



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 563 OF 2014

TREVVY JAMES OYOMBA1ST PLAINTIFF/APPLICANT

PIC CENTRE LIMITED 2ND PLAINTIFF/APPLICANT

VERSUS

ORIENTAL COMMERCIAL BANK LIMITED DEFENDANT/RESPONDENT

R U L I N G

1. This matter comes before the Court on Notice of Motion and a Certificate of Urgency on 3rd December 2014. The Application is brought under Order 40 Rules 1 and 2, Order 51(1) of the Civil Procedure Rules and Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act Cap 21 of the Laws of Kenya. It seeks a temporary injunction restraining the Defendant from freezing the Plaintiffs' Bank Accounts.
2. The interests of justice required the Respondent Bank should be served and eventually on the afternoon of 5th December 2014, the matter was heard.
3. Although there was insufficient time for the Respondent Bank to file a Replying Affidavit, the Risk Manager and Compliance Manager of the Respondent Bank attended and gave oral evidence under Oath. In addition the following documents were received into evidence:
 1. Standard Terms and Conditions for Account No. 0070000862 together with completed application forms by the First Plaintiff/ Applicant.
 2. Standard Terms and Conditions for Account No. 0070000941 in the name of the Second Plaintiff/Applicant. The Second Plaintiff also holds Account No 0070001040.
4. Mr. Ogutu appeared for the Plaintiffs and Ms. Makanga appeared for the Defendant Bank. Both were helpful in bringing out their respective parties cases. Mr. Ogutu presented his arguments clearly and concisely with reference to the documents before the Court. He had an opportunity to cross-examine the representative of the Bank, Mr Josiah Asembe, the Risk and Compliance Manager of the Bank. This meant that Mr. Ogutu had the additional task of having to deal with the Defendant's evidence by way of oral testimony rather than a written affidavit which he handled admirably.
5. The Application seeks on an urgent and ex-parte basis the following Injunctions under paragraphs

2, 3 and 4 of the Prayer:

“2. THAT this Honourable Court be pleased to grant a temporary order of injunction restraining the Defendant whether by itself, its employees, its servants or agents and/or otherwise however from restricting access, continued freezing and/or preventing the Plaintiffs/Applicants from dealing with Accounts Number 0070000941, 0070001040 and 0070000862 domiciled at the Respondent’s Westlands Branch Apollo Centre pending the inter partes hearing of this Application.

3. THAT this Honourable Court be pleased to issue an order directed at the Defendant/Respondent compelling it to unconditionally lift the freezing order placed by itself without any valid court order on the Applicants Accounts Number 0070000941, 0070001040 and 0070000862 domiciled at the Respondent’s Westlands Branch Apollo Centre and to immediately grant the Applicants unlimited access to the said accounts and that the Respondent be restrained by way of an injunction from freezing the said accounts pending the inter partes hearing and determination of this application or until further orders of this court.

4. THAT pending the inter partes hearing and determination of this suit this Honourable Court be pleased to grant a temporary mandatory injunction compelling the Defendant to grant the Applicants unlimited access to their Bank Accounts Number 0070000941, 0070001040 and 0070000862 domiciled at the Respondent’s Westlands Branch Apollo Centre and the Respondent whether by itself, its employees, its servants or agents and/or otherwise however be restrained from freezing the Applicants’ said accounts more so relating to the Applicants accessing the funds held in the said accounts”.

6. In effect the Plaintiffs are seeking mandatory interim orders preventing the Defendant from restricting access to and/or freezing the Plaintiffs’ three named accounts and in effect asking the court to compel the Defendant to lift the “freezing order” and to provide “unlimited access to the named Bank Accounts” and permit access to the said accounts.(Prayer 4) and provide banking services.
7. The main issues for determination now are:
 - (1) Whether the Bank was entitled to freeze the Applicant’s account; and
 - (2) Whether the Applicants are entitled to the interim mandatory injunctions sought.
8. The Grounds relied on in the Application seem to relate mainly to the Second Plaintiff (Grounds 4, 5, 6, 7). Grounds 8, 9, 15 and 17 relate specifically to the First Plaintiff.
9. The facts underlying Ground 1, in other words that the Bank accounts were frozen is admitted by the Bank. However the Bank denies illegality and relies on Clause 16 of its Standard Terms and Conditions.
10. Ground 2 states that the Bank proffered no valid reason for freezing the account “save for the fact that it acted on instructions from its Board of Directors”. However, the supporting affidavit states at paragraph 6 that on 16 November 2014 the Risk Manager informed the First Plaintiff that his personal accounts had been frozen and could not be accessed due to an Order of the Magistrate’s Court. As stated above, Mr. Josiah Asembe, the Risk Manager came to court and gave evidence on Oath, and he said that it was not him but the Branch Manager who informed the First Plaintiff that the Accounts had been frozen on 16 November 2014. It is important to note at this stage that only the First Plaintiff’s Accounts Nos. 070000862 and 0070000863 seemed to have been frozen at that stage.
11. Paragraph 7 of the Affidavit confirms that oral evidence stating that the First Plaintiff was informed that the account has been frozen pursuant to a court order served upon them by the officers of the Ethics and Anti Corruption Commission on 15 November 2014. A copy of the order was not provided to the Plaintiffs and was subsequently obtained by the Plaintiffs from the

- Chief Magistrate's Court, Kibera. It is annexed at TJ01.
12. As submitted by Mr. Ogutu for the Plaintiffs, that Order does not freeze the Bank Accounts. It is, in fact, a warrant authorising the named officer of the Ethics and Anti-Corruption Commission to investigate the First Plaintiff's named accounts. The warrant provides for requiring production, and scrutiny of books and records relating to the Plaintiff's account. The relevant period for investigation under the warrant is January 2013 to August 2014.
 13. TJ01 also includes the Notice of Motion filed in the Chief Magistrates Court. It sets out the Grounds and suspicions of the EACC. The Chief Magistrate was satisfied that it was necessary and desirable to make the Order. The Offences relied on in the Notice of Motion are (1) Abuse of Office contrary to Section 46 of Anti-Corruption and Economic Crimes Act 2003 and fraudulent acquisition of public property contrary to Section 45 (1) (a) of the Anti-Corruption and Economic Crimes Act 2003. The period is identified and the sums of money raising the need for investigation are set out as Kshs. 20,500,000.
 14. Paragraph 9 of the Supporting Affidavit again correctly sets out that an order relating to the personal accounts cannot and should not affect the accounts of the company. The ECACC thought the same and obtained a second warrant for the Accounts held by the Second Plaintiff that was served on the Bank on 21 November 2014 and the Second Plaintiffs accounts were frozen on 22 November 2014.
 15. It is clear from the statements attached at TJ03 that the First Plaintiff knew that the 2nd Plaintiff Company's Accounts were not frozen between 16 and 24 November 2014 because he withdrew and/or attempted to withdraw significant sums of money from Account No. 0070000941, namely:

1. Kshs. 84,600 on 18/11/2014
2. Kshs. 89,600 on 20/11/2014
3. Kshs. 30,000 on 20/11/2014
4. Kshs. 89,600 on 21/11/2014
5. Kshs. 70,000 on 21/11/2014 - by Cheque No. 0366
6. Kshs. 70,000 on 21/11/2014 - by Cheque No. 0365
7. Kshs. 30,000 on 21/11/2014 - by Cheque No. 0361
8. Kshs. 70,000 on 21/11/2014 - by Cheque No. 0364
9. Kshs. 70,000 on 21/11/2014 - by Cheque No. 0363

10) Kshs. 243,600 on 24/11/2014

Amounting to Kshs. 947,400 in total.

16. There were further attempts to withdraw funds between 24 November 2014 and 29 November 2014. Had these attempts (amounting to Kshs. 1,158,850) been successful the funds in the account would have nearly, if not completely, depleted the sum of 2,298,053.50 in the account on 4 November 2014. That is in marked contrast to the impression that the Plaintiff sought to create of several bank accounts being frozen simultaneously leaving the Plaintiffs with absolutely no means of support.
17. Ground 3 states that the Plaintiffs "operations are now crippled as they cannot meet their obligations including but not limited to staff salaries". Ground 4 states that, a number of persons and institutions are threatening to sue the Plaintiffs for breaches of contract. Grounds 5 and 6 suggests a long standing reputation and relationships built up over the years. The Supporting Affidavit refers only to the non-payment of salaries at paragraphs 16 and 17. Paragraph 18 refers to one contract. Exhibit TJ02 is said to contain contracts in evidence of the foregoing. That Exhibit contains a Lease for business premises on property LR 209/2484 Biashara Street (sometimes Tubman Road) at a sum of Kshs. 70,000 per month payable on 5th of each month. Notably that is exactly the sum withdrawn from Account No. 0070000941 four times on 21 November 2014. The Plaintiff says that the Defendant has usurped the powers of the court by freezing the accounts.
18. The Second Plaintiff was incorporated in August 2013. The contracts included in TJ02 are mainly dated either August or September 2013. There is a Renewal Endorsement for No. R8742914 dated 3 September 2014 seeking a payment of Kshs. 259,240 in other words 2 ½ months before

the account was frozen. The premises named are 209/2484 Kitamu House. There are no copies of current invoices or demands seeking immediate payment within the Exhibits.

19. In relation to the salaries to be paid to the employees of the second Plaintiff the contracts for the following are attached:

1. Mr. Patrick Olen, the Executive – Contract dated 12 August 2013 (2 copies) signed by the Chief Executive (The First Plaintiff), for the position of “Sports Photographer”, his remuneration was to be Kshs. 114,000 per month payable in arrears together with medical cover.
2. Frank Onyango Omondi also known as “the Executive” but employed as a Sports Photographer from 1/9/2013 at a salary of Kshs. 114,000 together with medical cover.
3. Kellen Muguru Muhari, “the Employee” was employed as a Systems Administrator with effect from 1/9/2013 at a salary of Kshs. 30,000 per month. It is noteworthy that the Systems Administrator is described as a “Cashing Agent” authorized to cash cheques in the Second Plaintiff’s letter to the Bank dated 28 November 2013.
4. Stephen Mudiari, “Executive”, employed as a Sports Photographer (Clause 3.1.3) at the salary of Kshs. 114,000 and medical cover.
5. Tropister Njeri Musheli, the Employee, employed as a further Systems Administrator at a Salary of Kshs. 55,000 per month.
6. Esther Lusweti employed as Communication and Marketing Lead at Kshs. 42,000 per month and medical cover.
7. Staffer Ondeyo – Executive employed as a “Sports Photographer” at the same remuneration as the other three Sports Photographers.

20. The above and others are named as principals in the Medical Cover Scheme 2013/2014 which ran from 5/9/2013 to 4/9/2014 which does not include the First Plaintiff’s name.

21. There is no evidence within the Exhibits of the current liabilities of the Second Plaintiff. The documents produced relate back to August/September 2013.

22. On behalf of the First Plaintiff it is said that the effect of No Order will cause untold hardship. However, the Application is not supported by clear and cogent evidence setting out exactly what are his expenses and how much he needs to support and maintain himself and his family. For example, as stated, the only lease exhibited is not for residential premises.

23. Given the circumstance of the case and the need for urgency, although the Respondent Bank did attend by Counsel, Miss Makanga, and the Risk and Compliance Manager gave oral evidence, it did not have an opportunity to put a more considered response to the Application.

24. The Respondent Bank’s position can be summarised as follows:

1. That when the Plaintiffs opened their accounts with the Bank, they did so under the Standard Terms and Conditions and pursuant to a written application (“Ts and Cs”).
2. Their agreement to the Standard Terms and Conditions was signified by appending their signatures to each page of the Terms and Conditions.
3. In the case of the First Plaintiff the signature was of the First Plaintiff. For the Second Plaintiff the Application was signed by the First Plaintiff a Mr. Jack Otieno Owuor and a Mr. Mohammed Amin Shallie.
4. In each case the account was opened at the Westlands Branch of the Bank.
5. The Principal account designation was applied to Account No. 0070000862 in the name of the First Plaintiff. This seems to be a current account.
6. In addition there was a fixed/call Deposit Account also opened in the name of the 1st Plaintiff referred to as No. 0070000862/3 and No. 0070000863 on the same document.
7. The personal accounts were opened on 20 April 2013 and the Company Account No 0070000941 was opened on 26 August 2013
8. The Bank was served with two court orders the first on 15 November 2014 referring to Account No 0070000862 and the second on 21 November 2014 in respect of Account No. 0070000941.
9. The Bank then froze Account No. 0070000862 on 16 November 2014 as well as its subsidiary accounts and account No 0070000941 and associated accounts on 22 November 2014.
10. It is accepted by the Bank that they did not obtain a freezing order from the court, but it relies on Clause 16 of its Standard Terms and Conditions. Clause 16 provides:

“16. The Bank may at any time freeze any account of the Customer if and so long as there is any dispute or the Bank has doubt for any other reason (whether or not well founded as to the person or persons entitled to operate the same, without any obligation to institute interpelader proceedings or to take any other step of its own initiative for the determination of such dispute or doubt”.

11. The Risk Manager accepted that the Bank Charges applied to the accounts after 16 November or 22 November relevant charges would have to be refunded to the respective Plaintiff.
12. The Risk Manager accepted that the Bank Charges appear to have been applied to the Company's Account No. 0070000941 should be refunded as the account is not operating.
13. The Defendant says that it is their practice to freeze any accounts that are under investigation, until the investigation is over and that the freezing of the accounts was approved by the Board of Directors. There was also a suggestion in the oral evidence that a government Agency asked the Bank to freeze the Accounts. Neither the Applications nor the Warrants issued refer to the freezing of a bank account.
14. It is further said on behalf of the Bank that they are required by the Central Bank of Kenya to only re-activate Bank Accounts when there is good justification to do so. However, the compliance Manager was very frank in his evidence when he accepted that the Central Bank had not been informed until that morning (5/12/2014).

The Orders of Chief Magistrate's Court at Kibera:

25. There are two warrants that issued from the Chief Magistrate. The first appears to have been made on 15 November 2014. It appears at the end Exhibit TJ01. The warrant of the magistrate Authorises the Investigation named therein to—

“...require the production for his scrutiny of any such bankers book or books, original cheques, account opening documents, mandate cards, EFT instruction letters, disbursement authorization, schedules and statements and to take copies of any relevant entry or matter in such documents for the period of January, 2013 to August, 2014”.

relating to Account No. 0070000862.

26. The Second order/warrant is dated 20 November and served the Bank on 21 November. It refers to Account No. 0070000941 being the account of the Second Plaintiff and authorises the named Investigator to:-

“...require the production for his scrutiny of any such bankers book or books, original cheques, account opening documents, mandate cards, EFT instruction letters, disbursement authorization, schedules and statements and to take copies of any relevant entry or matter in such documents for the period of January, 2013 to August, 2014”

Relating to Accounts No 007000941 and 008001040.

27. The Applicant to these orders is the Ethics and Anti-Corruption Commission and the Respondent is Oriental Commercial Bank Ltd, the Respondent in these proceedings.

28. The Ethics and Anti-Corruption Commission (“the Commission”) was set up by the Ethics and Anti-Corruption Act No 2 of 2011. The Commission has the powers conferred by Articles 252 and 253 of the Constitution of Kenya 2010 and in particular by Section 11 of the Act which provides:

11. Additional functions of the Commission

(1) In addition to the functions of the Commission under Article 252 and Chapter Six of the Constitution, the Commission shall—

(a) in relation to State officers?

(i) develop and promote standards and best practices in integrity and anti-corruption;

(ii) develop a code of ethics;

(b) work with other State and public offices in the development and promotion of standards and best practices in integrity and anticorruption;

(c) receive complaints on the breach of the code of ethics by public officers;

(d) investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or violation of codes of ethics or other matter prescribed under this Act or any other law enacted pursuant to Chapter Six of the Constitution;

(e) recommend appropriate action to be taken against State officers or public officers alleged to have engaged in unethical conduct;

(f) oversee the enforcement of codes of ethics prescribed for public officers;

(g) advise, on its own initiative, any person on any matter within its functions;

(h) raise public awareness on ethical issues and educate the public on the dangers of corruption and enlist and foster public support in combating corruption but with due regard to the requirements of the Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003), as to confidentiality;

(i) subject to Article 31 of the Constitution, monitor the practices and procedures of public bodies to detect corrupt practices and to secure the revision of methods of work or procedures that may be conducive to corrupt practices; and

(j) institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.

As can be seen these are extensive.

29. Section 11(2) of the Ethics and Anti-Corruption Act provides: “(2) Any person who contravenes subsection (1)(i) commits an offence”

30. Regard must also be given to the Proceeds of Crime and Money Laundering Act 2009, in particular the following Sections:

“5. Failure to report suspicion regarding proceeds of crime

A person who wilfully fails to comply with an obligation contemplated in section 44(2) commits an offence.

6. Defence

If a person is charged with committing an offence under section 3, 4 or 5, that person may raise as a defence the fact that he had reported a suspicion under the terms and conditions set forth in section 44 or, if the person is an employee of a reporting institution, that he has reported information pursuant to section 47(a).

7. Financial promotion of an offence

A person who, knowingly transports, transmits, transfers or receives or attempts to transport, transmit, transfer or receive a monetary instrument or anything of value to another person, with intent to commit an offence, that person commits an offence.

8. Tipping off

(1) A person who—

(i) knows or ought reasonably to have known that a report under section 44 is being prepared or has been or is about to be sent to the Centre; and

(ii) discloses to another person information or other matters relating to a report made under paragraph (i).

(2) In proceedings for an offence under this section, it is a defence to prove that the person did not know or have reasonable grounds to suspect that the disclosure was likely to prejudice a report made under subsection (1).

13. Misuse of information

(1) A person who knows or ought reasonably to have known—

(a) that information has been disclosed under the provisions of Part II; or (b) that an investigation is being, or may be, conducted as a result of such a disclosure, and directly or indirectly alerts, or brings information to the attention of another person who will or is likely to prejudice such an investigation, commits an offence.

19. Immunity where actions are exercised in good faith

A suit, prosecution or other legal proceedings shall not lie against any reporting institution or Government entity, or any officer, partner or employee thereof, or any other person in respect of anything done by or on behalf of that person with due diligence and in good faith in the exercise of any power or the performance of any function or the exercise of any obligation under this Act.

44. Monitoring and Report by institutions

(1) A reporting institution shall monitor on an ongoing basis all complex, unusual, suspicious, large or such other transactions as may be specified in the regulations, whether completed or not, and shall pay attention to all unusual patterns of transactions, and to insignificant but periodic patterns of transactions which have no apparent economic or lawful purpose as stipulated in the regulations.

(2) Upon suspicion that any of the transactions or activities described in subsection (1) or any other transaction or activity could constitute or be related to money laundering or to the proceeds of crime, a reporting institution shall report the suspicious or unusual transaction or activity to the Centre in the prescribed form immediately and, in any event, within seven days of

Authorities

31. I considered the Authorities provided by Plaintiffs Counsel at end of his submissions, these were:

(1) **Civil Case No 175 Of 2014 (Viable Deco Solutons Limited Vs Co-Operative Bank Of Kenya Limited**

(2) **Civil Case No 404 Of 2008 BENSON ODONGO OKWIRI V CONSOLIDATED BANK OF KENYA LIMITED 2008 EKL**

I also looked again at *Giella Vs Cassman Brown & Co. Ltd (1973) E.A 358*. *Giella* sets out the principles that are well known:

- i. An applicant has to establish a prima facie case with a probability of success;
- ii. There has to be demonstration that damages would not be an adequate remedy in case the injunction is denied; and
- iii. In case of any doubt on the above two considerations the court can consider balance of convenience having regard to the circumstances of the case.

32. Moving on to the issue of a mandatory Injunction, I am again guided by the arguments in paragraph 14 of *Civil Suit No. 175 of 2014* which states: that since the Applicant seeks an Interlocutory Mandatory Injunction, in addition to the principles set out in *Giella v Cassman Brown & Co. Ltd*, the Applicant must also meet the following thresholds set out in *RAFIQUE EBRAHIM V WILLIAM OCHANDA T/A OCHANDA & ADVOCATES [2013] Eklr* that:

- i. a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstance and only in clear cases where the Court thinks that the matter ought to be decided at once or where the injunction is directed at simple and summary act which can easily be remedied; and
- ii. a mandatory injunction at interlocutory stage is merely granted, only where the Applicant's case is clear and incontrovertible.

and

CIVIL CASE NO. 262 OF 2012: (2013) eKLR that:

“... where the Court has granted an interlocutory Injunction prayed for, it should not grant a mandatory injunction whose effect shall bring the litigation to an end”.

33. Again, there are computing arguments that the imposition of a mandatory injunction at this stage will bring the matter to an end, alternatively the refusal of such an injunction has a serious impact on the Plaintiffs.

34. There is insufficient evidence before the court and the Plaintiff must have an opportunity to address the Respondents obligations, therefore this is another issue upon which an inter partes hearing is a better forum for resolution. It is true that the matter was, in effect, heard ex parte with limited evidence from the Bank. That was an exceptional circumstance bearing in mind the seriousness of the implications of the freeze unilaterally imposed by the Respondent.

35. In the submissions of Plaintiffs, I note a similarity with the arguments before the Court of Appeal in the matter of *MUCAHA V RIPPLES LTD 35 Civil Application No. Nai. 186 Of 1992 KLR 1993* at 41 where a Defendant is alleged to have taken the law into its own hands and then is seeking to gain advantage from that position the Court there also urged caution in the granting of mandatory injunctions and stated that mandatory injunctions will only be granted exceptionally and in the clearest cases (page 39). The reason is that there will normally be no question of granting a further mandatory injunction at trial as the Plaintiff will have obtained all the orders he needs (headnote).

A mandatory injunction requires the taking of positive steps (Megary J. in *Shepherd Homes vs. Sandham [1970] 3 WLR 348* at 356).

35. I also bear in mind the duty of full and frank disclosure and the equitable principle of having clean hands. In deciding whether the Bank acted in breach of its contractual obligations, or otherwise acted in an arbitrary and offensive fashion, the Court must have regard to the factual background. The Bank had been served with an Application setting out categorically that the Accounts in question and the Account holders are being investigated by the Ethics and Anti-Corruption Commission.

36. There is, on the face of it, an issue as to whether Clause 16 of the Standard Terms and Conditions is enforceable. as to whether the Defendant should be entitled to enforce or otherwise rely upon a clause that is so widely drafted as to appear unfair upon its face,. (applying the argument in paragraph 7 of the Judgment of Hon. Justice Gikonyo, (*Civil Case No. 175 of 2014*).

That consideration should be weighed against the principal that the parties to a contract are entitled to come to whatever bargain they choose. Therefore, there are arguments on both sides and again this is an issue better resolved at an inter partes hearing (as in *Civil Case No. 175 of 2014*).

36. The Applicant will need to demonstrate either (a) a breach of the contractual terms; or (b) other grounds upon which the contractual terms should not be applied to this case. The Plaintiffs also need to establish why damages would not be an adequate remedy. It is fair that the Plaintiffs, should also have such an opportunity at an inter partes Hearing.

37. In deciding whether the Bank acted in breach of its contractual obligations or otherwise in an arbitrary and offensive fashion, the Court must have regards to the faction background. The Bank had been served with an Application setting out categorically that the Accounts in question and the Account Holders are being investigated under the Anti-Corruptions and Economic Crimes Act 2003. That would inevitably raise some concerns.

38. In the circumstances and upon consideration of all the matters before the Court, the Plaintiffs have not established, at this stage, on a balance of probabilities that the Defendant has acted in breach of its contract and illegally.

39. The question of whether the Defendant has acted unconscionably requires a different analysis of the competing obligations upon the Bank, on the one hand is the purely contractual obligations to the Plaintiffs. On the other are the Bank's obligations under the Money Laundering Regulations as well as its duties to the Regulator i.e. the Central Bank.

41. The Plaintiffs have failed to provide any evidence as to whether the Bank Accounts in question were (a) their only source of income and (b) that was known to the Bank.

42. The matters that affect only the First Plaintiff are said to be:

1. That the 1st Plaintiff has not paid for medical care in the sum of Kshs. 638,000 (paragraph 15 of Affidavit).
2. Pay for domestic workers (paragraph 17).
3. That he cannot pay for house rent.
4. That he has other contractual arrangements.

The medical service contract exhibited to the Supporting Affidavit is dated 5/9/2013. The Schedule that appears under cover of Letter of 18 September 2013 does not contain the First Plaintiff's name. In the circumstances, the evidence is neither up to date nor probative of the issues.

In relation to House rent the need and quantum's not supported by independent evidence as the only lease exhibited relates to business premises in Tubman Road.

The Plaintiffs also allege that the actions of the Bank have led to a loss and/or damage to their business reputation and threats to sue. The exhibits do not contain any letters threatening legal proceedings or final demands.

43. However, taking into account and making allowance for the dignity of a person and his right to shelter and subsistence, the Court would be amenable to making an order that requires the Bank to provide the 1st Plaintiff with sufficient funds to meet his immediate needs. Unfortunately, the Plaintiff has not provided any up to date or cogent evidence as to what those needs would be and the costs thereof.

The court is therefore hampered in its ability to make such an order. Should the Plaintiff provide such evidence, the matter can be reviewed.

44. In addition it is unclear what happened to the funds withdrawn between 17 and 22 November and why they were not used to pay existing debts of the 2nd Plaintiff giving rise to an issue as to clean hands.

45. In the circumstances the Orders sought cannot be made on an Ex parte basis.

I therefore direct the matter be heard inter partes on the following Directions.

1. **Plaintiffs to have leave which is hereby granted to file and serve on Defendant a further affidavit setting out the quantum of living expenses together with documentary evidence showing how those expenses arise within 14 days.**
2. **The Defendant to have leave to file and serve a Replying Affidavit in response to the Application and any Further Affidavit within 14 days after service.**
3. **The Plaintiff to have leave to file a Supplementary Affidavit if considered necessary within 14 days thereafter.**
4. **List for inter partes Hearing before any Judge of this Division.**
5. **Parties to take a date from the Registry on a priority basis.**
6. **Costs in the cause.**

DATED SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2014.

FARAH S. M. AMIN

JUDGE