



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 349 of 2009**

**KENYA COMMERCIAL BANK LIMITED PLAINTIFF
VERSUS
ANN KAJUJU CHARLES alias
ANN KAJUJU MAGONDU & 24 OTHERS DEFENDANTS**

RULING

1. The plaintiff originally filed this suit on 19th May 2009 against 28 defendants. Simultaneously with the filing of the suit, a notice of motion was filed seeking for interim orders of injunction against the several defendants from dealing with certain accounts where it was alleged bankers cheques were fraudulently issued from the plaintiff's accounts and monies paid to the account of the various defendants without consideration. On the same day the court issued interim orders of injunction in terms of the court order made on that day. Subsequently, the plaintiff applied to withdraw the suit against the 10th, 19th, 20th, 21st and 23rd defendants. The plaintiff was also given leave to amend the pleadings to reflect the amendments on 3rd December 2009.
2. The plaintiff filed the amended notice of motion on 10th December 2009, which is brought under the provisions of **Order 39 Rules 1(a) and (b), 3(1), 7, 8 and 9. Order 5 rules 17; Order 31 rules 3 and 4 of the Civil Procedure Rules Sections 3, 3A and 63 of Civil Procedure Act.** This application seeks for several orders against the defendants in the terms stated in the application. This application is supported by the grounds set out in the body thereto and the affidavits of **Aloys Okari Ombui** sworn on 19th May 2009, a supplementary affidavit sworn on 24th September 2009, and a second supplementary affidavit sworn on 25th November 2009.
3. Briefly stated it is the plaintiff's case that the 1st defendant **Anne Kajuju** was employed by the plaintiff and worked as the Operations Manager at the plaintiff's Prestige Plaza Branch Ngong Road Nairobi. The plaintiff is the wife of the 2nd defendant; she is also the mother of the 24th, 25th and 26th defendants. The 1st defendant is the sister to 4th and 14th defendants, while the 3rd defendant was the best man of the 1st and the 2nd defendants when they got married on 23rd December 2001 as per the marriage certificate annexed to the supplementary affidavit of **Aloys Okari Ombui**.

4. It is alleged that in the course of her employment, the 1st defendant had the opportunity to deal with cheques on shelves counters from which the bankers cheques were issued by her as the Operation Manager. the 1st defendant was authorized as a second signatory to all the bankers cheque issued from the Prestige Branch. The 1st signature was already by a Senior Manager which was printed electronically when the cheques are issued. The 1st defendant was entrusted with the cheque books consisting of various cheque leaves duly serialized to be used in the ordinary course of banking business. On diverse dates between 3rd November 2008 and 4th March 2009 it is alleged that the 1st defendant fraudulently and without authority, signed various bankers cheques from the plaintiffs bankers cheques which were in her custody for varying amounts payable to the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 12th and 29th defendants. All amounted to Ksh.73,467.834/- while knowing that no consideration was received by the plaintiff as the issuing bank.

5. Ordinarily a bankers cheque would be covered for the value by the customer who is issued with the bankers cheque. All those cheques were presented for payment by the plaintiff by receiving banks being the 16th, 17th, 18th and 22nd defendants. The effects were credited to the payees accounts without any consideration flowing to the plaintiff or any authority issued by the plaintiff. The money was paid as follows:-

DATE	KCB BANKERS CHEQUE NO	AMOUNT (KSH)	PAYEE/DEFENDANT
31/11/08	680004	250,000	British American Insurance Co. Ltd (K) Limited 12 th Defendant)
2.12.08	680220	3,284.500	Mutuli & Apopo Advocates 7 th Defendant
8.12.08	680142	1,267,500	Mutuli & Apopo Advocates 7 th defendant
11.12.08	680230	5,848,920	Mutuli & Apopo Advocates 7 th defendant
15.12.08	68244	4,608,340	Mutuli & Apopo Advocates 7 th Defendant.
17.12.08	680214	2,630.200	Mutuli & Apopo Advocates 7 th Defendant.
18.12.08	680268	2,475.000	Mutuli & Apopo Advocates 7 th Defendant
24.12.08	680206	759,000	John Kihia Karitie (3 rd defendant)
29.12.08	680265	3,418,745	Mutuli & Apopo Advocates (7 th Defendants

30.12.08	680128	2,440.100	Mutuli & Apopo Advcoates (7 th Defendant)
5.1.09	680205	482.000	John Kihia Karitie (3 rd defendant)
7.1.09	680218	592,000	Robert Majau (4 th defendant)
7.1.09	680216	3,126,735 (unpaid)	Mutuli & Apopo (7 th defendant)
8.1.09	680202	565,000	Mary Tetu (6 th Defendant)
9.01.09	680213	3,280,000	Mutuli & Apopo Advocates (7 th Defendant)
12.01.09	680224	4,840,200	Mutuli & Apopo Advocates (7 th Defendant)
14.01.09	680107	1,000,000	General Motors E.A Limited (19 th Defendant)
15.01.09	680211	3,515,500	General Motors E.A. Limited (19 th Defendant)
15.01.09	68104	796,315	Charles Magondu Stephen (2 nd Defendant)
15.01.09	680207	985,000	Charles M. Stephen (2 nd defendant)
17.01.09	680233	2,873,219	Mutuli & Apopo Advocates (7 th Defendant)
20.01.09	680144	4,098,215	Mutuli & Apopo Advocates (7 th defendant)
28.01.09	680263	3,685,210	Mutuli & Apopo Advocates (7 th Defendant)
29.01.09	680228	2,726,910	Mutuli & Apopo Advocates (7 th Defendant)
5.02.09	680121	2,175,100	Mutuli & Apopo Advocates (7 th Defendant)
14.01.09	680252	2,530.450	Mutuli & Apopo Advocates (7 th Defendant)
27.02.09	680258	3,481.940	Mutuli & Apopo Advocates (7 th Defendant)
3.12.08	680249	2,815,940	Mutuli & Apopo Advocates (7 th Defendant)
04.03.09	680219	1,362,215	Laikipia Petroleum Dealers (8 th Defendant)
	680108	1,124,080	Ruthanna Enterprises, 29 th Defendant)

- (v) A replying affidavit of the 4th defendant sworn on 22.07.2009 and filed in court on 30.07.2009.
- (vi) A replying affidavit of the 5th defendant sworn on 25.06.2009 and filed in court on the same day.
- (vii) Grounds of opposition filed on 9.06.2009 on behalf of the 6th defendant.
- (viii) Statement of defence on behalf of the 6th defendant dated 22.07.2009 and filed in court on the same day.
- (ix) A replying affidavit by the 6th defendant sworn on 22.07.2009 and filed in court on the same day.
- (x) A statement of defence dated 3.7.2009 and filed on 7.7.2009 on behalf of the 7th defendant
- (xi) A replying affidavit of Patrick Lubanga Mutuli sworn on 30.10.2009 and filed in court on the same day on behalf of the 7th defendant.
- (xii) A replying affidavit of Gladys Gathuni sworn on 24.06.2009 and filed in court on 1.7.2009 on behalf of the 8th defendant.
- (xiii) Statement of defence dated 6.08.2009 filed on behalf of the 10th defendant (proceedings against this party were terminated/withdrawn on 3.12.2009).
- (xiv) Notice of preliminary objection dated 27.5.2009 and filed in court on the same day on behalf of the 11th defendant.
- (xv) Grounds of opposition dated 27.5.2009 and filed on the same day on behalf of the 11th defendant
- (xvi) A replying affidavit of Stephen O. Wandera sworn on 25.6.2009 and filed in court on 26.6.2009 on behalf of the 12th defendant.
- (xvii) A replying affidavit of Nicholas Mugambi John sworn on 29.7.2009 and filed in court on 30.7.2009.
- (xviii) A replying affidavit of the 14th defendant sworn on 22.7.2009 and filed in court on 30.6.2009.
- (xix) Statement of defence dated 30.6.2009 and filed in court on 1.7.2009 on behalf of the 15th defendant.
- (xx) A replying affidavit sworn on 27.5.2009 and filed in court on 28.5.2009 on behalf of the 15th defendant.
- (xxi) Statement of defence dated 11.6.2009 and filed in court on 15th June 2009 on behalf of the 16th defendant.
- (xxii) A replying affidavit of Mercy Kamau sworn on 27.5.2009 and filed in court on 28.5.2009 on behalf of the 16th defendant.
- (xxiii) Statement of defence dated 20.8.2009 and filed in court on the same day on behalf of the 17th defendant.
- (xxiv) A replying affidavit of Hilda Mugo sworn on 9.7.2009 and filed in court on 13.7.2009 on behalf of the 17th defendant.
- (xxv) A replying affidavit of Samuel M. Kibugi sworn on 11.6.2009 and filed in court on 12.6.2009 on behalf of the 18th defendant.
- (xxvi) Statement of defence dated 20.7.2009 and filed in court on 23.7.2009 on behalf of the 19th defendant (proceedings against this party were terminated/withdrawn on 3.12.2009).
- (xxvii) A replying affidavit of Carolyne Kerubo Matara sworn on 24.8.2009 and filed in court on the same day on behalf of the 19th defendant (proceedings against this party were terminated/withdrawn on 3.12.2009).
- (xxvii) A replying affidavit of Alfred Wachira sworn on 16.9.2009 and filed in court on 17.9.2009 on behalf of the 20th defendant

(proceedings against this party were terminated/withdrawn on 3.12.2009).

- (xxviii) A replying affidavit of Godfrey Ngugi sworn on 16.6.2009 and filed in court on the same day on behalf of the 21st defendant (proceedings against this party were terminated/withdrawn on 3.12.2009).
- (xxix) A replying affidavit of David Amboga sworn on 29.6.2009 and filed in court on the same day on behalf of the 23rd defendant (proceedings against this party were terminated/withdrawn on 3.12.2009).
- (xxx) Statement of defence dated 17.7.2009 and filed in court on 22.7.2009 on behalf of the 28th defendant.
- (xxxi) A replying affidavit of the 28th Defendant sworn on 22.7.2009 and filed in court on the same day.
- (xxxii) Grounds of opposition dated 3.6.2009 filed in court on 9.6.2009 on behalf of the 28th defendant.

9. Some of the defendants also filed applications seeking their names to be struck out from the proceedings and also seeking the plaintiff's suit against them be dismissed. All these applications were heard together as follows:

- (i) Chamber summons application dated 27.5.2009 and filed on the same day on behalf of the 11th defendant
- (ii) Chamber summons application dated 25/06/2009 and filed on 26/06/2009 on behalf of the 12th defendant.
- (iii) Chamber summons application dated 26/08/2009 and filed on behalf of the 15th defendant.
- (iv) Chamber summons application dated 2/10/2009 and filed on 7.1.2009 on behalf of the 16th defendant
- (v) Chamber summons application dated 15/10.2009 and filed on 21/10.2009 on behalf of the 23rd Defendant (proceedings against this party were terminated/withdrawn on 3/12/2009).

10. Counsel for the defendants also made oral submissions. Mr. Ndungu on behalf of the 6th and 28th defendants relied on the affidavits of his client's in entirety. Mr. Amollo for the 7th defendant submitted that the 7th defendant is a Firm of Advocates who acted on instructions from their clients. The Advocates are not obliged to conduct due diligence to establish the source of money which they received on behalf of their client called **Tetu**, the 28th defendant. The funds were disbursed according to the instructions by their clients and a sum of about 58 million was paid out after the Advocates paid themselves a sum of about 1.7 million being handling fees. There are no allegations that the 7th defendants have derived undue enrichment from the banker's cheques fraudulently taken from the plaintiff.

11. It was submitted that the plaintiff was down right careless and reckless to allow their cheques be issued without consideration and the 7th defendant should not be made to suffer. All the monies came to the 7th defendant through the 28th defendant and the 7th defendant received it innocently and paid it

out. The sum of Ksh.10 million which is still with the 7th defendant client's account is not part of the money. It belongs to other clients, and the 7th defendant was not obliged to disclose the details of the clients whose money they are holding. Pursuant to section 134 of the Evidence Act, that is privileged information.

12. Mrs. Kinyanjui represented the 8th defendant, She relied on the replying affidavit by Gladys Gathuri. She contended that the 8th defendant was wrongly joined in these proceedings. The plaintiff ought to have conducted due diligence to establish who to include in the suit. She urged the suit against the 8th defendant be dismissed with costs. Mr. Wanyaga represented the 11th defendant, it was contended that the money that was transmitted through the 11th and 15th defendants was paid to the plaintiff to redeem a property which was charged by the 1st defendant to the plaintiff. They therefore urged the court to strike the entire suit against the 11th defendant. Miss Muchiri represented the 15th and the 16th defendants who argued the application to have the suit against the 15th defendant struck out.

13. The plaintiff is seeking to bar the 15th defendant from accessing money in their account to the extent of 1 million. Yet there is no cause of action against the 15th defendant who is a firm of Advocates. The money was paid into the clients account on behalf of the plaintiff. Accordingly the money was credited to the plaintiff and the 15th defendants would be holding only a sum of about Ksh.54,000/- which is disputed. Indeed the 15th defendant was acting for the plaintiff for the redemption of the mortgage account between the plaintiff and the 1st defendant. The 11th defendant was acting for the 1st defendant who the vendor and was also acting for the 13th defendant who was the purchaser. The plaintiff instructed the 15th defendant as their advocate and is the plaintiff's officer, who introduced the 1st defendant to the 15th defendant with the instructions to act in the redemption of the mortgage.

14. It was a genuine sale agreement and the 1st defendant's property was to be sold for 6.5 million out of which one million was to be paid as deposit. The agreements stipulated how the balance was to be paid but this suit was filed before the transaction was completed. There was absolutely no fraud on the part of the 15th defendant. The proceeds of cheques of 1 million and 3 million were received from the 11th defendant which was paid to the plaintiff. Therefore there is no cause of action against the 15th defendant.

15. As regards the 16th defendant the money was deposited in various accounts by their customers in the normal banking

transactions. When the fraud was brought to the attention of the 16th defendant, they immediately froze the accounts affected by the fraud. They have no objections to any orders being issued in regard to those accounts as they have no interest with the accounts which were operated by their respective customers to the extent that the 16th defendant was doing its normal banking business they have no objections to any orders being made as they court may deem just. The 18th defendant was represented by Miss Njoroge; she relied on the matters deposed to in the replying affidavit sworn on its behalf on 13th July 2009. Since no prayers were sought for 18th defendant they prayed for costs.

16. The 1st, 2nd, 4th, 9th, 13th, 14th, 24th, and 26 defendants were represented by Mr. Mungu. He also filed very comprehensive written submissions and cited several authorities. It was argued that the affidavit in support of this application is defective because **Mr. Aloys Okari Ombui** the deponent of those affidavits did not exhibit the authority by the plaintiff to swear the affidavits. The affidavits were also faulted for being argumentative and for failing to disclose the source of information. They are therefore contrary to the provisions of the Oath and statutory Declarations Act.

17. On the merit of the application it was submitted that no prima facie case with a probability of success has been demonstrated. The plaintiff's is seeking for judgment against several defendants for the loss of about 70 million but cumulatively seeking for a judgment of over 170 million. The plaintiff is also seeking for mandatory orders of injunction which can only be granted in very clear cases where the facts are not controverted. In this case the plaintiff has not been able to show how the 70 million disappeared. The plaintiff can only prove how the money disappeared and was traced in various accounts of the defendants though viva voce evidence. The matters complained about by the plaintiff are not summary. The fact that the plaintiff amended the pleadings to remove many parties clearly shows that this is a serious matter and should be tried by way of evidence.

18. Mr. Njogu for the 12th defendant argued the application to strike out the suit against the British American Insurance Limited. The 12th defendant is a limited liability. The 1st defendant purchased a unit trust from the 12th defendant. It was alleged that the money that was used to purchase the unit trust was stolen from the plaintiff. The 12th defendant denied having received any money from the 1st defendant. The plaintiff's evidence is that a cheque was made out to **Britax Family Fund and British American Balanced Fund**. There was no cheque that was made to the 12th defendant. The 12th defendant is not even authorized to deal with Equity Fund. According to counsel for the 12th defendant no prima facie case has been made out against the 12th defendant. Even if orders were made against the 12th defendant, they are not capable of being observed. Moreover this is a quantified claim against the 12th defendant which can be paid if the plaintiff can prove their case. I agree there is no cause of action against the 12th defendant and there is no point of causing them to defend this suit.

19. I have gone through the pleadings as well as submissions and the authorities cited by the various Advocates. This application seeks for both temporary and mandatory injunctions. The principles upon which such orders sought can be granted are well settled. As regards the prayer for interim order of injunction the plaintiff is required to establish a prima facie case with a probability of success. Secondly irreparable harm which cannot be compensated for in damages would arise and if in doubt the court will determine the matter on a balance of convenience. (See the often cited case of **Giella vs Cassman Brown & Company limited [1973] EA 358**)

The principles to guide the court on whether to grant a mandatory order of injunction are similarly articulated in a long line of authorities by the Court of Appeal especially in the case of **Kenya Breweries Ltd & Another vs. Washington Okeyo C.A. Civil Appeal No.322 (Nairobi)** (unreported) at page 3 Their Lordships quoted with approval the Text Vol.24 of Haslbury Laws of England 4th Edition paragraph 948 which reads as follows:-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the 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 be easily remedied, or if the defendant attempted to steal a march on the plaintiff . . . A mandatory injunction will be granted on an interlocutory application.

Also in Locabail International Finance Ltd. V. Agroexport and others [1986] 1 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 where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory 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 than was required for a prohibitory injunction.”

These principles of law enunciated in those e decisions have received full approval in other cases within our Courts. See the cases of; Belle Maison Limited vs Yaya Towers Limited H.C.C.C. 2225 of 1992, per Bosire, J (as he then was) and The Ripples Limited vs Kamau Mucuha H.C.C.C. No. 4522 1992 per Mwera J.”

20. The claim by the plaintiff as against the 1st defendant, it is alleged that she was the master mind of the entire scheme where colossal sums of money amounting to over 70 million was paid out through cheques stolen from the plaintiff. The claim by the plaintiff against the 1st defendant is for the recovery of the money fraudulently paid out of the plaintiffs' bankers cheques without consideration. The 2nd defendant was a direct beneficiary of the plaintiff's banker's cheque. The 2nd defendant used the proceeds to purchase a motor vehicle **KBG 685B**. The 2nd defendant also received Ksh.2.2 million from the 7th defendant out of the proceeds paid to the 7th defendant. It is questionable how the 2nd defendant a spouse of the 1st defendant would be a beneficiary of the plaintiff's bankers cheques issued without consideration from the branch where his

wife was the operations manager and trusted with the custody and access of the plaintiff's banker's cheques.

21. As regards the 4th and the 14th defendant they are brothers of the 1st defendant it is shown how the 4th defendant was a beneficiary of a bankers cheque and also the 14th defendant received a cheque for over 1.5 million from the 7th defendant. The 3rd and 5th defendants are also seemingly close family friends of the 1st and the 2nd defendants as they witnessed their marriage according to the copy of the marriage certificate annexed to the replying affidavit of **Aloys Okari Ombui**. They were also beneficiaries of bankers cheques. The 24th and 26th defendants are children of the 1st and the 2nd defendants. They too received substantial amount from the 7th defendant. There is material evidence on record to show that motor vehicle registration No. KBG 471L was purchased from Gigi motors from the plaintiff's bankers cheque paid to the Gigi Motors Limited with proceeds from the 7th defendant.

22. The 11th and the 15th defendants are Firms of Advocates, they handled proceeds of the cheques from the 7th defendant in a transaction which was contrived to look like a purchase of the 1st defendant's property which was charged to the plaintiff. Money was paid to the plaintiff purportedly to discharge a charge when in actual fact the money was part of the bankers cheques fraudulently taken from the plaintiff without consideration. As regards the 6th defendant she received a bankers cheque for Ksh.565,000,00 and this is confirmed by the affidavit of **Hilda Mugo** on behalf of the 17th defendant.

23. As regards the 7th defendant that is the firm that received the bulk of Ksh.58,499,498.00. The source of this money was from the bankers cheques stolen from the plaintiff's Prestige Branch when they were in the custody of the 1st defendant. The 7th defendant account was the conduit through which the fraud upon the plaintiff was executed. According to the 7th defendant the money was received in their professional capacity and they are not required by law to conduct due diligence to establish the source of the funds. On the face of the matter it would appear these cheques had no consideration. Counsel for the plaintiff relied on the case of **Dubai Aluminium Company Limited vs Salaam and Other [2003]3 LRC 682**. Counsel drew an analogy with the facts of that case and the arguments taken by the 7th defendant. In that case a company had fraudulently being induced to pay substantial sums of money under a fake consultancy agreement. The agreement had been drafted by a partner in a law firm who also gave advice to the wrong doers. The law firm made payments to the company which had been defrauded on the basis that it was vicarious liable for the actions of the partner. The House of Lords affirmed that the law firm was vicariously liable because the partner was so closely connected with the wrongful conduct. The issue of whether the 7th defendant was vicariously liable is for the trial court, but for now they are intricately connected with the money that was fraudulently taken from the plaintiff.

24. The 7th defendant confirmed that out of the proceeds of the plaintiff's banker's cheques, payments were made to the 11th and 15th defendant as well as Gigi Motors Company Limited. From the pleadings and the affidavits on record, I find there is ample material that implicates the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 11th, 13th, 14th, 15th, 24th, 25th, 26th, 27th, 28th and 29th defendants with the proceeds of the bankers cheques fraudulently taken from the plaintiff without cover. In my view this material establishes a prima facie case with a probability of success. The plaintiff has been able to justify the issuance of the interim orders granted on the 19th May 2009. The 16th and 17th defendants indicated that they would abide by the orders of this court, and thus it is so ordered that the funds held in the accounts of the defendants will remain frozen until further orders of this court.

25. I will confirm those orders in terms of the amended notice of motion dated and amended on 10th December 2009 as against the above defendants. Costs of this application, including costs to the 10th, 12th, 16th, 17th, 19th, 20th, 21st and 23rd against whom the suits were withdrawn will be in the cause.

RULING READ AND SIGNED ON 9TH JULY 2010 AT NAIROBI

M.K. KOOME
JUDGE