



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL CASE NO. 901 OF 2009

**BARCLAYS BANK OF
KENYA.....PLAINTIFF**

VERSUS

**GEORGE KAMAU GITHERE t/a KOM
STOCKISTS.....DEFENDANT
EQUITY BANK LTD.....2ND
DEFENDANT**

RULING

1. By an amended chamber summons dated 11th march, 2010, Barclays Bank of Kenya Ltd, who is the plaintiff in this suit seeks inter alia orders of injunction restraining George Kamau Githere t/a Kom Stockists (hereinafter referred to as the 1st defendant), from removing any of its assets including moneys deposited in his account and held in all and any other bank operating in Kenya, from the jurisdiction of the court or disposing, interfering with, charging or otherwise dealing with the assets in any way whatsoever pending the full hearing and determination of the suit.

2. The plaintiff also seeks an injunction restraining the 1st defendant from selling, transferring, or in any manner dealing with any shares he owns in any listed company in the Nairobi Stock Exchange, and that the Central Depository and Settlement Corporation do within three days of service of the court order freeze any and all of the accounts in the name of the 1st defendant, and do furnish the plaintiff’s advocate and the court with a complete record of all the shares owned by the 1st defendant pending the full hearing and determination of the suit.

3. The plaintiff further seeks orders that the 1st defendant be ordered to furnish security in the sum of Kshs.30,465,285/95 for satisfying the decree. Also sought is an order directing the 2nd defendant to lodge the proceeds of sale of motor vehicle KAZ 387Z in court pending the determination of the suit.

4. The facts upon which the application is premised are stated in the application and an affidavit sworn by one Nereah Okanga on 11th March, 2010 as follows: pursuant to financial facility arrangements made between the plaintiff and the 1st defendant, the plaintiff financed the purchase of motor vehicle

Registration KAZ 835Q which vehicle was registered in the joint names of the plaintiff and the 1st defendant. The 1st defendant having defaulted in honouring his obligation under the financial arrangement, the plaintiff's attempts to repossess the vehicle were frustrated as the 1st defendant used the police to forcibly take away the vehicle.

5. Thereafter the plaintiff through its agent discovered that the vehicle had been tampered with, registration numbers altered to KAZ 387Z and the vehicle pledged to Equity Bank Ltd (hereinafter referred to as the 2nd defendant), as security for certain advances. Subsequently, the 2nd defendant sold the vehicle. The plaintiff therefore contends that the defendant is liable to deliver all the properties in their possession and or the proceeds of the sale of the vehicle to meet the 1st defendant's obligation under the financial arrangements.

6. The 1st defendant filed grounds of opposition, objecting to the application on the grounds that he does not own shares in any company, and therefore it would be futile for the court to act in vain. The 1st defendant also complains that the plaintiff's application is blanket and speculative, as the names of the institutions in which the 1st defendant is alleged to own money has not been given. The 1st defendant states that since the plaintiff seeks recovery of money allegedly had and received, its proper cause of action would be to have the main suit heard and determined.

7. The 2nd defendant objected to the application through a replying affidavit sworn by its employee Charity Kinyanjui. She swears that the 1st defendant as a director of Pro Oceanic Construction and General Agencies Ltd, approached the plaintiff for a loan facility, and offered motor vehicle registration No.KAZ387Z as personal security for the loan facility. The 1st defendant conducted a search and established that the 1st defendant was the real owner of motor vehicle registration KAZ387Z. Pro oceanic Construction and General Agencies Ltd subsequently defaulted in the repayment of the loan and the 2nd defendant repossessed and sold motor vehicle registration No.KAZ 387Z to recover its debt. The 2nd defendant urges the court to dismiss the application contending that the application is defective and bad in law, as no cause of action has been disclosed against the 2nd defendant.

8. I have carefully considered this application and the submissions. I note that the application is a two pronged application as it seeks an interlocutory injunction and also security. The plaintiff's application for security is anchored under Order XXXVIII Rules 1 & 5 of the Civil Procedure Rules (now repealed). The rules stated as follows:

1. Where at any stage of a suit, other than a suit of the nature referred to in paragraphs (a) to (d) of section 12 of the Act, the court is satisfied by affidavit or otherwise -

(a) that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him -

(i) has absconded or left the local limits of the jurisdiction of the court; or

(ii) is about to abscond or leave the local limits of the jurisdiction of the court; or

(iii) has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof; or

(b) that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance: Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the court until the suit is disposed of or until the further order of the court.

- 2.
- 3.
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5. (1) Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him -

(a) is about to dispose of the whole or any part of his property; or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

9. It is apparent from the above that Order XXXVIII Rule 1 of the Civil Procedure Rules deals with a situation where the defendant may be called upon to furnish security for his appearance in court. In this case, there is no evidence that the defendant intends to abscond from the local limits of the jurisdiction of the court, or that the 1st defendant has disposed off or removed from the local limits of the jurisdiction of this court its property such that there can be reasonable apprehension regarding the attendance of the 1st defendant in court. Therefore, Order XXXVIII Rule 1 of the Civil Procedure Rules is not applicable.

10. As regards Rule 5 of the Civil Procedure Rules, the same applies where there is fear that a defendant is about to dispose off his property or remove his property from the local limits of the jurisdiction of the court such that execution of any decree obtained against him may be difficult. Again, that is not the situation herein. The plaintiff's claim arises over a specific property which plaintiff claims it was entitled to as security pursuant to an agreement entered into between the plaintiff and the 1st defendant. That property was allegedly disposed off before the plaintiff filed its suit. Moreover, there is a dispute as to whether the alleged motor vehicle disposed off is the same vehicle claimed by the plaintiff. Furthermore, there is no evidence that the defendant has disposed off or is about to remove any of his property out of the jurisdiction of the court with intent to obstruct or delay the execution of any decree that may be passed against him.

11. Indeed, the plaintiff has simply made general averments without specifically identifying the property required to be attached and the estimated value thereof. In trying to restrain the 1st defendant from dealing with any shares in any listed company or withdrawing any money in accounts held in any bank in Kenya, the plaintiff appears to be merely engaging in a fishing expedition in the hope that it will stumble upon the 1st defendant's property.

12. As regards the prayer for interlocutory injunction, prayer (v) and (vi) are not specific. It will be difficult for the court to issue orders without knowing exactly whom the order is to be addressed. Moreover, neither the stocks, shares or the money held in any bank account is a subject of the plaintiff's suit.

13. In the circumstances, I find that the plaintiff has failed to establish a prima facie case to justify the granting of an interlocutory injunction in terms of prayers (v) and (vi) of his application. Nor has the plaintiff established circumstances that will justify the court ordering the 1st defendant to furnish security for satisfying the decree as sought in prayers (viii) and (ix).

14. As regards the order direction the 2nd defendant to lodge the proceeds of sale in respect of motor vehicle registration No.KAZ 387Z in court, pending the hearing and determination of this suit, I find no justification for issuing such an order. The 2nd defendant has demonstrated that it sold the motor vehicle pursuant to an agreement entered into between the 1st defendant and the 2nd defendant. It is evident that there is an issue as to whether the vehicle sold by the 2nd defendant is the same vehicle which was offered to the plaintiff by the 1st defendant as security. That is a matter which will have to be determined upon full hearing of the suit.

15. As of now, I am not persuaded by the plaintiff that it has a better claim to the motor vehicle sold by the 2nd defendant, or that it will suffer irreparable loss if the proceeds for sale of the suit property is not deposited in court. The 2nd defendant is a financial institution. It has not been suggested nor demonstrated that the 2nd defendant will not be able to refund the money should that become necessary. For all the aforesaid reasons, I find no merit in the application dated 11th March, 2010. Accordingly, the application is dismissed with costs.

Dated and delivered this 6th day of April, 2011

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the plaintiff absent

Murango H/B for Olubhai for the 1st defendant

Murango H/B for Kibanga for the 2nd defendant

B. Kosgei - Court clerk