REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 410 of 2008

MIDDLE EAST BANK KENYA LTD……PLAINTIFF

VERSUS

KYANZAVI FARMERS COMPANY LTD……DEFENDANT

RULING

Before me is an application by the plaintiff made under the provisions of **Order XXXIX Rules 1** and **2** of the **Civil Procedure Rules** seeking orders of the court to restrain the defendant by itself, its servants or agents from presenting to this court a petition for the winding up of the plaintiff or in any way advertising or publishing in press any notice or announcement alleging or contending that the plaintiff had defaulted in repaying any debt due to the defendant or otherwise in any manner as threatened in the defendant's advocates letter of 21st July 2008 addressed to the plaintiff. The ground in support of the application is stated on the face of the application i.e. that the defendant is not entitled to present a petition for the plaintiff's winding up and further that there was no provision in law that entitles the defendant to advertise prior to presentation of such petition in court in daily newspapers notification which its advocates have threatened to do. The application is supported by the annexed affidavit of Borkatte Srinivas Pai, the executive director of the plaintiff. The application is opposed. The defendant filed grounds of objection to the application and notice of preliminary objection in opposition to the application.

The application was fixed on 25th February 2009 by this court for hearing on 19th May 2009 by the consent of the parties. On 19th May 2009, the advocate for the defendant sought adjournment on the ground that the defendant desired to file a further affidavit in answer to the plaintiff's application. The advocate for the plaintiff objected to the application. This court upheld the objection by the plaintiff and ordered the hearing of the application to proceed as earlier scheduled. Counsel for the plaintiff made submissions urging the court to allow the application as prayed. Counsel for defendant did not present any arguments in response to the plaintiff's submissions.

I have carefully read the pleadings filed by the parties in support of their respective opposing positions. I have also considered the submissions made by counsel for the plaintiff. The issue for determination by this court is whether the plaintiff established a case to enable this court grant it the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled. In **Giella vs Cassman Brown [1973] EA 358** at page 360 Spry VP held that:

"*The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa.*

*First, an applicant must show a prima facie case with a probability of success. Secondly, 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. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (**E.A. Industries v. Trufoods, [1972] E.A. 420**)."*

The facts in support of this application are uncontroverted. The defendant chose not to file any affidavit in reply to the facts deponed to in the affidavit sworn in support of the plaintiff's application. According to the said affidavit, the defendant maintains two current accounts with the plaintiff wherein is deposited the sums of Kshs.8,756,156.90 and US$16,275.71 respectively. There appears to have been a dispute in regard to the officials of the defendant that were mandated to be signatories to the said accounts. A suit was filed in court by some members of the defendant (*i.e.* **Nairobi HCCC No.101 of 2007 Joseph Kibuba Kioko & 2 others vs Mangu Ngolo & Kyanzavi Farmers Co. Ltd**).

On 21st May 2007, the suit was compromised by consent. In the consent, the suit was marked as withdrawn and settled, *inter alia*, on the following terms; the signatories of the defendant's said accounts were to be Mangu Ngolo, Jackson Musembi Musyimi, Judas Mbili Ndawa and Juvenalis Musyoki Kavita. They further agreed that three signatories would be sufficient for funds to be withdrawn from the said bank accounts provided that Mangu Ngolo and Judas Mbili Ndawa were to be mandatory signatories. The parties further agreed that withdrawals from the defendant's bank accounts would only be made by resolution of the board of directors. From the affidavit sworn in support of the application, there is an annexure of a letter addressed to the plaintiff purportedly written on behalf of the defendant. The letter is dated 23rd June 2008. In the said letter, the plaintiff is notified that the four signatories of the bank accounts would be James Muiya Muema, Crispus Mwove Nguma, Peter Muamba Mulika and Juvenalis Musyoki Kavita. The signatories to the bank accounts were changed purportedly following elections of new directors of the board of the defendant on 18th June 2008. The plaintiff notified the defendant that it could not comply with its said letter notifying it of the change of signatories to the defendant's accounts in view of the court order of 21st May 2007 which had compromised the suit on certain terms.

It appeared that the defendant's attempt to review of the court order of 21st May 2007 so that the signatories to the said bank account could be changed was disallowed by the court. The defendant's application to change the signatories of the bank accounts was disallowed by the court on 19th May 2008. In its ruling, the court made the following observation:

"*…Since that order was recorded, [on 21st May 2007] none of the parties made an application to review and/or reinstate the suit for purposes of obtaining further orders and/or seeking further intervention of this Honourable court. It is therefore my humble view that the present application is an abuse of the process of this court since there is no suit in existence between the parties the same having been withdrawn on 21st May 2007. In the premises the application is dismissed with no orders as to costs.*"

It is apparent that the officials of the defendant who intended to be recognized as the new signatories to the defendant's accounts were frustrated by the said order of the court. Instead of pursuing the advice of the court, the said officials of the defendant instructed Mssrs Kalove & Co. Advocates to write a letter to the plaintiff. By its letter dated 21st July 2008, the said firm of advocates wrote a letter to the plaintiff, and copied it to among others, the Governor of the Central Bank of Kenya, the Registrar General, Companies Registry Nairobi and the Director of Criminal Investigations Department. The material part of the said letter states as follows:

"*We are under instructions from our client to treat your bank as a defaulter in paying its creditors (who are our clients) and to give you statutory notice under the provisions of the companies (Winding Up) Rules, to show cause why your bank should not be wound up for failure to pay your creditors; and to publish such notice in the local dailies before proceeding to the High Court of Kenya for formal orders for the winding up of your bank as by law prescribed. This may sound a draconian measure but it is your bank that has pushed our client into taking that action and clearly you will have no one to blame but*

yourselves."

It was this notice that prompted the plaintiff to file the present suit with the accompanying application for interlocutory orders of injunction.

Has the plaintiff established a prima facie case to entitle this court grant it the orders sought? It was clear to this court that the defendant's advocate wrote the said letter to the plaintiff with a view to pressurizing the plaintiff to grant the defendant's wish to change signatories of the defendant's bank accounts in circumstances that would be in clear contempt of an existing court order. The defendant was aware or ought to be aware that the only way the said court order could be varied or set aside was for an application to be made in court which issued the order for appropriate orders. By threatening to publish in the press its purported intention to wind up the plaintiff in clear breach of the provisions of the **Companies Act** and the rules made thereunder that relate to winding up of companies, the defendant was acting unlawfully. In fact, the defendant was acting in abuse of the duly established procedure of the law that requires a petition for winding up to be first filed in court before any notice can be published of the filing of such petition. It is this court's view that the defendant wrote the said letter for ulterior purposes and not for the legitimate purpose of securing its purported right to change signatories of its bank accounts in the plaintiff bank.

The plaintiff has therefore, in this court's view, established a prima facie case that the defendant's intended action is *ex facie* unlawful and should therefore be restrained by this court. I am satisfied that the plaintiff will suffer irreparable damage that cannot be compensated by an award of damages since its reputation as a sound financial institution will irretrievably be affected if the defendant publishes the intended spurious notice in the press that the plaintiff is unable to pay its creditors, yet the plaintiff acted within the mandate directed by the court.

The defendant is restrained by means of a temporary injunction in terms of prayer (ii) of the application dated 23rd July 2008 pending the hearing and determination of the suit. The plaintiff shall have the costs of the application.

DATED IN NAIROBI THIS 24TH DAY OF JUNE 2009

L. KIMARU

JUDGE