



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 204 of 2004

CENTRAL BANK OF KENYA.....PLAINTIFF

VERSUS

GIRO COMMERCIAL BANK LIMITED.....1ST DEFENDANT

JIGNESH DESAI2ND DEFENDANT

RULING

The plaintiff is established under the Central Bank of Kenya Act Cap 491. It carries out statutory duties specified in that act. The first defendant is a Banking Company incorporated under the Companies Act. The second defendant at the material time was the first defendant's Branch Manager of their Westland's Branch. The third defendant is described in the plaint as an adult male resident in Nairobi trading under the name of Mpesha Enterprises and also known as Alex Rebiro Ngugi alias Aba Mpesha. On or about the 29th July as pleaded in the plaint the 1st defendant through its Manager the 2nd defendant opened an account for the 3rd defendant under the business name of Mpesha Enterprises. It is further pleaded in the plaint that at all material times that account was handled under the supervision of the 2nd defendant. It is averred in the plaintiff that the opening of that account was handled in a very casual way and not in keeping with the accepted process of opening a Bank account. That thereafter the 3rd defendant falsely and fraudulently procured Treasury Bonds in the name of another entity. These bonds were subsequently gratuitously transferred through the CDS account in the name of the 3rd defendant. It is further pleaded that the 1st defendant through the 2nd defendant assisted the 3rd defendant with the view of defrauding the plaintiff. The plaint thereafter gives particulars of the payment made through the 3rd defendant account with the 1st defendant and then finally stated that the plaintiff is claiming from the defendant the amount of kshs 205 million which was fraudulently acquired through the transfer of the treasury bonds which rightly belong to the plaintiff. At this interlocutory stage the plaintiff has moved this court by chamber summons dated 12th June 2006. The same is brought under Order XXXIX Rules 1, 3 and 7, Order XXXVIII Rule 5 of the Civil Procedure Rules. Although that chamber summons has in total nine prayers the plaintiff only seeks four prayers from the court. Those prayers are in the following terms: -

- 1) That pending the hearing and determination of this suit, the 2nd and 3rd defendants, by themselves, agents, nominees or persons claiming any right of interest under or through them, be restrained by an order of this court from demanding from, or drawing from or otherwise dealing with the funds held by the 1st defendant on account of Johmat Distributors Limited FDR 5001525/FD/1/2797).
- 2) That pending and determination of this suit, the 2nd and 3rd defendant by themselves, agents, nominees or persons claiming any right or interest under or through them, be restrained by an order of this

court from demanding from the Banking Fraud and Investigation Department of the Kenya Police, the release of the funds or more specifically USD 57, 850 held by the said Department pursuant to their investigations in the fraud which formed the subject matter in Nairobi Chief Magistrate's Criminal Case Number 1342 of 2003.

3) That pending the hearing and determination of this suit, the 2nd defendant be restrained by himself, agents, nominees or person claiming any right or interest under him from demanding from the plaintiff the amounts totalling about kshs 31, 000, 000 – retrieved from the 2nd defendants, bankers, Citi bank, Dubai.

4) That pending the hearing and determination of this suit, the 3rd defendant be restrained by himself, agents, nominees or any person claiming any right or interest through him from demanding, withdrawing or in any way accessing the fund held in a/c No. 500011456-001 in the 1st defendant's bank to the credit of the said 3rd Defendant.

5) That in the alternative, the 2nd and 3rd defendant do furnish security to produce and place at the disposal of the court, the sum of kshs 205, 000, 000/-.

The affidavit in support of the application is sworn by the person holding the office of Director Monetary Operation and debt management of the plaintiff. He began by stating in his affidavit that the information therein had come to him by virtue of his office and from the records in respect of the Government debt including Treasury Bonds. He stated that from information available from the investigations carried out he was able to confirm the following: -

1. On 29th April 2002, the Government of Kenya floated a two year coupon rate Treasury Bond through issue number FXT 2/2002/2.
2. The Treasury bonds were for a fixed coupon rate of 13% to mature on 26th April, 2004.
3. Among the successful bidders was CBA Capital Limited for Treasury Bonds worth kshs 175, 000, 000/-.
4. The said CBA Capital is the holder of the CDS account No. 09-30-00595-1.

He deponed that on the 29th of July 2002 the Government of Kenya floated four years coupon rate Treasury Bonds through issue on FXD I/2002/4. He also found from his investigations that on the 29th of July 2002 the 1st defendant opened an account in its Westland's branch for the 3rd defendant under the name of Mpesha Enterprises. On the 28th of January 2003 Treasury Bonds valued at kshs 175 million were purchased by another entity and these bonds were fraudulently without the knowledge of that entity transferred to the CDS account of the 3rd defendant. The investigation also revealed that on 3rd of April 2003 a Treasury bond of kshs 30 million was fraudulently transferred from another entity to the 3rd defendants CDS account. Those Treasury bonds were subsequently disposed off without the knowledge of their true owners and a total of kshs 216, 191, 750/- which amount was paid into the 3rd defendants account held with the 1st defendant. The investigations that were carried out by Banking Fraud attached to the Kenya Police found out that a certain gentleman by the name Mr Patel gave the information that in the year 2002 the 2nd defendant informed him that he had a friend by the name of Aba Mpesha who was a businessman desiring to open an account with the 1st defendant. To that end the said Mr Patel was requested to assist by signing the account opening forms for the said Mr Mpesha. At sometime in 2003 the 2nd defendant called Mr Patel and advised him that the 3rd defendants account was about to receive some undisclosed amount of money and that for his assistance Mr Patel was going to receive some amount of money to keep him happy. The deponent stated that Mr Patel later surrendered to the investigating officer USD 57, 850 which he said was his share in the Kenya Shillings 205 million stolen from the plaintiff. The deponent stated that Mr Patel did record a statement with the police to that effect.

That statement was annexed to the affidavit. Similarly the police obtained an enquiry statement from the 2nd defendant wherein he confirmed that he was the Manager of the 1st defendants Westland's branch. He confirmed that the 3rd defendant caused a person known as John Mathara Mwangi to approach him, the 2nd defendant, with an offer of a commission of 15% of money received through the 3rd defendants account. He confirmed in that enquiry statement that a sum of USD 175, 000 was paid to him by the 3rd defendant after having discounted bonds for the said 3rd defendant. In April 2003 kshs 30 million was credited in to the 3rd defendants account from the proceeds of sale of Treasury Bills and the 2nd defendant facilitated the withdrawal of the same this was confirmed by the forensic report. The deponent stated that the 2nd defendant did instruct his Bankers namely Citi Bank Dubai to uplift his deposit from the bank and the same was transferred to the plaintiff. The deponents stated that he believed that the amounts surrendered by Mr Patel and also surrendered by the 2nd defendant was part and parcel of the amount of kshs 205 million fraudulently taken from the plaintiff. The deponent stated that there was an amount held in an account in the name of Johmat distributors Ltd which account was held on behalf of the 3rd defendant and this too was stated to be believed to be part of the amount stolen from the plaintiff. The deponent also talked about an account No. 5001456 – 001 held by the 1st defendant in the name of the 3rd defendant which has in credit an amount of money believed to be part and parcel of the money stolen from the plaintiff. The deponent concluded by saying that the defendants are not known to hold any assets which could satisfy any judgment that might be passed against them in favour of the plaintiff in this matter. It is clear that what the plaintiff seeks from this court is a Mareva injunction. The Court of Appeal by the case Kuria Kanyoko t/a Amigo Bar and Restaurant versus Francis Kinuthia Nderu and other [1988] 2 KAR 126 has recognised that our courts can grant a Mareva injunction. The case of Nippon Yusen Kaisha Versus Karageorgis and Another [1975] ALL ER 282 case the respondents had chartered a ship from the applicants but they later failed to pay the hired charges. The applicant believed that the respondents had money in banks in London. They therefore sought a Mareva injunction to stop the respondents from accessing that money and the court granted that order. Another case that was relied upon by the plaintiff was Mareva Compania Naviera SA versus International Bulkcarriers SA [1980] I All ER. In the judgment of Lord Denning MR, he stated as follows:

“In my opinion that principle applies to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting judgment for it. If it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assts so as to defeat it before judgement, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets

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In face of this danger, I think this court ought to grant an injunction to restrain the charteres from disposing of these moneys now in the bank in London until the trial or judgement in this action.”

The plaintiff did also rely on the case of Z Ltd versus A and others [1982] I All ER 556 where it was stated;

“Once granted, a Mareva injunction has immediate effect on every asset of the defendant covered by the injunction because it is a method of attachment which operates in rem in the same manner as the arrest of a ship and because any authority which third parties may have to deal with the asset in accordance with the instructions of the defendant is revoked once such third parties have notice of the injunction.”

The 2nd defendant in his replying affidavit denied the averments both in the plaint and in affidavit in support. He stated that the evidence relied upon by the plaintiff was mostly hearsay therefore could not be relied upon by the court. In respect of the information provided by Mr Patel the 2nd defendant said that information was false and it was also hearsay. In respect of the inquiry statement attached to the affidavit of the plaintiff the 2nd defendant stated that its was admissible and therefore could not amount to a confession. He further stated that it was obtained through inducement and threat made by the investigating officer who investigated the case for the criminal trial. Similarly he stated that the uplifting

of the amount in his Citi Bank Dubai account was as a result of that threat. The 2nd defendant denied that he was involved in the alleged theft and stated that the money in his account represented past investments by him. He finally stated that the prayer for security for cost by the plaintiff was meant to hinder the prosecution of his defence case. The authorities that were relied upon by counsel for the 2nd defendant all related to applications for security for costs. In the case of Abdil Ali Nuru versus Transami Kenya Ltd the court found that for an order for security for costs to be made there must be credible evidence of the respondents inability to pay. In the case of Jax Kenya Ltd versus South African Mutual Life Assurance Society the court found that the fear that a plaintiff might not pay costs to the defendant if the defendant was successful in the action was not reason enough to order security for costs against such a plaintiff. In the case of Swapan Sadhan Bose versus Ketan Surendra Somaia & 3 others the judge was of the opinion that ordering for security of costs should not give an impression that justice is only available to those who can financially afford it. The judge did order that the plaintiff to supply security of cost but the amount so ordered was not as high as had been demanded by the defendants. As it would become clear from the affidavit in support of the plaintiffs application there was a mention of a party involved in this transaction by the name of Johmat Distributor Ltd. That party is not a party in this action. A notice was filed in court on 20th June 2006 by the said Johmat Distributor Ltd seeking that the court be moved to join that entity as an interested party in this matter. The proposed interested party has not moved this court formally but I am of the view that by virtue of order I Rule 9 of the Civil Procedure Rules the court can grant leave to that interested party to be joint in this action. I will deal further of this matter at the conclusion of this ruling. That proposed interested party did swear an affidavit in opposition to the plaintiffs application. In that affidavit sworn by the managing director he stated that Johmat Distributors Ltd are desirous as being joint as interested party to this suit. He also stated in his affidavit that the evidence relied upon by the plaintiffs deponent contained hearsay statements made to Kenya police officers. He confirmed that he was an accused person in the criminal trial involving the other defendants namely criminal Case NO. 1343 of 2002. In that trial he stated that there was no evidence that was adduced by Mr Patel against him. He confirmed that Johmat distributor's Ltd is bonafide depositor with the 1st defendant and that the money in the saving and fixed deposit account was normally rolled over as necessary. The Managing Director denied that he was at all involved or participated in the alleged theft of the plaintiff money. He concluded by saying that the plaintiff application is incompetent and vexatious.

As the court considers the application before it, I am aware that it is not the obligation of this court to protect a creditor before he has obtained judgement. In also considering the application that has been made by the plaintiff which application seeks to restrain the defendants from operating or accessing certain funds I am of the view that to grant such an order can not at all be seen as though the injunction is intended to grant a benefit a benefit to the plaintiffs case. The plaintiff seeks from this court a Mareva injunction and Halsbury Laws of England 3rd Edition Vol. 3 [1] page 329 to 331 defines Mareva injunction as follows:-

“A Mareva injunction is an order of the court restraining a party to proceedings from removing from the jurisdiction of the court, or otherwise dealing with assets, located within that jurisdiction and in more limited circumstances from dealing with assets located outside, the jurisdiction. The foundation of the court's jurisdiction is the need to prevent judgements of the court from being rendered ineffective, whether by the removal of the defendants assets from the jurisdiction, or by dissipation.”

As it can be seen from the above quote a Mareva injunction is not a form of pre-trial attachment but is a relief in personam. It is interlocutory and ancillary to the substantive claim as stated in the authority relied on the plaintiff. Our courts has recognised that a Mareva injunction can be granted. I am of the view that in the court's consideration whether such an injunction should be granted the principle that should guide the court are those that are enunciated *Giella v Cassman Brown & Co. Ltd* [1973] EA these are:

- (i) An applicant must show a prima facie case with a probability of success.
- (ii) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.

(iii) When the court is in doubt, it will decide the application on the balance of convenience.

Having examined the evidence presented before court by the plaintiff that is the forensic reports and the statements obtained from the defendants amongst others I am of the view that the plaintiff has shown a prima facie case with a probability of success sufficient to move this court to grant the orders sought. The defendants objection to the evidence produced before court is I believe misplaced for those statements may not have withstood the test of the Criminal standard of proof but I find that they may very well be able to stand the Civil standard of proof. I do therefore find that that evidence proves a case with high probability of success. The 3rd defendant did not oppose the plaintiffs application. The case in respect of the 1st defenantrn was withdrawn prior to my hearing the present application. All in all, the plaintiff application does pass the first test of the principles of granting an injunction. The case of Giella V Cassman Brown & Co. Ltd (supra) stated that an injunction will not normally be granted where the applicant does not show that it will suffer irreparable injury. In this case I am of the view that the plaintiff has sufficiently shown that damages cannot in any way compensate the loss that it will suffer if the restraining orders are not granted as prayed. I therefore also find that the plaintiffs case does also pass the second test of the principles of granting an injunction. In respect of those two tests, I find that I do not entertain any doubt and I will not therefore proceed to examine the third test. I am of the view that the prayers in the Mareva injunction sought by the plaintiff are merited and will accordingly grant the same. The plaintiffs prayer for security for costs to my mind was an alternative to the injunction prayers and since I have found for the plaintiff in respect of the injunction I will not consider in dept the prayers for security for costs. Suffice it say I am in agreement with the second defendant that the plaintiff did not prove that the court should order the defendant to provide security for cost. In respect of Johmat Distributors Ltd as stated before the provision of order 1 rule 9 of the Civil Procedure Rules does provide that the court can order a party to be joined in an action where the presence of such a party is necessary to enable the court to effectually and completely adjudicate upon all the questions involved in the case. Some of the prayers for injunction seem to restrain the defendants from operating an account in the name of Johmat Distributor Ltd. If that be so it is essential for such a party to be brought in this action. I therefore order that Johmat Distributor Ltd be joined as the 4th defendant in this action. The plaintiff will file an amended plaint to reflect the name of that entity and thereafter the plaintiff shall serve summons and plaint upon that entity. Finally I do need to make reference to the defendants objection to the evidence adduced in the plaintiffs affidavit. The defendants objected to that evidence on the basis that it was hearsay evidence. That objection is rejected by the court for in looking in the plaintiffs affidavit there was a statement that the information was obtained from records and from investigations carried out. At this interlocutory stage since the plaintiff dilverged the source of that information the court will allow that evidence to stand. It is important to notice that as I conclude in this ruling that the plaintiff is entitled to the prayers that are sought it ought to be noted that the plaintiff has given and filed in this court an undertaking as to damages that may be suffered by the defendants as a result of the injunction sought. That undertaking to my mind should allay any fears that the defendants have that the loss they incur could be irreparable. In the final analysis I grant the following orders:

- 1) That pending the hearing and determination of this suit, the 2nd and 3rd defendants, by themselves, agents, nominees or persons claiming any right of interest under or through them, be and are hereby restrained by an order of this court from demanding from, or drawing from or otherwise dealing with the funds held by the 1st defendant on account of Johmat Distributors Limited (FDR 5001525/FD/1/2797).
- 2) That pending the hearing and determination of this suit, the 2nd and 3rd defendant by themselves, agents, nominees or persons claiming any right or interest under or through them, be and are hereby restrained by an order of this court from demanding form the Banking Fraud and Investigation Department of the Kenya Police, the release of the funds or more specifically USD 57, 850 held by the said Department pursuant to their investigations in the fraud which formed the subject matter in Nairobi Chief Magistrate's Criminal Case Number 1342 of 2003.
- 3) That pending the hearing and determination of this suit, the 2nd defendant be and is hereby restrained by himself, agents, nominees or person claiming any right or interest under him from demanding from the plaintiff the amounts totalling about kshs 31, 000, 000 – retrieved from the 2nd defendants, bankers, Citi

bank, Dubai.

4) That pending the hearing and determination of this suit, the 3rd defendant be and is hereby restrained by himself, agents, nominees or any person claiming any right or interest through him from demanding, withdrawing or in any way accessing the fund held in a/c No. 500011456-001 in the 1st defendant's bank to the credit of the said 3rd Defendant.

5) The Plaintiff is granted leave to amend the plaint herein within 21 days to reflect the name of Johmat Distributors Ltd as the 4th Defendant in this action.

6) Once the plaint is so amended the same together with summons shall be served upon the said Johmat Distributors Ltd.

7) The costs of the chamber summons dated 12th of June 2006 shall be in the cause.

MARY KASANGO

JUDGE

Dated and delivered this 15th day of February 2007

MARY KASANGO

JUDGE