

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 404 of 2008

BENSON ODONGO OKWIRI.....PLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA LIMITED.....DEFENDANT

RULING

By an application dated 18th July 2008 purportedly made under the provisions of **Order XXXIX rules 1, 2, 3, and 5** of the **Civil Procedure Rules** and **Sections 3, 3A, 63(c) and 63(e)** of the **Civil Procedure Act**, the plaintiff sought a temporary injunction to restrain the defendant by itself or its servants from blocking, freezing or rendering inactive savings account No.0130350478800 and current account No.0120450478800 (*hereinafter referred to as the said bank accounts*) at the defendant's head office branch at Koinange street. The plaintiff further prayed for an order of mandatory injunction to compel the defendant to reactivate the said bank account to enable the plaintiff operate the same without hindrance pending the hearing and determination of the suit.

The grounds in support of the application are on the face of the application. The plaintiff contends that the defendant had acted in breach of fundamental principles of banking law and practice by blocking the operation of the said account. The plaintiff was of the view that the defendant had acted in breach of its fiduciary duty to the plaintiff by freezing the said bank account without any justification. The plaintiff contends that the defendant had acted unilaterally and in bad faith by unfairly and unconscionably blocking the said bank account without notice and further without seeking a valid order from a court with competent jurisdiction. The plaintiff explained that the above breaches of the law by the defendant had made the plaintiff suffer irreparable loss and damage. The application is supported by the annexed affidavits of Benson Odongo Okwiri and Roselyn Apiyo Okwiri.

The application is opposed. The defendant filed notice of preliminary objection to the application on the grounds that the plaintiff lacked *locus standi* to prosecute the matter. The defendant further stated that the application was bad in law. A replying affidavit was filed by Jimmy Mwithi, the security officer of the defendant. He deponed that the said bank accounts were frozen when it was discovered that the sum of KShs.8.8 million belonging to Mastermind Tobacco Kenya Limited had been fraudulently stolen. He deponed that investigations in the said theft conducted by the Banking Fraud Unit of the Police touched on the owner of the said account, Roselyn Okwiri, the sister of the plaintiff. He swore that the bank had frozen the said account to mitigate any loss that it may incur should the bank be found liable to settle the claim arising out of the loss of the said sum. He submitted that the said unit of the police were still investigating the case, and pending the conclusion of investigation, the court should not grant the application sought by the plaintiff.

At the hearing of the application, I heard the rival submissions made by Mr. Jaoko for the plaintiff and Mr. Muchigi for the defendant. I have carefully considered the said submissions made. I have also read the pleadings filed by the parties in support of their respective opposing positions. The issue in dispute in this application involve two account maintained at the defendant's Koinange street branch. The said two accounts, one savings and another current, were opened by Roselyn Apiyo Okwiri, a former employee of the defendant. The said Roselyn Apiyo Okwiri resigned from employment when she obtained a scholarship to undertake a postgraduate course at the University of Trento in Italy. Before leaving the country, the said Roselyn Okwiri mandated his brother, the plaintiff, to operate the said accounts. The

defendant approved the mandate and allowed the plaintiff to operate the said accounts.

Apart from receiving funds from Italy, the plaintiff instructed his employer to pay his salary through one of the said bank accounts. The plaintiff operated the said accounts for a period of over a year without any problems. Meanwhile, it appears that upon conducting investigations of certain fraud which touched the period when Roselyn Okwiri was working for the bank, the defendant discovered that the said Roselyn Okwiri may have participated in the said fraud. As a pre-emptive action, the defendant froze the said accounts maintained in the names of Roselyne Okwiri. The plaintiff was able to establish that despite the fact that the two accounts were in the name of the said Roselyn Okwiri, the defendant had allowed him to deposit cheques written in his name in the said accounts. For instance, the plaintiff annexed a copy of a cheque dated 25th June 2008 of KShs. 1,000,000/= drawn by Njiwa Sacco Limited which was drawn in his favour.

When the plaintiff filed the present suit, the defendant spurned the opportunity to convince this court that indeed the said bank accounts had been used for fraudulent activities. From the affidavit evidence presented to the court, it is clear that the defendant failed to establish that either the plaintiff or his sister participated in the fraud which the Banking Fraud Unit of the Police is currently investigating. The plaintiff is not a suspect. The defendant has not placed before the court any evidence to suggest that the amounts currently held in the two accounts were deposited therein as a result of fraud. The plaintiff persuaded this court that the balances in the said accounts are either remittances from his sister, Roselyn Okwiri or the deposits of his salary by his employer. He has further satisfactorily explained the cheque of KShs.1,000,000/= that was issued in his favour by Njiwa Sacco Limited. This court was convinced that the plaintiff borrowed the said sum from his co-operative society to purchase a motor vehicle. It seems that the defendant froze the said bank accounts on suspicion and without any concrete proof that fraud had been perpetrated through said accounts.

For this court to grant the mandatory injunction sought by the plaintiff at this interlocutory stage, it must be established that there exists special circumstances that would compel the court to grant the same. The court must be convinced that the case before it is clear and ought to be determined at once so as to avoid any hardship or injustice being occasioned to the plaintiff. The court must further be convinced that in granting the mandatory injunction at the interlocutory stage, the court must feel a high degree of assurance that at the trial it would appear that the mandatory injunction was rightly and justifiably granted (see **Kenya Breweries Limited & Anor vs. Washington Okeyo Nairobi CA Civil Appeal No. 332 of 2000** (unreported)).

In the present application, it is clear that the defendant had no legal justification in freezing the said bank accounts. Mr. Muchigi for the defendant explained to the court that the defendant had frozen the said accounts to mitigate its losses. This court wondered what loss the plaintiff and his sister had caused to the defendant to warrant the defendant to mitigate its loss. In the first instance, the defendant failed to place any material before this court that would give an indication of the fraud committed either by the plaintiff or his sister, Roselyn Okwiri.

It is clear that the defendant froze the said accounts once the plaintiff deposited the cheque for the sum of KShs.1,000,000/= issued to him by his co-operative society. The defendant acted unlawfully in freezing the said accounts. Although the defendant submitted that investigations are still being conducted by the Banking Fraud Unit of the Police, that is not a sufficient ground for the defendant to take the decision to freeze the said accounts. It is clear that the defendant froze the said accounts to steal a march on the plaintiff. The court will not allow the defendant to take advantage of its position to act oppressively and to the detriment of the plaintiff. I hold that the plaintiff established a case to entitle this court grant him the order of mandatory injunction sought.

I will grant the plaintiff's application for interlocutory and mandatory injunction in terms of prayer (2) and (3) of his application dated 18th July 2008. The plaintiff shall have the costs of the application.

DATED at NAIROBI this 23rd day of OCTOBER 2008.

L. KIMARU

JUDGE