

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 148 of 2009

JAMES NYAKUNDI NDEGE.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD.....DEFENDANT

RULING

The plaintiff filed suit seeking certain orders from the court relating to the operation of certain accounts at the defendant bank. Contemporaneous with filing suit, the plaintiff filed an application pursuant to the provisions of Section 3A and 63 of the Civil Procedure Act and Order XXXIX Rules 2, 2A, 3 & 9 of the Civil Procedure Rule seeking orders of temporary injunction to restrain the defendant by itself, its servants or agents from interfering with the plaintiff's operation and access to the said bank account held at the defendant bank i.e. A/c Nos.3691204, 2601611, 0942506422 and 0084100358 pending the hearing and determination of the suit. The plaintiff further prayed for a mandatory order of the court seeking to compel the defendant to release all monies held by it that allegedly belongs to the plaintiff. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of James Nyakundi Ndege, the plaintiff. He swore an affidavit in further support of his application. The application is opposed. Jason Turanta, the security manager of the defendant swore a replying affidavit in opposition to the application.

At the hearing of the application, I heard submissions made by Mr. Gitonga for the plaintiff and by Mr. Gichuhi for the defendant. Apart from relying on the plaintiff's written submissions, Mr. Gitonga made oral submissions that the plaintiff is seeking orders from the court to enable him gain access to his accounts at the defendant bank. He submitted that the defendant had denied access to the plaintiff to the said accounts on the allegation that the plaintiff was not the one who had opened the said accounts. The plaintiff took issue with the replying affidavit sworn on behalf of the defendant. He was of the view that the said affidavit had been sworn by a person who lacked legal capacity to depone to the facts therein. He submitted that the defendant had so far not produced any evidence to establish its claim that the plaintiff was not the owner of the said accounts. He took issue with the fact that the defendant had failed to produce an alternative person it claims could be the owner of the accounts. He submitted that although the parties to this suit recorded a consent in court unfreezing the plaintiff's account at Kisii branch, the defendant had failed to comply with the said order of the court. He explained that the defendant had confiscated all identity documents belonging to the plaintiff and thus the plaintiff has been unable to transact any business in relation to the said accounts. The plaintiff was of the view that the defendant did not have any lawful excuse to deny it access to its account. The plaintiff argued that the defendant acted beyond its mandate in the banker – customer relationship by commencing investigations in the operations of the plaintiff's account without any justifiable cause. The plaintiff urged the court to intervene and grant the plaintiff access to his accounts. He urged the court to allow the application with costs.

In response, Mr. Gichuhi submitted that the defendant had taken the action of stopping the operations of the accounts in question because it was suspicious of the identity of the plaintiff. He submitted that the identity card possessed by the plaintiff was not genuine. There was doubt whether the address supplied by the plaintiff was the same address of the person who opened the account. He maintained that the plaintiff was required to establish to the satisfaction of the bank that he was the person who opened the said accounts and therefore authorized to operate the accounts in question. He submitted that the plaintiff

had been charged with a criminal offence which was still pending in court relating to obtaining false identity papers. He reiterated that the bank cannot grant access to the plaintiff to the said accounts on the ground of discrepancies in the identity papers of the plaintiff. Mr. Gichuhi was of the view that the plaintiff had been economical with the truth. He urged the court not to grant the application pending conclusion of the criminal proceedings that have been commenced by the police against the plaintiff. He urged the court to dismiss the application with costs.

I have carefully considered the rival submissions made by counsel for the parties to this application. I have also read the pleadings filed by the parties in support of their respective opposing positions, including the cited authorities. The plaintiff essentially seeks two orders from the court; that of interlocutory injunction to restrain the defendant from obstructing him from accessing and operating the accounts in question, and secondly, mandatory injunction to compel the defendant to allow him to have access and operation of the said accounts. For the plaintiff to obtain an order of interlocutory injunction, he must satisfy this court that he has a prima facie case with a high probability of success. He must also satisfy the court that he would suffer irreparable damage that will not likely be compensated by an award of damages. If the court is in doubt, it will determine the case on a balance of convenience. (*See Giella vs Cassman Brown* [1973] EA 358) In the case of mandatory injunction, the plaintiff must establish existence of special circumstances that would persuade the court that it is necessary to grant such orders before the full trial of the case. The court of Appeal in *Kenya Breweries Ltd & Anor vs Washington O. Okeyo* CA Civil Appeal No.332 of 2000 (*unreported*) cited with approval the English decision of *Locabail International Finance Ltd. Vs Agroexport and others* [1986] 1ALL ER 901 where it was held as follows:

“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.”

In the present application, certain facts are not in dispute. It is not disputed that a person known as James Nyakundi Ndege had in 1994 opened a savings account at the defendant's Kisii branch. He indicated his postal address as being care of P.O Box 99 Kisii. He also indicated to the defendant that he was a student in United States of America and his postal address is care of P.O Box 4767 108th Lane NE Circle Pines MN 55014 USA. From the statements annexed to the replying affidavit sworn on behalf of the defendant, it was apparent that a substantial sum in US Dollars was deposited in the said account by telegraphic transfer from outside the country. Between the months of April and July 2008, a sum of US\$ 180,000 was deposited in the account.

In October 2008, a person purporting to be the said James Nyakundi Ndege opened two accounts with the defendant's Queensway branch, Nairobi. There was substantial movements of funds from the Kisii branch of the defendant to the said Queensway branch. Substantial amounts were withdrawn. The defendant became suspicious when its staff closely examined the identity documents of the plaintiff. The officers from the Banking Fraud Investigation Division of the police were notified. The identity card of the plaintiff was confiscated by the police and sent to the National Registration Bureau Nairobi to establish its authenticity. The fingerprints of the plaintiff were also taken. In a report dated 20th January 2009, an officer from the said bureau noted that the identity card found in possession of the plaintiff was not genuine. The photograph on the identity card appears to have been superimposed. On account of this report, and other evidence gathered by the police, the plaintiff was charged with various offences related to identity theft. The criminal case is still pending determination at the Chief Magistrate's court.

If I understood the plaintiff's case correctly, the plaintiff wishes to persuade this court that he is the genuine holder of the said bank accounts. I carefully perused the affidavits sworn by the plaintiff in support of his application. In the said affidavits, he deposed that he was a businessman carrying out various businesses, ranging from farming to real estate. The amount in cash that has been frozen in the

said accounts is over Kshs.9 million. The plaintiff stated that in his life he has never left the country or been to United States of America. As stated earlier in this ruling, a substantial sum of the amount deposited in the said account was transferred in form of US Dollars. The plaintiff attempted to persuade this court that the amounts in the said accounts were proceeds from his various businesses. He did not give an explanation on how a substantial sum in US Dollars was deposited in the said accounts.

Having evaluated the facts of this application, I am satisfied that the defendant was entitled to be suspicious of the plaintiff's identity when he claimed that he was the holder and operator of the said accounts. My cursory examination of the signatures contained in the application forms signed in 1994 by the person going by the name James Nyakundi Ndege and the signature in the plaintiff's alleged identity card clearly establishes that the signatures are not the same. I am not persuaded at this stage of the proceedings that the plaintiff has established that he is the genuine James Nyakundi Ndege, the person who opened the accounts in question and therefore has the requisite mandate to operate them. The defendant did not exceed its mandate in the banker – customer contract in demanding the plaintiff, if indeed he is the person who opened the said accounts, first establishes his identity before he can be allowed to operate the said accounts. I am in agreement with counsel for the defendant that before the criminal case is determined, it may be impossible for this court at this stage to reach a definitive determination that the plaintiff is the genuine holder of the said accounts.

In the premises therefore, I hold that the plaintiff has failed to establish a prima facie case to entitle this court grant him the orders of interlocutory and mandatory injunctions sought in this application. The application dated 4th March 2009 lacks merit and is hereby dismissed with costs.

DATED AT NAIROBI THIS 25TH DAY OF JUNE 2009

L. KIMARU

JUDGE