



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI COMMERCIAL AND ADMIRALTY DIVISION

Civil Case 399 of 2009

TASTYBREAD BAKERY LTD.....1^S PLAINTIFF

HARUN MEITAMEI OLE LEMPAKA.....2ND PLAINTIFF

VERSUS

CLICKET TRADERS (UK) LTD.....1ST DEFENDANT

MRS. OLIVIA GATHIERI.....2ND DEFENDANT

PARAMOUNT UNIVERSAL BANK.....3RD DEFENDANT

RULING

Before me is the plaintiffs' application made under, *inter alia*, the provisions of **Order XXXIX Rules 1(a) &(b), 2, 3(1), 7, 8 & 9** of the **Civil Procedure Rules** seeking orders of the temporary injunction to restrain the 3rd defendant whether by itself or through its servants from accessing, interfering with the plaintiffs' account particularly the deposit account No. 0010396 dated 18th March 2009 and which was set to mature on 14th June 2009 in which the sum of Kshs.1,782,916.80 was being deposited in a ninety (90) day fixed deposit account, pending the hearing and determination of the application. The grounds in support of the plaintiffs' application are stated on the face of the application. The application is supported by the annexed affidavit of Harun Lempaka, the 2nd plaintiff. He swore an affidavit in further support of the application. The application is opposed. Ayaz Merali, the managing director and Muhammad Mujtaba, the general manager of the 3rd defendant swore affidavits in reply and in opposition to the plaintiffs' application.

At the hearing of the application, I heard rival arguments made by Mr. Ondieki for the plaintiffs, Mr. Anzala for the 2nd defendant and Mr. Ngatia for the 3rd defendant. Miss Nduati for the 1st defendant did not make any submissions either in support or in opposition to the application. I have carefully considered the said submissions. I have also read the pleadings filed by the parties herein in support of their respective opposing positions. The facts of this application are more or less not in dispute. The 2nd

plaintiff is a director of the 1st plaintiff. The 1st plaintiff entered into an agreement with the 1st defendant with a view to purchasing a motor vehicle, Toyota Landcruiser Lexus V8 4.7 Litre, petrol propelled. The 1st defendant is a company registered in the United Kingdom with its offices at Basildon, Essex United Kingdom. According to the plaintiffs, the 2nd defendant was the 1st defendant's representative in Kenya. The purchase price for the motor vehicle was agreed at £15,800 Sterling. The plaintiffs paid the said sum through the 3rd defendant bank. The said amount was paid in two installments of £14,000 and £1,800 respectively. The said amounts were paid on 14th November 2008 and 18th November 2008. The amount was paid to the 2nd defendant as the representative of the 1st defendant. The 2nd defendant was issued with a receipt for the said sum of £15,800 Sterling. According to the plaintiffs, the 1st defendant breached the terms of the contract by attempting to supply a motor vehicle that was propelled by petrol and gas (LGG) instead of the one that the plaintiffs had specifically ordered. It was in this regard that the plaintiffs rescinded the contract and demanded to be refunded the money that they had paid to the 1st defendant.

According to the plaintiffs, the 1st defendant issued them with two cheques dated 1st November 2008 and 7th December 2008 respectively. The two cheques were for the sum of £14,000 and £1,800. The said cheques were drawn on the 1st defendant's account at HSBC, Basildon Essex Branch in the United Kingdom. It was the plaintiffs' case that the said cheques were deposited in the 2nd plaintiff's account at the 3rd defendant bank. The two cheques were deposited on 25th February 2009. The plaintiffs insist that the said cheques were honoured and funds transferred to the 2nd plaintiff's said account.

It was the plaintiffs' case that the defendant acknowledged receipt of the said amount and credited the same to his account. In support of their contention that indeed the said amount had been deposited in the 2nd plaintiff's account, the plaintiffs annexed copies of bank statements. The plaintiffs further stated that the 3rd defendant allowed them to open a fixed deposit account in which the entire proceeds of the said cheques were to be deposited and fixed for a period of three (3) months. The plaintiffs were therefore shocked and surprised when they were notified on 23rd April 2009, that the two cheques were dishonoured and consequently the plaintiffs could not benefit from its proceeds. It was the plaintiffs' case that the 3rd defendant had acted negligently, recklessly and in breach of its duties as a bank.

In response to the plaintiffs' claim, it is the 3rd defendant's case that the two cheques that are the subject matter of the suit were indeed deposited by the 2nd plaintiff in his account, but upon presentation of the same to the 1st defendant's bankers in the United Kingdom, the same were dishonoured. It was the 3rd defendant's case that the 1st defendant instructed his bankers to stop payment of the said cheques: as proof of the said instructions, the 3rd defendant annexed copies of the said cheques that were returned to it upon the same being unpaid. The 3rd defendant explained that it was normal banking practice that the amount reflected in a cheque would be reflected in the customer's bank statement pending clearance of the said cheque by the bankers of the person to whose account the cheque is debited.

The 3rd defendant reiterated that the fact that the amount in such a cheque is reflected in the customer's account does not mean that the amount is available for withdrawal by such a customer. It was the 3rd defendant's case that the payment of the two cheques having been stopped by the 1st defendant's bankers, the 3rd defendant could not be expected to pay the value of the said cheques. It was on the said basis that the 3rd defendant is of the view that the plaintiffs' application did not have merit and ought to be dismissed.

Having evaluated the facts of this application, the issue for determination by this court is whether the plaintiffs established a case to entitle it restrain the 3rd defendant in the manner prayed for by the plaintiffs in their application. The principles to be considered by this court in determining whether or not to grant an order of interlocutory injunction are well known: the plaintiffs must establish a prima facie case that is likely to succeed during the main hearing of the case. The plaintiffs must establish that they

would suffer irreparable harm that will not likely be compensated by an award of damages. In the unlikely event that the court will be in doubt, it will determine the application on a balance of convenience. (**See Giella vs Cassman Brown [1973] EA 358**).

In the present application, it was clear that the basis of the plaintiffs' application is a bank-customer relationship between the plaintiffs and the 3rd defendant. The plaintiffs' case is based on the alleged breach of the contractual obligations by the 3rd defendant. For the plaintiffs to succeed in their application, they must establish that the 3rd defendant violated its contractual obligation to credit the 2nd plaintiff's account with the sums in the disputed cheques. The plaintiffs will be required to prove that the 3rd defendant acted contrary to the normal bank practice to enable the court issue the orders sought in their application.

In the present application, it was clear that the basis of the plaintiffs' application was the allegation by the plaintiffs, particularly the 2nd plaintiff, that the 3rd defendant had breached the banking regulations by failing to pay him the proceeds of the two cheques that were issued to him by the 1st defendant. Upon evaluation of the facts of this application, it was evident that the 3rd defendant established to the required standard of proof that it followed the normal procedure used by banks in managing the 2nd plaintiff's account. The 3rd defendant was able to establish that the two cheques were dishonoured upon being presented to the 1st defendant's bankers in the United Kingdom. The 1st defendant in fact issued instructions to its bankers stopping payment of the said cheques.

It was apparent to the court that the plaintiffs confused the normal banking practice by which the amounts in cheques are reflected in the statements of beneficiaries of the cheques as credits but uncleared effects to imply that the said amounts in the cheques were indeed credited in the 2nd plaintiff's account. The period it took for the bank in the United Kingdom to communicate to the 3rd defendant the dishonour of the cheques contributed to some extent to the plaintiffs' conviction that indeed the said cheques had been honoured. I find no merit with the plaintiffs' assertion that the 3rd defendant had breached its banking mandate by failing to pay him the proceeds of the said cheques. The 3rd defendant informed the court that the two dishonoured cheques are in their custody upon the same being returned to it by the 1st defendant's bankers. The 3rd defendant cannot credit the 2nd plaintiff's account with proceeds of the cheques which were dishonoured.

In the premises therefore, it is clear that the basis of the plaintiffs' application is misconceived. The application lacks merit and is hereby dismissed with costs to the 3rd defendant.

DATED AT NAIROBI THIS 13TH DAY OF NOVEMBER 2009

L. KIMARU

JUDGE