



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 373 of 2012

MAP EXPRESS TRADING(K) LIMITED PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED DEFENDANT

RULING

1. The application for consideration is the Plaintiff's Amended Notice of Motion dated 20th June, 2012 brought under Order 40 Rules 2, 3, 4 and 9 of the Civil Procedure Rules and Section 1A, 1B, 3A and 63(e) of the Civil Procedure Act. The same seeks a prohibitory order as well as a mandatory order against the Defendant. The application was supported by the Affidavit of Mahamud Ibrahim Jama sworn on 8th June, 2012.
2. The Plaintiff contended that it is the bonafide holder of A/c No. 202-324-6689 at the Defendants Queensway Branch, Nairobi (hereinafter "**the said account**"), that the Defendant had wrongfully denied the Plaintiff access to its monies held in the said account, that the Plaintiff had exported coffee to one Ifeany Kenneth Chioma Muchai in Dubai in May, 2012 valued at Kshs.10million which sum was deposited by instalments in the said account, that the Plaintiff's directors had been barred from accessing the said funds on the grounds that the said account was under investigation by the Banking Fraud Investigation Department, that the Plaintiff's directors had not been summoned or questioned by the said Banking Fraud Unit, that the Defendant had already made reversals by debiting the Plaintiff's said account.
3. The Plaintiff further contended that it was not uncommon for it to receive into and withdraw huge sums from the said account, that the Defendant had admitted that there was internal fraud which the Plaintiff had nothing to do with, the Plaintiff denied that it had authorized any debits to its account, the deponent denied a letter relied on by the Defendant to debit the Plaintiff's account and averred that indeed the Defendant had since reversed the said unauthorized debit.
4. Mr. Ochola, learned Counsel for the Plaintiff submitted that the Defendant had superior knowledge and access to the Plaintiff's account, that the Defendant had alluded to fraudulent dealings by its employees but had not disclosed what specific offence its employee had been charged with, that the Plaintiff's hands were clean as they continued to deposit and withdraw funds to and from the said account even after the said transfers of Kshs.10,130,000/- into its account. Counsel further submitted that if the order is not made the funds therein could be spirited away and relied on the case of **Barclays Bank of Kenya –vs- Christent Mutisya maingi (2006) e KLR** for that proposition. Counsel urged that the application be allowed.

5. In opposition, the Defendant filed a detailed Replying Affidavits of Peter K. Ng'ang'a sworn on 4th July, 2012 and 16th July, 2012, respectively. The Defendant contended that the subject funds are proceeds of fraudulent dealings which was under investigation, that the plaintiff was guilty of concealment of material facts, that the amounts in question had been fraudulently transferred from four (4) of its customers Accounts through the use of compromised passwords that the amount involved totalled Kshs.27,030,000/- and involved its employees at River Road Branch and Ngong Road and nine (9) accounts. That one of its employees Enos Muhindi and a beneficiary Richard Ndhiwa Mwongela had been charged in court, that two directors of the Plaintiff had visited the Defendant's Queensway Branch and had given instructions to reverse the entries from their account, which they have since reversed, that investigations are still ongoing. The Defendant produced a copy of a letter dated 7th June, 2012 in support of its assertions, that the Plaintiff had concealed from court the existence of this letter.

6. Mr. Ochieng, learned Counsel for the Defendant submitted that according to the Plaintiff they were expecting a sum of Kshs.10million and not Kshs.10.5 million, that the Plaintiff had not disowned the signatories in the letter of 7th June, 2012 only the spelling mistakes in the names, that the Defendant had given the full particulars of the Kshs.10,130,000/- whilst the Plaintiff had not. The cases of **Rift Valley Contractors Ltd –vs- Githae and Company Accountants (2005) e KLR and Locabil International Finance Ltd –vs- Ago Export & others (1986) all ER 906** were relied on. Counsel urged that the application be dismissed.

7. I have considered the Affidavits on record, the written submissions and oral hi-lights of Counsel. I have also considered the authorities relied on. This is an injunction application and the principles applicable under the **Giella –vs- Cassman Brown case** are well known that the applicant must establish a prima facie case with a probability of success, that damages would not be an adequate remedy and that if the court is in doubt it will decide the matter on a balance of convenience. Prima facie case is one where on the facts presented a tribunal properly directing itself will conclude that there is a right of the applicant that has been infringed requiring a rebuttal by the Respondent.

8. It is not disputed that the Plaintiff is the Defendant's customer at the latter's Queensway Branch, Nairobi. The dispute is on some Kshs.10,130,000/- that was transferred to the Plaintiffs said A/c No.2023248689 on the 4th of June, 2012 and the subsequent attempt by the Plaintiff to use the funds in the said account – the use of which the Defendant declined. It must be noted that in the ordinary cause of business, a bank customer has little if any power over what happens with or in his/its account. The entries of whatever nature are originated by and concluded by the Bank through its employees. The contract between a banker and customer is such that the former has not only superior knowledge but unlimited access as to the operation, manipulation and control of the latter's account. Indeed in most cases, the latter may be helpless as to what happens to his account save for those instructions he gives to the bank.

9. In the case before me, the Plaintiff has contended that it was expecting a sum of Kshs.10 million from its customer in Dubai whom it had identified as Ifeanyi Kenneth Chioma. The Plaintiff has produced evidence to show that in or about May, 2012 it had supplied its said customer with some merchandise. The Plaintiff contended that on the said 4th June, 2012 it had called the Defendant's Queensway Branch who confirmed that the expected funds had been transferred into the account. However, when the Plaintiff tried to access the said funds the same was denied.

10. The Defendant on its part has contended that the funds were fraudulently transferred from some of the accounts held by its customers, that there were a total of nine (9) accounts involved and a sum of Kshs.27,030,000/- involved, that one of its employees had been arrested and charged with the offence of stealing, that another beneficiary of the fraudulent transfer had been arrested and charged when attempting to withdraw Kshs.400,000/- at Queensway Branch.

11. Having considered the material before me and in particular the bank statement of the Plaintiff with the Defendant and the rival arguments, one thing that has struck me is that the Plaintiff seem to be a genuine business outfit and dealing with its account in a honest manner, I have noted that its said account was very active before and after the material date, that even after the said sum of Kshs .10,130,000/- was

transferred to its account, between 4th and 7th June, 2012, it made three (3) withdrawals totaling Kshs.21.2 million but at the same time made several deposits totaling approximately Kshs.15.8M. Surely if the Plaintiff was involved in the alleged “fraud”, why deposit the said sum after having withdrawn all the amounts leaving a paltry sum of Kshs.251,811.10 as at 5th June, 2012? On a prima facie basis, my view is that the dealings and actions of the Plaintiff were those of a honest business entity. By writing two cheques totaling Kshs. 20.2 million on the same day 4th June, 2012 after having called the Defendant to confirm if the funds had been transferred to that account is a clear indication that indeed the Plaintiff was aware of and/or was awaiting for funds to the tune of Kshs.10 million.

12. The Defendant’s case is that the subject monies was a result of internal fraudulent transfers by one of its employees, that the said employee has since been charged with the offence of stealing, that the directors of the Plaintiff or the account signatories had authorized the Bank to reverse the entries, the bank exhibited a letter dated 7th June, 2012 purportedly written by the Plaintiff’s directors to the Defendant. That letter was denied by the Plaintiff as emanating from itself or its directors. One issue that defeats logic and leaves some questions unanswered is, if the said transfers were fraudulently transferred into the account of the Plaintiff by the Defendant’s employee as is alleged, that would mean that the said transactions did not have the input of the Plaintiff. **Why then would the Bank require the Directors of the Plaintiff or the Account signatories to write a letter to the bank to authorize the reversal thereof?** Wouldn’t the bank have reversed the entries suo motto if the entries were as a result of an internal fraud? If the story of the Bank is to be believed, I do not think it required the authority of the Plaintiff to effect the reversals. Something is not adding up here!

13. There may be conflicting and disputed facts. Whilst the Defendant produced a statement of account in respect of two entries for Kshs.1,500,000/- and Kshs.1,450,000/- 0165213068 in support of its case, that the amounts were as a result of fraudulent transfers, there was no evidence in respect of the other entries that had not been reversed. The court was not told why. In **Kwanza Estates Ltd vs. National Bank of Kenya HCCC No. 547 of 2011** Hon Odunga J held that:-

“However, it is now well established that the considerations in an application for interlocutory injunction are not limited to the ones enumerated in Giella –vs- Cassman Brown case. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the Respondent whether or not he has acted with impunity. The court is also by Section 1A (2) of the Civil Procedure Act enjoined to give effect to the overriding objective as provided under Section 1A(1) of the said Act in exercising of the powers conferred upon it under the Civil Procedure Act or the interpretation of any of its provisions. One of the aims of the said objective as interpreted by the Court of Appeal is the need to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to Court on equal footings”. (Emphasis mine)

My view is, the conduct of the Defendant as explained above does not add up.

14. In view of the foregoing, I am satisfied that the Plaintiff has established a right that has been infringed by the Defendant. I am of the opinion that prima facie case with a probability of success has been established.

15. On the issue of irreparable damage, I am alive to the fact that the bank is financially sound and that it can repay the amount earmarked or frozen in the account when called upon to do so. But I have always believed that the fact that one has a fat financial chest, it is not a licence to breach another’s legal rights at the pain of paying damages. That won’t do. For the foregoing reasons, I am inclined to grant the Plaintiff an injunction sought in terms of paragraph 3 of the amended Notice of Motion amended on 10th June, 2012.

16. As regards Prayer 4 – for a mandatory injunction, the dicta in the case relied on by the Defendant is of some help. In that case **Rift Valley Agricultural Contractors (LTD) –vs- Githae & C0. Advocates and anor (2005) e KLR** the Court stated:-

“The principles governing the grant of mandatory injunction are now well settled. In the Kenya Breweries Ltd & anor –vs- Washington Okeyo C.A No. 332 of 2000 (NB) (unreported) it was held by the Court of Appeal at page 3 that:-

‘The test to grant a mandatory injunction or not is correctly stated in Vol.24 Halsburys Law of England 4th Edition Paragraph 948 which reads:-

‘A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the case of absence of special circumstances, it will not normally be granted. However if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can easily be remedied, or if the Defendant attempts to steal a match on the Plaintiff.... A mandatory injunction will be granted on an interlocutory application.’

Also in Locabil International Finance Ltd –vs- Agro Export and others (1986) All ER 901 at page 901 it was stated:-

‘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 that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or her he defendant had attempted to steal a match on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibitory injunction.’

17. In this case, I have not found any special circumstances to warrant the grant of the mandatory injunction sought. Accordingly, I decline to grant prayer No. 4 of the Amended Motion but direct that the suit be listed for trial as soon as practically possible.

18. In the premises, the amended Notice of Motion is allowed in terms of Prayer No. 3 thereof. The costs of the application is awarded to the Plaintiff in any event.

DATED and DELIVERED at Nairobi this 9th day of November, 2012.

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A. MABEYA

JUDGE