



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

**Civil Case 15 of 2006**

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

**VERSUS**

**CHRISTANT MUTISYA MAINGI .....1<sup>ST</sup> DEFENDANT**

**JOHNSON NGOTHO KIOGE .....2<sup>ND</sup> DEFENDANT**

**RULING**

The plaintiff has brought this application pursuant to the provisions of Order 39 rules 1, 3 and 7; Order 38 rule 5 of the Civil Procedure Rules; and Section 3A of the Civil Procedure Act.

Through this application, the plaintiff seeks an injunction to restrain the defendants from drawing or otherwise dealing with the bank account No. 0013943001 at Trans-National Bank Limited, City Hall Way Branch, Nairobi. The plaintiff also wishes the said injunction order extended so as to apply to any other bank accounts of the defendants in any bank or similar institutions within Kenya.

The application is dated 20<sup>th</sup> January 2006, and was filed under a certificate of urgency, on that date. The matter was then placed before the Hon. Azangalala J. on the same date.

After giving due consideration to the application, *ex parte*, the court granted an interim order, which was to remain in force until 21<sup>st</sup> February 2006, when the matter was scheduled to be heard *inter-partes*. However, on that date (21<sup>st</sup> February 2006), none of the parties appeared before the court, causing the application to be adjourned indefinitely.

It was not until 26<sup>th</sup> April 2006 that the application was next listed for hearing. And on that date, the defendants did not attend court. However, after satisfying myself that the defendants had been duly served, I allowed the plaintiff to prosecute the application.

It is the plaintiff's case that it is a registrar of shares, through one of its specialised departments. In that capacity, the plaintiff had custody of shares belonging to its customers. The defendants herein are said to have impersonated one of the plaintiff's customers, whose share certificates they forged. After the defendants sold out the shares, the plaintiff had to indemnify their customer, whose share certificates had been forged. The sum of money which the plaintiff paid out to their customer is Kshs.8,140,239/65. It is that sum of money which the plaintiff is now seeking to recover from the defendants.

For now, the plaintiff says that it has traced the funds to the defendant's account at Trans-National Bank.

Therefore, in order to ensure that the funds are not withdrawn by the defendants whilst the case was still pending, the plaintiff is requesting the court to freeze the defendant's bank account.

By virtue of the provisions of Order 39 rule 7 (1) (a), the court may, on the application of any party to a suit, and on such terms as it thinks fit, make an order for the detention, preservation or inspection of any property which is the subject matter of such a suit.

From the evidence made available to the court, so far, I am satisfied that the plaintiff has made out a prima facie case with a probability of success. I am also satisfied that if the money in the defendants' account is not preserved, there is a real possibility that it may be spirited away, so as to be beyond the plaintiff's reach.

Meanwhile, the defendants have been the subject of police investigations, in relation to the forgery which led to the bank's loss of the money now being claimed. Of course, pursuant to the provisions of the Constitution of Kenya, the defendants are presumed to be innocent until and unless the state was able to adduce such evidence as was found, by a trial court, to be sufficient to convict them. Therefore, by holding that the plaintiff had established a prima facie case with a probability of success must not be construed as visiting criminal liability on the defendants. The said finding is wholly consistent with the presumed innocence of the defendants, as the defendants may yet use the opportunity available to them during the trial of this civil case to prove, on a balance of probability that they were not liable.

For now, the defendants have not challenged any of the evidence tendered by the plaintiff. In the circumstances, it does appear, on the face of the evidence already adduced, that the plaintiff has made out a good case, which has a more than even chance of success.

In the case of **STANDARD CHARTERED BANK OF KENYA LIMITED –VS- SAMUEL NKONGE KIBERA & 2 OTHERS, HCCC NO. 1729 OF 1997**, the HON. M. OLE KEIWUA J. (as he then was) held as follows, in an application similar to the one before me:

**"I am, in view of these elucidations from the English Court of Appeal, satisfied that a Mareva injunction lies in the circumstances of the case presently before this court. I am also of the view that by saying that an applicant has made out a prima facie case with a probability of success is not the same as saying an accused is guilty before the trial and conviction. That finding of a prima facie case is not even in civil law sufficient to conclude that the Respondent is liable on a balance of probability."**

I am wholly in agreement with those remarks of the learned judge, and can do no better than to adopt his words above-cited.

As the defendants have not placed any material before me, I am unable to discern their ability to meet the judgement, if the plaintiff was to finally get judgement in accordance with the prayers in the plaint. In effect, I hold the considered view that unless the sums in the defendants' account were secured, by way of an injunction until the suit was heard and determined, the plaintiff may suffer irreparable loss and damage.

Accordingly, I am satisfied that the plaintiff has met all the conditions for the award of an interim injunction. Therefore, I hereby grant an injunction to restrain the defendants by themselves or by their servants, agents or otherwise howsoever, from drawing money from or otherwise dealing with the bank account number 0013943001, at Trans-National Bank Limited, City Hall Way Branch Nairobi, pending the hearing and determination of this suit.

The plaintiff is also awarded the costs of the application dated 20<sup>th</sup> January 2006.

Dated and Delivered at Nairobi this 7th day of June 2006.

**FRED A. OCHIENG**

**JUDGE**