



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 142 OF 2013

PRINTWELL INDUSTRIES LIMITED PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED DEFENDANT

R U L I N G

1. By a Notice of Motion dated 4th April 2013 brought under Certificate of Urgency, the Plaintiff herein seeks orders from this Court that a temporary injunction do issue to restrain the Defendant whether by itself, its servants, agents or employees from operating, processing, transacting or dealing in any manner whatsoever with the Plaintiff's account No. [particulars withheld] held at the Defendant's Queensway House Branch, Nairobi. It requested that such Order be made pending the hearing and determination of the Application on the one hand and the hearing and determination of this suit on the other. Further, the Application prayed for Orders that the Plaintiff be at liberty to inspect the Defendant's books and records and to take copies of statements of account, cheque deposits, cash withdrawals, account opening documents and any other documents relating to the said account. The Application was brought under the provisions of **Order 40 rule 2** of the *Civil Procedure Rules* as well as under **sections 1A, 1B, 3A and 63 (e)** of the *Civil Procedure Act* and **section 179** of the *Evidence Act*.
2. The grounds in support of the Plaintiff's Application read as follows:
 - “a) The Plaintiff is a limited liability company registered and incorporated in the Republic of Kenya.**
 - b) The Plaintiff is the rightful owner and beneficiary of cheque numbers 126363 dated 13/12/12 and 126364 and 17/12/12 issued by Moran (EA) Publishers Limited in favour of the Plaintiff and cheque number 001420 dated 28/12/12 issued by Vide Muwa Publishers Limited in favour of the Plaintiff.**
 - c) The Defendant's servants, agents or employees misappropriated the Plaintiff's aforesaid cheques and fraudulently opened an account number [particulars withheld] at the Defendant's Quesway House Branch through which account the Defendant's servants, agents or employees cleared the said cheques totaling Kshs.2,137,846.00 and**

cashied them.

d) The Defendant's actions as aforesaid are illegal and have caused the Plaintiff to suffer substantial loss while exposing the Plaintiff to further losses as the aforesaid account number [particulars withheld] held at the Defendant's Queensway House Branch in the Plaintiff's name remains operational.

e) Demand issued to the Defendant has been responded to casually with no assurance of any action having been taken to safeguard the Plaintiff's interest in so far as the said account remains operational.

f) Unless the orders sought are granted, more of the plaintiff's cheques may be illegally and fraudulently obtained by the Defendant's servants, agents or employees and cleared through the said account resulting in irreparable loss and damage to the Plaintiff".

3. The Plaintiff's Application was supported by the Affidavit of one of its directors namely **Sharmilla Hilda D'Cunha** sworn on 4th April 2013. The deponent detailed that the Plaintiff was a limited liability company incorporated in Kenya and carried on the business of printing, running a printing factory at its premises in the Industrial Area, Nairobi. In December 2012, the Plaintiff had received 3 cheques in its favour from two of its customers namely Moran (EA) Publishers Ltd and Vide Muwa Publishers Ltd totalling Shs. 2,137,846/-. The deponent maintained that the cheques were stolen and had been deposited in the above numbered account with the Defendant's Queensway House Branch, Nairobi. The Plaintiff had investigated the theft of the cheques and reported the matter to the Banking Fraud Investigation Department. Thereafter, on 25th January 2013 the Plaintiff's advocates had written to demand payment from the Defendant of the amount, in relation to the stolen cheques, cleared through the said account and also demanding that the account be frozen and that the account opening documents be provided to it. The Defendant had responded by detailing in a letter to the Plaintiff marked "without prejudice" and dated 4th February 2013 that it was still investigating the theft and asked the Plaintiff to take no precipitate action. The Plaintiff feared that unless injunctive a Orders were issued as against the Defendant, the said account No. [particulars withheld] could still be used to commit further theft as against the Plaintiff exposing it to irreparable loss. Further, the Plaintiff was unable to establish the facts in relation to the perpetrators of the theft of the cheques without the Defendant bank revealing the information as to just who had opened the said account.
4. The Defendant responded by the swearing and filing of a Replying Affidavit on 30th May 2013. The said Replying Affidavit was sworn by one **Nereah Okanga** who is a Legal Counsel with the Defendant bank, authorised on its behalf. She had perused the records as held by the Defendant bank and had conducted investigations into account opening procedures instigated by the Plaintiff. The deponent noted that sometime in December 2012, the Plaintiff company had made an application to open an account at the Defendant's Hurlingham Branch, Nairobi. In accordance with the Defendant Bank's practice, the application and accompanying documents were forwarded to its Operations Processing Centre on 18th December 2012. The deponent went on to say that the Defendant carried out due diligence and that there was nothing to hinder the opening of the said account number [particulars withheld] to be operated by the Plaintiff company. As regards the Plaintiff's documents annexed to the Supporting Affidavit, the Defendant objected to the production of its letter dated 4th February 2013 addressed to the Plaintiff as it had not waived privilege for the production thereof. Apart from that, the deponent maintained that the Plaintiff was not deserving of the Orders sought by its Application as such did not meet the barest of conditions for granting the same. She regarded this suit as frivolous and vexatious and opined that the Plaintiff had not demonstrated what harm or irreparable loss it would suffer if the Orders prayed for were not granted.
5. The Plaintiff's submissions with regard to its said Application dated 4th April 2013 were filed herein on 26th June 2013. It is noted that its first prayer as regards the halting of the operation of

account number [particulars withheld] had been granted at the *ex parte* stage and remained in force. It noted that in the Replying Affidavit filed by the Defendant, it had annexed some of the documents listed in the prayer 4 of the Application but did not provide Statements of account, cheque deposit slips or cash withdrawals slips. In the Plaintiff's opinion, these documents were necessary for it to complete its claim as against the Defendant fully. It appears that the Plaintiff's main complaint is that the Defendant allowed the opening of a phantom account to which the proceeds of cheques stolen from the Plaintiff were cleared and encashed to the detriment of it and a sum of Shs. 2,137,846/-had been lost. The Plaintiff submitted that it was not disputed that the Defendant did open a bank account number [particulars withheld] with its Queensway House Branch in the name of the Plaintiff. However, the Plaintiff noted that the persons who operated the account opened by the Defendant were not the directors of the Plaintiff Company. Further, the Plaintiff submitted that the documents of incorporation annexed to the Defendant's Replying Affidavit detailed a phantom company incorporated long after the Plaintiff Company had been in existence for about 6 years. The Court notes that these statements have been submitted from the bar and is not backed up by the Supporting Affidavit to the Application before this Court. Thereafter, the Plaintiff annexed to its submissions, the Central Bank of Kenya's Prudential Guidelines for Institutions licensed under the Banking Act. It pointed out various clauses in those Guidelines relating to banks obtaining and maintaining proper identification of customers wishing to open accounts or make transactions with the particular bank concerned in each instance. The Plaintiff maintained that there was nothing to show in the Defendant's Replying Affidavit that it had abided by the Guidelines when opening the said account. The Plaintiff also referred the Court to **sections 3 and 45 (1) (b) (i)** of the *Proceeds of Crime and Anti-money Laundering Act (2009)*. In this regard it considered that the Defendant bank had committed an offence under that Act in that it had illegally opened the phantom account which had then been used to steal the cheques proceeds from the Plaintiff.

6. The Defendant filed its written submissions herein on 19 July 2013. It commenced the same by detailing the prayers requested by the Plaintiff in its Application before Court. It submitted that the Application, as canvassed, alleged fraud on the part of the Defendant whom the Plaintiff sought to hold liable for the loss of the proceeds of the three cheques (and any other cheques) cleared through the said account No. [particulars withheld]. The Replying Affidavit to the Application clearly denied the allegations levied against the Defendant by the Plaintiff. The Defendant considered the issues before Court to be as follows:

“a. Whether the Defendant exercised due diligence and followed procedure in opening Bank Account Number [particulars withheld] for Printwell Industries Limited?

b. Whether the Plaintiff was entitled to statements of accounts, cheque deposit slips and other incidentals documents in relation to Bank Account Number [particulars withheld] and whether the same should be availed to them for inspection?

c. Whether the Plaintiffs are entitled to the orders sought?”

As regards the first issue above, the Defendant maintained that when a customer opened an account with any banking institution, there was a requirement that he/she should provide correct information while, on the other hand, the Bank was required to exercise due diligence and verify the validity of the information disclosed. The Defendant maintained that it had exercised and carried out due diligence according to the Practice and Procedures of the Kenya Banker's Association as well as the Central Bank's Rules in ascertaining the true status of the Plaintiff company. It maintained that there was nothing in place to hinder the opening of the said account and the same was being operated by the Plaintiff Company. There was no requirement for the Defendant bank to carry out a search at the Companies Registry to verify as to who were the directors of the Plaintiff company. There was not an iota of evidence before the Court, adduced by the Plaintiff, to show that the Defendant had failed to exercise due diligence in the opening of the account. In that regard, it submitted that the Court should not find any fraud or illegality on the Defendant's part.

7. As regards the prayer of the Plaintiff that it was entitled to the various documents as detailed in the Application, the Defendant submitted that the operations of the Defendant's customers' banking and/or financial details should be treated with utmost confidentiality. It maintained that the information was extremely sensitive and could only be released upon the issuance of a Court Order. Further, on the point as to the Defendant being entitled to take copies of such documents, this would fall within the parameters of privileged documents as envisaged under the Evidence Act. The Defendant felt that any arbitrary release of such information by the Defendant could be construed as a negligent act on its part. The Defendant submitted that the Plaintiff's Application was a blatant attempt by it to search for clues to trace its messenger who allegedly went missing after being dispatched to go to bank what it termed "the alleged cheques". It further submitted that the Application was an attempt by the Plaintiff to use the Defendant as a sacrificial lamb for lapses that were clearly committed by the Plaintiff's own employees, who had now gone missing. In terms of whether the prayers for interlocutory Orders by the Plaintiff should be granted, the Defendant pointed to the principles of granting injunctions as laid down in the case of Giella v Cassman Brown including the necessity for the Applicant to prove a *prima facie* case, that it must show that it stands to suffer irreparable damage that cannot be compensated by way of damages and if there should be any doubt, the Court should decide the matter on the balance of convenience. It was the Defendant's submission that the Plaintiff had failed to satisfy these conditions. It noted that the Plaintiff had gone to great lengths to allege that the Defendant had colluded with the holders of the account in question to open the same and to act upon it without following due procedures. However, the Plaintiff had not gone further to demonstrate how these alleged fraudulent acts were perpetrated, if at all. It had also cited the provisions of the Prudential Guidelines issued by the Central Bank of Kenya. The Defendant was incredulous that it could be considered by the Plaintiff to have participated in money laundering to the extent that it had contravened **section 3** of the *Crime and Anti-Money Laundering Act (2009)*. There was no such evidence and the Plaintiff had not elucidated on measures that it had taken to ascertain such allegations.
8. The Plaintiff herein has submitted that in relation to the partial documentation provided by the Defendant by the annexures to its Replying Affidavit as regards account number [particulars withheld], it has been defrauded. That documentation clearly indicates that the said account was opened after the Defendant Bank had been provided with what it termed the "necessary documentation" to cover its general practice as regards customers opening accounts as per the rules relating to due diligence according to the Kenya Bankers' Association practice and procedures. Whether the Defendant bank has been in any way guilty of negligence or indeed carelessness in the opening of the said account is a matter for determination at the hearing of this suit in due course. On the face of what has been put before this Court in terms of copies of Memoranda and Articles of Association, it seems clear that there are two separate companies, one certainly, incorporated under the name "Printwell Industries Ltd". As per the Affidavit in support of the Plaintiff's Application before Court, the first company being No. C. 126939 was incorporated on 25th of July 2006. However, as per the Replying Affidavit there would seem to be another company utilising the same name, the Memorandum and Articles of which were executed on 4th June 2012. The difference between the Plaintiff's evidence in this regard and the Defendant's is that the Defendant has not exhibited the Certificate of Incorporation of the second Company in 2012. There is no evidence of the same ever having been incorporated.
9. It is the Plaintiff's submission in this regard, that under the Prudential Guidelines issued by the Central Bank of Kenya, banking institutions licensed under the Banking Act should obtain basic information on its customers under the Customer Identification and Verification Procedures as per clause 4.3 which reads as follows:

"4.3 Customer Identification and Verification Procedures

In all circumstances, any business entity operating within the financial sector requires basic information on its customers. The nature and extent of this information will vary according to the type of business. It shall also depend on whether the business is being

introduced by a financial intermediary, and the type of customer.

An institution should establish to its satisfaction that it is dealing with a person that actually exists, and identify those persons who are empowered to undertake the transactions, whether on their own behalf or on behalf of others. When a business relationship is being established, the nature of business that the customer expects to conduct with the institution concerned should be ascertained, so as to determine what might be expected as the customer's normal activity levels. In order to judge whether a transaction is or is not suspicious, an institution needs to have a clear understanding of the pattern of its customer's business as its relationship with the customer develops. Suspicious transactions may arise at any stage, and frequently occur within an established business relationship rather than at the outset".

Further, under clause 4.3.1.3 for accounts or transactions in relation to corporates, the banking institution should obtain a certified copy of the Certificate of Incorporation as well as the Memorandum and Articles of Association or other similar documentation evidencing legal status. This, the Defendant seems to have failed so to do.

10. However, what is before this Court is the Plaintiff's prayer that a temporary injunction do issue as against the Defendant in respect of the said account number [particulars withheld] opened at the latter's Queensway House Branch, Nairobi. The question that seems to lend itself to this situation is what entity is the owner of that account? According to the Plaintiff, it certainly is not that Company. However, according to paragraph 5 of the Defendant's Replying Affidavit, an entity named Printwell Industries Ltd made an application to open an account (and the Court presumes it is the same account as above) at its Hurlingham Branch. There seems to be no explanation forthcoming from the Defendant as to why an account was not opened for such entity at its Hurlingham Branch but was opened at its Queensway House Branch instead. Again, this matter will presumably come out in evidence at the hearing of this suit in due course, after there has been the due process of discovery. There seems to be little doubt in the Plaintiff's mind that it was defrauded of the amount of the three cheques which were stolen from it being processed and encashed through account No. [particulars withheld]. It would appear that the Plaintiff is afraid that the said account could be used again as against it. The Defendant maintains that it has no good reason to worry in that regard as it was quite clear to it that the defrauding party was the Plaintiff's own employee(s) that was responsible for the fraudulent transactions. Somewhat indirectly, the Plaintiff while admitting in paragraph 7 of the Supporting Affidavit, that its messenger Edward Kyalo may have been involved in the fraud, has pointed the finger at employees of the Defendant bank as also being implicated. Are the Plaintiff's worries in this regard capable of sustaining the granting of an interlocutory temporary injunction as regards the operation of the said account?

11. To succeed in an application for interlocutory injunction, the Plaintiff must satisfy this court in relation to the principles of granting interlocutory injunctions as per **Giella v Cassman Brown** (supra) as exemplified in **Mrao Ltd. versus First American Bank of Kenya Ltd & 2 Ors** (2003) **KLR 125**. That case detailed the principles of granting an interlocutory injunction as follows:

- "a) The applicant must show a *prima facie* case with a probability of success;**
- b) An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages;**
- c) If the court is in doubt, it will decide an application on the balance of convenience."**

Mrao also established that:

"A *prima facie* case in a civil application includes but is not confined to a 'genuine and

arguable case'. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

12. In my opinion, the Plaintiff has established that there exists a right which has been infringed by the Defendant bank. The evidence as currently placed before this Court through the two Affidavits of the parties, strongly suggests that the Defendant bank was in error in allowing the said Account No. [particulars withheld] to have been opened in the name of Printwell Industries Ltd. I consider that the Plaintiff has made out a *prima facie* case in that regard. Further, the Plaintiff's fears that the said account may be used again to defraud it, could result in irreparable injury which certainly, at this stage, cannot be assessed in terms of damages. As a result, I believe that the balance of convenience lies with the Plaintiff herein and consequently I allow prayer 3 of its Notice of Motion dated 4th April 2013. However, as regards prayer 4, I am not at all sure that it is the Plaintiff who is entitled to an Order for inspection of the Defendant's books and records etc. in relation to the said account number [particulars withheld]. Quite clearly, that is not the Plaintiff's account as it has disowned it. To my mind, that information should be within the province of the Banking Fraud Investigation Department to whom the Plaintiff has reported this matter. It is for that Department, in my opinion, to carry out the investigations surrounding the circumstances of the opening of the account and the operation of the same. Accordingly, this Court is not inclined to grant prayer 4 of the Plaintiff's Notice of Motion dated 4th April 2013. As the Plaintiff has been successful in this Court as regards its temporary injunction Application, I award the costs thereof to it and against the Defendant.

DATED and delivered at Nairobi this 10th day of December, 2013.

J. B. HAVELOCK

JUDGE