



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL CASE NO. 137 OF 2013**

**SERAH SHILOO TIPIS**

**EUNICE MWENDE MUSYOKA (suing as the duly appointed Attorneys of**

**VICTOR ODHIAMBO ORUKO.....PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LTD..... DEFENDANT**

**RULING**

1. The Plaintiffs Notice of Motion application dated 10<sup>th</sup> April 2013 supported by the Affidavit of Serah Shiloo Tipis sworn on the same date sought a mandatory injunction ordering the Defendant, its employees, servants, agents and/or assigns or any other person claiming through it to implement the Plaintiff's instructions vide the letter dated 23<sup>rd</sup> February 2013 in respect of his Account No. 234794421 held at Moi Avenue Branch.
2. The bone of the Plaintiffs' contention was that having been appointed as the duly appointed attorneys of Victor Odhiambo Oruko, the Defendant had refused, declined and/or neglected to endorse their introduction as signatories to the bank account No. 234794421 held in the Defendant's Moi Avenue Branch, pursuant to the letter of instructions dated 23<sup>rd</sup> February 2013 by Victor Odhiambo Oruko.
3. Serah Shiloo Tipis deponed in her affidavit that the Defendant had declined to effect the instructions on the ground that there was a court restriction on the said account over an on-going criminal case which was not justified as the Defendant's letter of 12<sup>th</sup> March 2013 related to A/C No. 1109064691 held at Industrial Area.
4. Through a Replying Affidavit by Elzeba Mittei sworn on 15<sup>th</sup> May 2013, the Defendant averred that the said Victor Odhiambo Oruko opened Account Number 234794424, which during the Defendant's upgrade system, the account was converted to Account Number 1109064691 and that for all purposes and intents the said account numbers referred to one (1) account. This fact was reflected in the Amended Plaint filed on 31<sup>st</sup> May 2013.
5. It further stated that pursuant to criminal investigation Restriction was put on the same account and that the Plaintiffs had sought to be added as signatories of the said account which it had declined to do as the said action was done to protect the interests of both the Plaintiff and the Defendant in light of the non-conversion fraud to which the said Victor Oshiambo Oruko was a suspected party.
6. In their written submissions dated 11<sup>th</sup> June 2013 and filed on 12<sup>th</sup> June 2013, the Plaintiffs submitted that they were entitled to the orders for mandatory injunction on the ground that the said

Victor Odhiambo Oruko had a constitutional right to deal with his account. The Plaintiffs argued that they had satisfied the condition set out in the **Geilla Vs. Cassman Brown & Co. Ltd. (1973) E.A 358**

7. In its written submissions dated 19<sup>th</sup> June 2013 and filed on 21<sup>st</sup> June 2013, the Defendant argued that in the absence of any special circumstances, a mandatory injunction would normally not be given. It relied on the cases of Civil Case No 2225 of 1992 **Belle Maison Limited vs Yaya Towers Limited, Florence I. Makotsi t/a Our Connections & Another vs Fortune Properties Limited and Others [2006]eKLR Morris and Company Limited vs Kenya Commercial Bank Limited and others [2003] 2 EA 600, Shepherd Homes Limited vs Shandham (1970) 3 All ER 402, Qualitron Limited vs Shaban Swedi, quoted with approval in, Canadian pacific Railway vs Gaud (1949) 2 KB 239.**
8. As was pointed out by the Defendant, it is not clear why it has taken the Plaintiff since 31<sup>st</sup> March 2013 to have brought this application. The court is not satisfied that the Plaintiffs absence from the country since 2009 had caused him to suffer loss or damage because no proof has been provided before this court.
9. The Special Power of Attorney donated by the said Victor Odhiambo Oruko to the Plaintiffs herein was registered at the lands Office on 19<sup>th</sup> March 2013, less than a month before the Plaintiffs filed the present application. It does appear to this court that the said special power of Attorney was donated by the said Victor Odhiambo Oruko specifically to circumvent the restrictions that had been placed over his account.
10. The court finds itself in agreement with the Defendant that the Plaintiffs had come to court with unclean hands having failed to disclose material and crucial information and for attempting to abuse the process of the court by obtaining an order that would be inconsistent with the restriction that had been placed pending the criminal investigations.
11. The facts of this case are totally contested making it an unsuitable case for a court can issue a mandatory injunction. Due to the divergence in the affidavit evidence presented by both parties, the court is of the view that this is a matter that would best be resolved by proceeding to full, and the matter heard on merit.
12. In aiming at the said conclusion, the court has had due regard to the case of **Kenya Breweries Ltd Vs. Okeyo [2002] 1 E.A 109** where the court held as follows:-

***“ A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought the matter sought to be decided at once or where the injunction was directed at a simple summary act which could be easily remedied.”***

13. Indeed, a mandatory injunction can only be granted in the clearest of the cases where the court finds that it would save judicial time to make the order during the interlocutory stage instead of waiting until after the trial. This is, unfortunately, not one of such clear cases.
14. In the circumstances foregoing, the court is not persuaded by the Plaintiffs' arguments that they are entitled to an order for mandatory injunction and accordingly, their Notice of Motion application dated 10<sup>th</sup> April 2013 and filed on the same date, being unmerited and an abuse of the process of the court, the same is hereby dismissed with costs to the Defendant.
15. Orders accordingly.

**DATED and DELIVERED at NAIROBI this 20<sup>th</sup> day of September 2013**

**J. KAMAU**

**JUDGE**