



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 541 of 2005**

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

**VERSUS**

**ABDI ABSHIR WARSAME .....1ST DEFENDANT**

**DAQARE TRANSPORTERS LIMITED .....2ND DEFENDANT**

**RULING**

The applicant, **Dagare Transporters Limited** seeks;

**“That the injunction restraining the 2nd defendant by itself or by its servants, agents or otherwise howsoever from drawing, or otherwise dealing with its Bank account number 7175184 with Barclays Bank of Kenya Limited Muthaiga Branch be discharged forthwith”.**

The grounds in support of the application are;

- (a) A consent order was recorded on 12/10/2005 that the first defendant to play the sum of USD 39000/= on or before 2nd November 2005 pending payment of the said amount, the injunction dated 30th September 2005 shall remain in force as against account numbers 7174242 and 7175184 at Barclays Bank of Kenya Ltd, Muthaiga Branch. The injunction order against Account number 002026530 paramount Universal Bank be lifted, in default of payment execution to issue against the first defendant. Parties be at liberty to apply.**
- (b) The aforesaid consent order provided that the 1st defendant do pay USD 39000 on or before 2/11/2005 and in default execution to issue against him.**
- (c) The injunction dated 30/9/2005 was to remain in force pending payment which was to be on or before 2/11/05.**
- (d) That the aforesaid injunction was to lapse on 2/11/2005 leaving the plaintiff with the alternative provided in the default clause being to execute against the 1st defendant.**
- (e) That the plaintiff has illegally continued to freeze 2nd defendant’s account number 7175184 Barclays Bank Ltd at Muthaiga Branch without any justification and alleging that the injunction is still subsisting.**
- (f) That the Account number 7175184 belongs to the 2nd defendant and there is no judgement against the 2nd defendant and therefore no justification to sustain the injunction any longer while the plaintiff has the option to proceed with execution as per the default clause.**
- (g) The continued freeze of the 2nd defendant’s account by the plaintiff while the entire suit is concluded is unjustifiable and is occasioning the 2nd defendant undue prejudice.**

**(h) The court has jurisdiction to grant the prayers sought.**

The application is supported by the affidavit of the 1st defendant, one **Abdi Abshir Warsame** who states as follows: That he is a director of the 2nd defendant company and therefore conversant with the facts in issue. He contends that the plaintiff Bank filed this suit seeking recovery of the sum of USD 39000/= from the defendants jointly and severally. That the bank obtained a mareva injunction against the accounts held by both defendants. That on 12/10/2005 a consent order was recorded in court ordering the 1st defendant to pay the claimed amount on or before 2/11/2005 and pending the payment, the interim injunction obtained against the account numbers 7174242 and 7175184 was to subsist and in default of the said payment, execution was to issue against the 1st defendant.

The deponent contends that since he did not pay the sum of USD 39000/= before 2nd November 2005, the only remedy available to the plaintiff is execution against him, which act is acknowledged by the plaintiff in the attempted execution proceedings undertaken by them. It is the contention of the deponent of the supporting affidavit that there is no justification for the interim injunction on account number 7175184 that belongs to the 2nd defendant to continue in favour of the plaintiff since the order recorded on 12th November 2005 in respect of that account has lapsed and there is no justification in the continued freeze of the said account by the plaintiff since there is no judgement against the 2nd defendant.

There is no dispute that the plaintiff filed the present suit seeking the sum of USD 39000 against the defendants and obtained a temporary injunction restraining the defendants from withdrawing any sums from accounts numbers 7174242 and 7175184 at its Muthaiga Branch. On 12th October 2005 the parties appeared before Justice (retired) Ransley and the consent subject of this determination recorded. It is pertinent to note that account number 7174242 is in the personal names of the 1st defendant while account number 7175184 belongs to the 2nd defendant but operated by the 1st defendant.

On 20th July 2005, the 1st defendant instructed the plaintiff Bank to issue a bank draft for USD 39000/- in favour of Awash Highland Traders which the bank obliged. After 3 days the 1st defendant changed his mind and re-banked the draft at the plaintiff's Branch at **Jomo Kenyatta International Airport**. It appears the draft was made from account of the 1st defendant but taken and/or transferred to the 2nd defendant's account. It is also clear that the bank did not reflect the transaction between the two accounts, at the time, the dispute arose.

It is also undisputed that the applicant is a company formed by the 1st defendant and one **Kassim Warsame**. There is ample and uncontroverted evidence to show that **Kassim Warsame** resigned from the company, making the 1st defendant the sole proprietor of the company. Perhaps it is also important to note that the 1st defendant acknowledges he operates, runs, manages and/or controls the account of the 2nd defendant alone. It is also clear that as at 27th September 2005 the 1st defendant knew the account of the 2nd defendant had been blocked from any transaction by the bank. And in one of the affidavits filed in court, the 1st defendant states in part;

**“it is evident from the bank statements that my account and that of the second defendant have had credit amounts well in excess of USD 39000 and the plaintiff's error could easily have been rectified with understanding and co-operation rather than harassment and intimidation”**

The 1st defendant never complied with the consent and on 8th November 2005 made an application seeking to set aside the consent order. The said application was heard on 18th November 2005 and dismissed on 25th November 2005 for lack of merit. The defendants decided to lodge an appeal against the said dismissal but later abandoned the same. On the other hand, the plaintiff resorted to execution for the sum of USD 39000 in terms of the consent order but no fruitful result has yielded from the said action.

Now the 2nd defendant seeks the injunction against its account be lifted and/or set aside on the grounds that there is no judgement against it. And that the plaintiff has the alternative to execute against the 1st defendant. The applicant also alleges that there is no justification to sustain the injunction any longer while the plaintiff has the option to proceed with execution as per the default clause against the only disclosed director, proprietor and/or shareholder of the company.

In **HCCC No.205/99 Mobil Kitale Service Station v Mobil Oil Kenya Ltd & another 1 K.L.R. (2004)**, I held;

**“An interlocutory injunction, being an equitable remedy, would be taken away (discharged) where it is shown that the person's conduct with respect to matters pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter”.**

The orders of injunction cannot be used to intimidate and oppress another party. It is a weapon only meant for a specific purpose – to shield the party against violation of his rights or threatened violation of the legal rights of the person seeking it.

As stated the applicant seeks to set aside a consent order and/or injunction given sometimes in 2005. An injunction being an equitable remedy will look at all the circumstances including the conduct of the parties. There was a bank/customer relationship between the plaintiff and the defendants herein and due to that relationship the bank lost a sum of USD 39000 due to the action or omission of the 1st defendant. It is alleged the money subject

of this litigation was moved from the account of the 1st to the 2nd defendant. There is allegation that the 1st defendant is the supreme authority in the affairs and management of the 2nd defendant.

The 2nd defendant has now made an application to set aside the injunction, which protects the interest of the plaintiff. In my humble view, the contention of the applicant that there is judgement against the 1st defendant is true but it is clear the money subject of this dispute was withdrawn from the 1st defendant's account and deposited to the 2nd defendant's account. In essence the money from the 1st defendant's account was moved by the deponent of the supporting affidavit to the application under my determination.

I agree with **Mr. Ochieng** learned counsel for the plaintiff that this is a unique case of one person having two faces. I am also in agreement that the money in the 2nd defendant's account is technically that of the plaintiff but it cannot have access due to legal impediments.

The question is whether the applicant can be allowed to use the legal process to defeat the rights of the plaintiff. I agree that the applicant may be separate and distinct from the 1st defendant but I do not think a court of equity would allow the applicant to derive double benefits due to the veil around its neck. The case of the plaintiff is against the defendants jointly and severally, therefore unless there is sufficient evidence that the 1st defendant has satisfied the decree, then it would be legally and equitably wrong to lift the injunctive orders against the account of the 2nd defendant.

It is not in dispute that some money need to be refunded to the plaintiff, which was lost through the action of the 1st defendant. And unless the loss of the bank is made good by the defendants, it would be unjustly improper to unlock the account holding the subject money. In my understanding the purport and effect of the consent order was for the account of the 2nd defendant to be frozen for the due performance of the obligation of the 1st defendant. That has not been done and I think to attempt to discharge the injunctive orders would be to abuse the judicial process in a manner contrary to law and justice. I refuse to do so.

**Order: The application dated 17th July, 2006 is hereby dismissed with costs to the plaintiff.**

**Dated, signed and delivered at Nairobi this 4th day of April, 2008.**

**M. A. WARSAME**

**JUDGE**