the best order is to preserve the subject matter by denying the orders sought in the interest of justice. He also cited the cases of **MOHAMED BHAKHESA V. AHMED (2006)eKLR** and **WAMBORA VS. SPEAKER EMBU NATIONAL ASSEMBLY & OTHERS PET.NO.3/2014**.

21. After going through the pleadings, Affidavits and parties submissions, I find the issues arising are;

- a. Whether the instant suit is competent for want of authority to file and swear affidavit herein?
- b. Whether the threshold for grant of the mandatory injunction has been met?
- c. What is the order as to costs?

22. On the first issue, the interested party submit that the resolution or minutes were not filed to demonstrate authority to lodge the suit and thus the suit is incompetent and thus its for striking out. The authorities of **AFFORDABLE HOME AFRICA LTD (Supra) Njagi J** held on 27.20.2004 that;

“The absence of a board resolution sanctioning the commencement of the action by the

company was not in court and thus P.O succeeded and suit was struck out with costs".

On the other hand, the Plaintiff relied on the case of **PIUS MUSEMBI KIVINDU (supra)** where Mutende J on 30.1.2014 relying on other authorities held that;

“Resolution by board of directors of a company may be filed any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence is, therefore, not fatal to the suit, at least not at this stage”.

23. This later authority is more persuasive than Njagi Judge holding in the former case as it is in tandem with article 159(2)(b) of the Constitution, which dictates that the court to endeavour to do substantial justice devoid of undue procedural technicalities. In any event, no director of the Plaintiff companies has complained, and in any event, they can rectify the act of filing of the suit any time before the hearing of the suit. The court thus holds that the instant suit is competent.

24. On the second issue, the court is to examine the circumstances of the case vis-a-vis the parameters for grant of mandatory interlocutory injunction. The Applicants seek to access the amount in their account held by the Defendant who claims no interest on the same fund. The Defendant froze the account on objection by the interested party. The Applicants averred that they have ran the account for over 10 years with funds sourced from donors abroad. The interested parties do not run the same account. The money is solely sourced by the 2nd Plaintiff from the donors and has invariably used such funds for the benefit of the African Orthodox Church, which is under 2nd Plaintiff's authority.

25. The funds have also been used in investment in churches, centres, seminaries, clinics, schools etc without the interested party's input. Nowhere was it alleged or demonstrated that in application of these funds sourced by the 2nd Plaintiff has ever been misused.

26. In the instant matter, the fund is being employed to buy a prime property in Nairobi Upper Hill area. Already a binding contract has been entered into and Ksh.45 million deposited with a completion date slotted on 1.11.2015.

27. The danger lurking at the moment is that if the balance is not paid by 23.10.2015 the deposit amounting to Ksh.45 million is going to be forfeited. The interested party submitted that, it does not matter even it is forfeited because if they win the case, they will pursue the trustees responsible in entering into such deal to recover the same money.

28. This draws analogy to the biblical story of King Solomon adjudication between two of his 2 spouses over a child and one of them chosing the death of the child by splitting it as a way to resolve the ownership of the disputed child.

29. The general principles of grant of the mandatory interlocutory injunction are that;

- a. The case must be clear.
- b. The court is to avoid injustice or hardship to the plaintiff.
- c. The court must feel high degree of assurance that at the trial it would appear, it was rightly and justifiably granted. Ref to OKWIRI case supra and KBL Ltd and another supra.

30. The court in the circumstances of the case has to balance the interests of the competing parties. The interested parties have already lodged a ELC Case No.525/2015 over properties held by the 2nd Plaintiff and African Orthodox Church.

31. If the sale transaction is completed, they can still claim the same and/or its value and/or trace the trust money. There will be no loss if the property is bought and preserved from alienation thereafter. On the other hand, the scuttling of the deal will inflict on the Plaintiffs a loss of Ksh.45 million. There is no undertaking that the interested parties can compensate the Plaintiffs the same if they lose in their claim.

32. In the interest of justice, the court finds that the orders sought are justified. The court thus makes the following orders:

1. The Defendant shall allow Plaintiffs access of the account and release the sought funds in terms of prayer 3 and 4 of the motion forthwith.
2. The property being bought once transferred to the 2nd Plaintiff's name shall not be alienated pending hearing and determination of the suit and/or pending further orders of the court.
3. The interested parties are at liberty to lodge the documents of claim herein.
4. Costs in the cause.

Dated, signed and delivered in court at Nairobi this 23rd day of October, 2015.

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C.KARIUKI

JUDGE