REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MILIMANI LAW COURTS

CIVIL CASE NO 543 OF 2014

GUARDIAN BANK LIMITED……..…….……PLAINTIFF

VS

XPLICO INSURANCE COMPANY LTD……..... DEFENDANT

RULING

Freezing of accounts

[1] The Plaintiff has applied for freezing of eight accounts belonging to the Defendant. The accounts to be frozen are listed under prayer 2 of the Notice of Motion dated 21st November, 2014. The Advocate for the Plaintiff appeared before the court ex parte on 24th November, 2014 but the court ordered that the application should be served on the defendant for hearing *inter partes* on 25th November, 2014. The advocate returned and filed an affidavit of service sworn on 24th November, 2014 which stated that the application had been served on the Defendant and the person who received it was a Mr Kioko of the legal department. The affidavit of service does not state the position held by the said Mr Kioko so as to say that Order 5 rule 3 of the Civil Procedure Rules has been complied with. That notwithstanding, during the oral submissions by Mr Singh Gitao, counsel for the Applicant, he made a startling submission. This is what was recorded:

''If notice is given to the other side they would debit their account obviously. Give me prayer No. 2 and we can come back for inter partes hearing''

[2] The submission put the service evidenced by the Affidavit of Service filed into doubt. But, despite the uncertainty or inadequacy of service, I would still deny the order sought on the following reasons. First, under section 7 of the Arbitration Act, the freezing order sought should be an interim measure of protection of the subject matter of arbitration. In the case of **BABS Security Limited v Theothermal Development Limited [2014] eKLR** the Court had the following to say:-

A consensus seems to have emerged from the string of judicial authorities cited and which the Court is familiar with, that, if an injunction is sought as the interim relief under section 7 of the Arbitration Act, existence of an enforceable arbitration agreement constitutes prima facie case in the context of GIELLA v CASSMAN BROWN CASE. But, of course, that is not enough to grant interim relief by way of a temporary injunction as the Court will be obligated to consider all the other factors before it comes to a decision that the Applicant deserves an injunction as a measure of protection of the subject

of the arbitral proceedings. The protection envisaged under the section is to ensure that the subject matter of the arbitral proceedings is not in any danger of being wasted or dissipated before the final decision by the arbitral tribunal is made on the matter. But the ultimate decision will depend on the peculiar circumstances of each case and matters such as; the nature of the contract to be preserved; the nature of and the potentiality of dissipation of the subject of the arbitral proceedings; and any other relevant factor attending the case will guide the decision of the Court in determining whether or not an order for interim protection should be made.

[3] What is the subject matter of arbitration herein or of the suit? This is a claim under a policy of insurance against the Defendant, Insurance Company and the insurer of a debt which is subject of the suit. The question which begs is; whether, accounts held by the Defendant in the Plaintiff Bank is the subject matter of the arbitration or this suit. Even with the most ingenious craft of high wit; it cannot be. Indeed, the accounts have nothing to do with the cause of action. I will repeat that: *the protection envisaged under the section 7 of the Arbitration Act is to ensure that the subject matter of the arbitral proceedings is not in any danger of being wasted or dissipated before the final decision by the arbitral tribunal is made on the matter.*

[4] Secondly, the Defendant is an insurance company with policy-holders drawn from the general insuring public and such interest is in the category of public interest which the Supreme Court has added as yet another ground for granting orders of interim nature. The Insurance Act has laid down a whole regime of statutory management of insurers in order to protect the insuring public. The action sought by the Plaintiff is in the nature of total freeze of the accounts of the Defendant whose effect would be to render complete paralysis of the Defendant. Such reliefs cannot even be granted to a Statutory Manager leave alone a policy holder like the Plaintiff. This is also not a winding-up cause, and even if it were only appropriate orders would be made. In any event, even if I were to place the freeze order on the scale of proof for a freezing order, it does not come anywhere close to meeting the thresholds. The fact that that a Mr Keith Beekmeyer, a Briish National, who purports to be the Chief Executive Officer of the Defendant has been charged with obtaining money through false pretence, conspiracy to defraud, obtaining a general licence on behalf of the Defendant by false pretence; or that there is suit pending between shareholder; does not establish an iota of the standard of proof required for freezing order. See what freezing orders cannot do in the case of **BGM HCCC NO 5 OF 2013 KANDUYI HOLDINGS LIMITED v BALM KENYA FOUNDATION & ANOTHER [2013] eKLR** where the court stated that;

''... freezing order... is not to be used: 1) to pressure a defendant; or 2) as a type of asset stripping (forfeiture); or 3) as a conferment of some proprietary rights on the plaintiff upon the assets of the Defendant. The purposes of any order that should be issued under Order 39 Rules 5 and 6 of the CPR is to prevent the Defendants or would be judgment-debtor from dissipating his assets as to have the effect of obstructing or delaying the execution of any decree that may be passed against him''.

[4] And again see the case of ***ELECTRIC MOBILITY COMPANY PTY LTD V WHIZ ENTERPRISES PTY LTD*** **[2006] NSWSC 580** that:

"...On the other hand, the appellate courts have reminded primary judges that they must always be vigilant to ensure that parties' assets are not frozen and their business lives impeded lightly...''

[5] The order being sought ***is to be used: 1) to pressure a defendant; or 2) as a type of asset stripping (forfeiture); or 3) as a conferment of some proprietary rights on the plaintiff upon the assets of the Defendant.*** Despite the seeming Board room wars, and pendency of a case between the shareholders of the Company, there is really nothing to show that the Defendants as a company will dissipate its assets or that the accounts are subject of the arbitration agreement or the policy of insurance. For those reasons, no serious court would give interim measure of protection in the nature of freezing accounts of an insurance company or any other person for that matter without causing extreme injustice on the Defendant. The order sought will shut down the Defendant insurance company and section 7 of the Arbitration Act was never meant to serve such ominous purpose. Who knows- and I am not saying it is the case here- this suit could be an extension of the Boardroom wars?

[6] The upshot is that I refuse the order to restrain the Defendant from debiting or dealing with or interfering with its own accounts listed in prayer 2 of the application dated 21st November 2014.

Dated, signed and delivered in court at Nairobi this 28th day of November, 2014

F. GIKONYO

JUDGE