



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS,**  
**CIVIL NO. 370 OF 2013**

**NATIONAL BANK OF KENYA LIMITED.....PLAINTIFF**

**VERSUS**

**LEONARD GETHOI KAMWETI.....DEFENDANT**

**RULING**

1. The plaintiff/applicant has filed a notice of motion dated 5/9/2013 brought under the Judicature Act Cap 8 of the Laws of Kenya, the High Court (practice & Procedure Rules (Part 1 of Rule 3), Section 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Order 40 Rule 1, 2 & 11, Order 39 Rule 5 (1) and Order 5 rule 17 of the Civil Procedure Rules, and any other enabling provisions of the law, seeking the following orders;
  - i. That this Honourable Court be pleased to issue a temporary injunction restraining the defendant by himself, his servants, workmen, agents or otherwise howsoever from disseminating, or revealing to unauthorized persons other than the plaintiff's Board of Directors, and/or using or exploiting in whatsoever manner, the plaintiff's confidential information particularly pertaining to all of the minutes of the plaintiff's Board of Directors' meeting held on the 8<sup>th</sup> day of July 2013, pending the inter partes hearing and determination of this application.
  - ii. That this Honourable Court be pleased to issue a temporary injunction restraining the defendant by himself, his servants, workmen, agents or otherwise howsoever from disseminating, or revealing to unauthorized persons other than the plaintiff's Board of Directors, and/or using or exploiting in whatsoever manner, the plaintiff's confidential information particularly pertaining to all of the minutes of the plaintiff's Board of Director's meeting held on the 8<sup>th</sup> day of July 2013, pending the hearing and determination of this suit.
  - iii. That the Honourable court be pleased to order service of the said summons upon the defendant herein to be effected by substituted service by registered postal mail under certificate of posting through their last known address namely P O Box 58346-00200, Nairobi.
  - iv. That any other and/or further or better relief that this Honourable Court may deem fit and just and convenient to grant in the circumstance.
  - v. That the costs of this application be provided for.
2. The application is based on the following grounds:
  - a. At all material times, the plaintiff is and was at all material times the owners of confidential information pertaining to its affairs and operations, in particular, the minutes of the Plaintiff Board of Directors Meeting held on the 8<sup>th</sup> day of July 2013.

- b. By virtue of his position the Company Secretary of the plaintiff, was entrusted and professionally obliged to ensure and maintain the confidentiality of the said information at all times.
  - c. Sometime in early August 2013, the plaintiff became aware of an unlawful recording made by the defendant of the said meeting and that the defendant had communicated the said confidential communication via his letter dated 2<sup>nd</sup> day of August 2013, addressed to the Director, Bank Supervision, Central Bank of Kenya, the Law Society of Kenya, Capital Markets Authority and possibly to various other persons and organizations.
  - d. The said confidential communication was communicated as aforesaid to the said recipients, with malicious intent and solely to disrupt, harm and damage the plaintiff's reputation, business and operations.
  - e. In the premises, the defendant, having been the plaintiff's company secretary, an advocate of the high court of Kenya and a certified public secretary of Kenya, unprofessionally and maliciously communicated the said confidential information despite at all material times being under a fiduciary duty of care, trust and confidence.
  - f. In breach of his said fiduciary duty of care, of trust and confidence and without the consent of the plaintiff, the defendant unlawfully made use of the said confidential information and exploited its purpose otherwise than for the purpose of keeping a record of the meeting.
  - g. The defendant has threatened and intends, unless restrained by this honourable court to use the said confidential information or part thereof otherwise than for its actual purpose being to keep a record of the discussion of the plaintiff's Board of Directors various meetings.
  - h. In fact on or about the 19<sup>th</sup> day of August 2013, there was a publication in the front page of the Business Daily Newspaper under a false and misleading title "THEFT OF PAPAERS SPARKS WAR IN NBK BOARDROOM"
  - i. Although the plaintiff is not certain who may have caused the said newspaper to make the said publication, the plaintiff finds it oddly coincidental that the said publication was done right after the defendant had just left the plaintiff's employment.
  - j. In view of the above the plaintiff is greatly apprehensive that the defendant shall proceed to use the said confidential information or part thereof otherwise than for its actual said purpose.
  - k. It is therefore necessary for the court to issue the orders sought so as to preserve the substratum of this suit and to also protect the information the defendant seeks to distribute which was not only unlawfully obtained but is confidential in nature and protected by the doctrine of privilege.
  - l. The plaintiff also prays for this honourable court to order that the court file in respect of this matter be kept and secured in a strong room pending the hearing and determination of this suit due to the sensitive and confidential nature of the matters arising in this suit.
3. The plaintiff filed a supporting affidavit sworn by of Habil Waswani is an Advocate of the High Court of Kenya, currently in the employment of the plaintiff as the Head of Legal, Compliance & Company Secretary of National Bank of Kenya Limited.
  4. This is what he states in his affidavit that the defendant was employed by the plaintiff as the company secretary. That the defendant as company secretary had an express and/or implied term of his employment and professional obligation not to disclose any information acquired in the course of his professional engagement, the without written consent of the plaintiff. That it was further an express and/or implied term of the defendant's employment and professional obligation, to prepare, maintain and be the custodian of the plaintiff's custodian of the plaintiff's minutes of Board meetings.
  5. That the plaintiff is and was the owner of confidential information in particular, the minutes of the plaintiff's Board of Directors meeting held on the 8<sup>th</sup> day of July 2013, in respect of which the defendant, by virtue of his position as Company Secretary of the plaintiff, was entrusted and professionally obliged to ensure and maintain the confidentiality of the same at all times. That said information was also not only confidential and covered by the doctrine of privilege, but, it is also sensitive in nature, as it involves the deliberation of the affairs and operations of the Bank and the plaintiff being a publicly listed entity, accordingly owes a duty of care to its shareholders and customers in respect of the same.

6. That the plaintiff's business, operations and staff has been undergoing a restructuring programme, as a result of which the defendant's employment came to an end after he was sent on early retirement effective from the 31<sup>st</sup> day of July 2013.
7. That sometime in early August 2013, the plaintiff became aware that the defendant made an unauthorized and unlawful recording of the plaintiffs Board of Directors meeting held on the 8<sup>th</sup> day of July 2013. That it was also then that the plaintiff became aware that the defendant had communicated the said confidential information via his letters dated the 2<sup>nd</sup> day of August 2013 and the 9<sup>th</sup> day of August 2013, both addressed to the Director, Bank Supervision, Central Bank of Kenya, the Law Society of Kenya, Capital Markets Authority and possible to various other persons and organizations. That when the defendant communicated the said confidential information to the said recipients, he proceeded to distort the said information, resulting in the same being inaccurate and a complete misrepresentation of the contents of the plaintiff's Board of Directors meeting held on the 8<sup>th</sup> day of July 2013. That the said confidential communication was communicated as aforesaid to the said recipients, with malicious intent and solely to disrupt, harm and damage the plaintiff's reputation, business and operations.
8. That the defendant having been its company secretary, an Advocate of the High Court of Kenya and a Certified Public Secretary of Kenya, communicated the said confidential information despite at all material times being under a duty of trust and confidence and with the full knowledge that the recipients of the said information were not entitled to the same without the prior consent of the plaintiff. That the defendant unprofessionally and maliciously communicated the said confidential information despite at all material times being under a fiduciary duty of care, trust and confidence. That in breach of his said fiduciary care, trust and confidence and without the consent of the plaintiff, the defendant unlawfully made use of the said confidential information and exploited its purpose otherwise than for the purpose of keeping a record of the meeting.
9. That the defendant has threatened and intends, unless restrained by this Honourable Court to use the said confidential information or part thereof otherwise than for actual purpose. That on or about the 19<sup>th</sup> day of August 2013, there was a publication in the front page of the Business Daily Newspaper under a false and misleading title, "**THEFT OF PAPERS SPARKS WAR IN NBK BOARDROOM**".
10. That although the plaintiff is not certain who may have caused the said newspaper to make the said publication, the plaintiff finds it oddly coincidental that the said publication was done right after the defendant had just left the plaintiff's employment. That the plaintiff is greatly apprehensive that the defendant shall proceed to use the said confidential information or part thereof otherwise than for its actual said purpose and it is necessary for the court to issue the orders sought so as to preserve the substratum of this suit and to also protect the information the defendant seeks to distribute which was not only unlawfully obtained but is confidential in nature and protected by the doctrine of privilege.
11. The plaintiff also prays for this Honourable court to order that the court file in respect of this matter be kept and secured in a strong room pending the hearing and determination of this suit due to the sensitive and confidential nature of the matters arising in this suit.
12. The defendant filed grounds of opposition on the 12<sup>th</sup> of November 2013 stating that:
  - i. That the application is incompetent and misconceived the injunctive reliefs sought having been overtaken by events admitted by the applicant.
  - ii. That there is no reasonable cause of action known to law or at all disclosed by either the application or the suit against the respondent.
  - iii. That the applicant is a public entity bound by the constitutional obligations and values of transparency, accountability and disclosure of information.
  - iv. That the applicant not having disclosed the nature, content or thrust of the information the alleged subject matter of the application and the entire suit there is no basis on which to issue the gagging

- orders sought.
- v. That the information sought to be gagged is prima facie neither confidential nor secret under the Constitution, the Companies Act, the Banking Act, the Evidence Act or any laws in force in the Republic of Kenya.
  - vi. That there is no evidence led of distribution or receipt of the alleged information by persons not entitled to receive the same and those alleged to have already received the information have not been enjoined to the suit.
  - vii. That the application and the entire suit herein are brought against the respondent in bad faith, discriminatorily, mala fides and for the benefit of a stranger to the applicant.
  - viii. That the application and the entire suit herein are not taken out with clean hands and are intended solely to extract from the Honourable court orders giving unfair advantage to the applicant in the simmering dispute on the termination of employment of the respondent, to conceal and suppress the truth about manipulation of the applicant by the stranger to the plaintiff who is the real beneficiary of the orders sought.
13. Parties took a date for inter partes hearing on the 27<sup>th</sup> November 2013 in court on the 1<sup>st</sup> of October 2013. When this matter came up for inter partes hearing the respondent did not attend, the matter proceeded ex parte. Mrs. Mc Asila for the applicant sought to have prayer no. 5 an injunctive order (see prayer (ii) in the orders sought, page 1 of this ruling)
14. I have considered the facts as deponed by the applicant, the grounds of opposition filed, together with the oral submissions made by counsel for the applicant. Counsel referred to the following documents in her submissions in court, the job description of the defendant at pages 23 and 24. Page 21 an extract from the plaintiff's "Human Resource Manual", paragraph 6.4.1 deals with unauthorized communication. Page 26 a letter the defendant wrote to the Governor of Central Bank on the 9<sup>th</sup> of August 2013 in it the defendant admits he is the custodian of the documents and at page 27 he admits having recorded the session without the knowledge of the board and proceeded to extract the minutes, pages 40 to 45 which she submitted were later distributed to external persons. That page 29 confirms that the defendant copied the letter to 3 other persons. That as a result of the distribution an article was published in the business daily newspaper. She reiterated what is deponed by Mr. Habil Waswani.
15. The applicant seeks an injunction. The principles of granting an injunction are that the applicant has to establish a prima facie case with probability of success, the applicant has to show that he will suffer irreparable loss and if the court is in doubt it will decide the case on a balance of convenience (**see Geilla Vs. Cassman Brown Ltd Company E.A 1973 C.A 51 of 1972 at page 358**). The averments made by the applicant were not challenged by the respondent. It is deposed that the respondent was the Company Secretary of the plaintiff/applicant and was in possession of confidential documents. From the letter dated 9<sup>th</sup> of August 2013 it is apparent that the defendant chose to write to the governor of Central Bank giving information on one Mohammed Abdirahman Hassan a director of the plaintiff bank stating that he was not fit and proper to hold the said office. As submitted the letter was copied to other persons being the Chairman of Capital Markets Authority, the AG and the Cabinet Secretary. The applicant's fears which have not been challenged are that the respondent is disseminating or revealing to unauthorized persons confidential information pertaining to the discussions of a board meeting held on the 8<sup>th</sup> of July 2013. The letter of 9<sup>th</sup> of August does touch on the meeting of 8<sup>th</sup> July 2013. The applicant has shown that it has a prima facie case on the basis of the annexures and especially the letter dated 9<sup>th</sup> of August 2013.
16. I do not find the application incompetent nor do I find that granting the injunction sought would amount to issuing a gagging order. Allowing further disclosure of the information by the respondent is likely to cause irreparable damage. The balance of convenient tilts in favor of the applicant. I therefore grant a temporary injunction restraining the defendant by himself, his servants, workmen, agents or otherwise howsoever from disseminating, or revealing to unauthorized persons other than the plaintiff's Board of Directors, and/or using or exploiting in

whatsoever manner, the plaintiff's confidential information particularly pertaining to all of the minutes of the plaintiff's Board of Directors meeting held on the 8<sup>th</sup> day of July 2013, pending the hearing and determination of this suit. Costs shall be in the cause.

Orders accordingly

Dated, signed and delivered this 16<sup>th</sup> day of January 2014

**R. E. OUGO**

**JUDGE**

In the presence of:-

.....Plaintiff/Applicant

.....Defendant/Respondent

.....Court Clerk