

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 599 of 2010

HOSWELL MBUGUA NJUGUNA T/A

FISCHER AND FISCHER MARKETING.....PLAINTIFF

VERSUS

EQUITY BANK LTD.....DEFENDANT

RULING

This application is brought by a Chamber Summons dated 6th September, 2010 and taken out under **Sections 1A, 1B, 3, 3A and 63(c) and (e) of the Civil Procedure Act; Order XIX Rules 1 and 2, and Order XXXIX Rules 1, 2,3,5 and 7 of the Civil Procedure Rules.** The Applicant thereby prays for an injunction restraining the Respondent(s) from using the confidential information of the Applicant for any purpose other than the purpose for which it was supplied, and from using or marketing the product branded "**M-Kesho**" or otherwise exploiting the said information or any part thereof pending the hearing of this suit. The Applicant also prays that the Defendant be ordered to render and deliver to the court proper accounts of all the profits made from the use o the said confidential information of the Plaintiff.

The application is supported by the annexed affidavit of the Applicant, and based primarily on the ground that the Respondent has unlawfully made use of confidential information communicated to it by the Applicant in good faith for the sole purpose of negotiating an agreement to be entered into between the parties for the creation and marketing of a proposed new product. The Applicant contends that the Respondent has unlawfully made use of the said confidential information otherwise than for the purpose for which it was supplied, and has thereby made profits for itself by creating and marketing a new product branded "**M-Kesho**" in partnership with Safaricom Limited, which has characteristics identical to the product discussed between the Applicant and the Respondent.

The application is opposed by a replying affidavit sworn by Eric Karobia, the Projects Manager of Equity Bank Limited. After considering the pleadings and submissions of the respective counsel, I note that this application is for the grant of an interlocutory injunction. To qualify for the grant of such an injunction, the Applicant must satisfy the conditions laid down in **GIELLA v CASSMAN BROWN & CO. LTD [1973] EA 358.**

The first condition is that an Applicant must show a *prima facie* case with a probability of success. In the instant case, the Applicant seeks an order restraining the Respondents from using or marketing the product branded "**M-Kesho**". Whereas the Applicant contends that he gave the 1st Respondent some information about this product in good faith for the purpose of negotiating an agreement to be entered into between the parties for the creation and marketing of a new product, the Respondent avers that the M-Kesho idea was born out of Safaricom Limited and Equity Bank Limited Commitment to work together and have a consumer proposition that utilizes the M-Pesa system for delivery of simple saving, loan and insurance services. M-Kesho obtained approval of the Central Bank of Kenya, and was registered as a trade mark. In the absence of some oral evidence which can be tested by cross examination, I would find it difficult to ascertain who of the two deponents is telling the truth. In the circumstances, I am no able to hold that the Applicant has established a *prima facie* case as envisaged in

GIELLA'S CASE.

Even if the Applicant had clearly made out a *prima facie* case with a probability of success, he still has to satisfy the second condition which ordains that an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. One of the prayers sought by the Applicant is that the Respondent be ordered to render and deliver to the court proper accounts of the profits made from the use of the confidential information of the Applicant. This prayer is in tandem with prayer (b) of the prayers for judgment in which he seeks an inquiry as to damages for breach of confidence. Indeed, the other three prayers for judgment also seek an account of all the profits made by the Defendant from the use of the confidential information; appointment of a receiver to collect and receive all the profits made by the Respondent from the use of confidential information; and an order for payment of all sums found to be due to the Applicant. The effect of these prayers is that the Applicant will not suffer irreparable injury as he can be adequately compensated by an award of damages. Consequently, he has not satisfied the second condition for the grant of an injunction. In view of this finding, the balance of convenience demands that the injunction sought should not be granted.

This application is not meritorious and is hereby dismissed with costs.

L. NJAGI
JUDGE

DATED and DELIVERED at NAIROBI this 7th day of November, 2012

ODUNGA
JUDGE