



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 691 of 2012

**JOHN KIMANI NGURE T/A KEYLINK
DISTRIBUTORS:.....:PLAINTIFF**

- VERSUS -

**SIMBA MERCHANDISING CO. (K) LIMITED:.....:
DEFENDANT**

JORI ENTERPRISES LIMITED:.....:PROPOSED INTERESTED PARTY

R U L I N G

1. The **Notice of Motion** before the court is dated **3rd December 2012** and seeks the following orders:-

1. That this Honourable Court be pleased to include the Applicant as an Interested Party in the instant proceedings.

2. That this Honourable Court be pleased to find that the interests of the Interested party herein supersede those of the Plaintiff herein as concerns the funds in Defendant's Account Number 0201117038 held at Development Bank of Kenya Limited, Finance House, Loita Street Nairobi, to the tune of Kshs.1,500,000.00 (one million five hundred thousand).

3. That this Honourable Court be pleased to vary, this Honourable Courts order 2(a) dated 1st November 2012, relating to the aforesaid account to the tune of Khs.1,500,000.00 (one million five hundred thousand) in favour of the Interested Party.

4. That the costs of this application be in the cause.

2. The application is supported by affidavit of **JOSEPHINE WARINGA** dated **3rd December 2012**. It is opposed by replying affidavit of **JOHN KIMANI NGURE** dated 18th December 2012.

3. The brief history of the application is that on 1st November 2012 this court issued interim orders in favour of the Plaintiff freezing certain accounts belonging to the Defendant including Account number 0201117038 held at Development Bank of Kenya Limited Finance House, Loita Street Nairobi to the tune of Kshs.5,502,000/= for the purpose of satisfying the decree that may be passed in the suit herein against the Defendant.

4. While those interim orders have not been discharged as the application has not been heard *inter-partes*, the current Applicant, the Interested Party has come to court to join these proceedings and

has made prayers as above among them that he be allowed to cash cheques of upto Kshs.1,500,000/= which were allegedly issued to it by the Defendant and drawn from the above account. This is on the basis that the Interested Party has a Judgement/Decree emanating from **CMCC NO. 4732 OF 2011 OF MILIMANI COMMERCIAL COURTS, NARIOBI – JORI ENTERPRISES LTD. – VS – HAVEN D. MANDAVIA T/A SIMBA MERCHANIDINSING CO. (K) LTD.** The said Defendant has allegedly issued cheques to the tune of Kshs.1,500,000/= to the Interested Party as decretal sums of the aforesaid decree to be drawn from the above bank account. When the Interested Party sought to cash in the cheques the Defendant alerted the Interested Party of the court order freezing any activity in the account, hence this application.

5. The Plaintiff has opposed this application on several grounds among them that the Defendant in CMCC NO. 4732 of 2011 as per the annexed supporting affidavit “**JR-1**” is HAVEN D. MANDAVIA and not the Defendant herein who is SIMBA MERCHANDISING CO. (K) LTD. The Defendant in the current suit is a company with a distinct and separate legal personality.

6. Again, all the (6) cheques annexed to the supporting affidavit as exhibit “**JR – 2** “ drawn on the above account were evidently made in favour of an individual (Kiama Wangai) and there is no evidence that the said cheques were being received in trust for and on behalf of the Interested Party and/or in liquidation of the decretal sum in CMCC No. 4732 of 2011.

7. It is further submitted for the Plaintiff that all the said cheques allegedly issued to the Interested Party were issued subsequent to those issued to the Plaintiff going by the serial numbers on the cheques and in that regard the Plaintiff’s cheques take priority.

8. I have considered the application and opposing submissions. I am persuaded by the submissions of the Plaintiff that the Applicant has not demonstrated an interest which supersedes that of the Plaintiff herein.

Further, even if the Interested Party has established a right, that right is subject to the Plaintiff’s rights as it is clear that the cheques issued to the Plaintiff came first in time.

9. It is also clear that the Interested Party has several options open to him to execute his decree.

10. More importantly, the original application by the Plaintiff is yet to be heard *inter-partes*. When the application is finally determined it is possible that the interim orders may not be confirmed. In that regard it is open for the Interested Party to participate in this suit and to challenge the interim orders at the *inter-parte* hearing stage.

11. For the reasons above, I dismiss the Notice of Motion by the Interested Party dated 3rd December 2012 with costs to the Plaintiff.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 26TH DAY OF FEBRUARY 2013

E. K. O. OGOLA

JUDGE

Present:

Njoroge for Plaintiff

N/A for Defendant

N/A for Interested Party

Teresia – court clerk