



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)
CIVIL CASE 515 OF 2003

RAMESH POPATLAL SHAH & ANOTHER.....PLAINTIFF

- VERSUS-

**NATIONAL INDUSTRIAL CREDIT
BANK...DEFENDANT**

RULING

There are two applications before the court. The first one is dated 31st July, 2003 and was filed in court on 1st August 2003. It was brought by way of chamber summons under O.XXXIX rules 1, 2, 2A, 3 and 9 of the Civil Procedure Rules and under section 3A of the Civil Procedure Act, Cap. 21, Laws of Kenya; under the High Court Vacation Rules and all other enabling provisions of the law. The application seeks several orders: 1 That this application be certified as urgent and be heard *ex parte* in the first instance.

2. That this Honourable Court be pleased to admit this matter for hearing during the High Court Vacation. 3. That this Honourable Court be pleased to issue a temporary injunction restraining the Respondent, by itself, its servants, employees and/or agents from selling, leasing, parting with physical possession of or disposing of motor vehicle registration Number KAH 758C pending the hearing and determination of this application.

4. That this Honourable Court be pleased to issue an order of injunction restraining the respondent from applying, appropriating and/or utilizing the proceeds of the deceased's life insurance policies numbers J/H64793, J/H64794, J/H64795 and J/H64796 released to the respondent by M/s Axa Equity and Law, United Kingdom, pending the hearing and determination of this suit.

5. That this Honourable Court be pleased to order the respondent to forthwith release and deliver to

the applicant the motor vehicle registration number KAH 758C.

6. That this Honourable Court be pleased to order the respondent to forthwith deposit in court all the payments it received from M/s Axa Equity & Law in respect of the deceased's life insurance policies numbers J/H64793, J/H64794, 3/H64795 and J/H64796 pending the hearing and determination of this suit.

7. That the costs of this application be provided for.

The application is based on the grounds that the respondent has unlawfully and irregularly repossessed the motor vehicle registration number KAH 758C which belongs to the estate of the deceased, and has refused to disclose to the applicants the basis upon which it repossessed the said motor vehicle; that the respondent has called for the proceeds of the deceased's life insurance policies from Axa Equity & Law on the grounds that the deceased had assigned the same to it as security while at the same time refusing to disclose to the applicants the origins, nature and extent of the debts allegedly owed by the deceased. It is a further ground of the application that as the personal representatives of the estate of the deceased who are appointed by this Honourable Court, the applicants are entitled to

full information regarding the assets, debts and other affairs of the deceased, which information the respondent has refused to divulge. Consequently, the applicants contend, it is in the interests of justice that the respondent be compelled to make a full disclosure of and produce the accounts sought for verification and ascertainment before any assets in the estate are distributed. Unless the orders sought are granted, the applicants say, the estate may be wasted and depleted to the detriment of the rightful beneficiaries. The application is also supported by the annexed affidavit of Surekha Shobhagchandra Shah, one of the administrators of the estate of the deceased, Shobhagchandra Ratilal Shah, and also his widow.

At the hearing of the two applications, Mr. Kamau and Mr. Bengi appeared for the applicants. The respondent did not attend. The record shows that the hearing date was taken ex parte on 9th December, 2003. The hearing notice dated 10th December, 2003 was served on counsel for the respondents on 11th December, 2003 as per the affidavit of service sworn on 4th January, 2004 and filed in court on 7th January, 2004 by one Elizabeth Kiasyo, an advocate of the High Court of Kenya.

In spite of service having been effected, the respondent did not attend. Furthermore, the respondent has filed neither a replying affidavit nor grounds of opposition.

The court was satisfied that the hearing notice was served insufficient time for the respondent to attend. However, it did not do so. When this matter was last adjourned on 13th October, 2003, it was at the instance and behest of the respondent/and the court granted that adjournment as a last opportunity. For these reasons, the court found it prudent to proceed ex parte, the respondent's absence notwithstanding.

In canvassing the above application, Mr. Kamau for the applicants said he was seeking entirely on the affidavit of Surekha Shah, and also on the grounds set out in the application. He also pleaded that the applicants were seeking prayers 5, 6, and 7 of the application, other prayers having been spent.

Prayer no. 5 seeks a release of motor vehicle No. KAH 758C which, according to the affidavit of Mrs. Shah, forms part of the assets of the deceased, and which the respondent attached without justification.

In prayer no. 6, the applicants apply for the release and deposit in court of all the payments which the respondent received in respect of the deceased's four life assurance policies. The sum assured in each policy was £12,500 sterling, exclusive of all interests earned and accrued. Mr. Kamau therefore argued that since there were four insurance policies, the respondent should deposit in court a total of £50,000 sterling as these were the sums received by the respondent from the insurers, M/s Axa Equity & Law. He added that this is a colossal sum of money and it forms the bulk of the estate of the deceased. The applicants are apprehensive that the respondent might utilize these funds to the detriment of the inheritors and their entitlement. The applicants therefore pray that the moneys in issue be deposited in court so that the respondent does not have the opportunity of using funds to which they are not entitled.

The plaint herein was filed on 1st August, 2003. Although the defendant was duly served, it did not file a memorandum of appearance within the prescribed period, consequent upon which failure the court entered an interlocutory judgment against the defendant on 26th September, 2003.

Mr. Kamau further submitted that the only step outstanding is formal proof, in which circumstances the applicants have established a very good case and have substantially succeeded so as to warrant the orders prayed for. In addition thereto, counsel continued, the respondent herein has demonstrated that it is not interested in assisting the applicants or the court in finalizing this matter. Therefore, the balance of convenience tilts in favour of the applicants. At this juncture, Mr. Kamau referred the court to Giellav. Cassman Brown & Co. Ltd [1973] E.A. 358. He also argued that on the issue of whether damages would be an adequate remedy, even if such damages were adequate, that does not, per se, preclude the court from issuing an injunction. In support of that position, he cited LUCY NJOKI WAITHAKA V. INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION, Civil Case no. 321 of 2001 (U.R.).

He concluded by submitting that the applicant had made out a good case to warrant the issuance of orders sought in the application, and that the applicant should also be awarded costs of the application.

So much for the application dated 31st July, 2003. The second application is similarly brought by way of a Chamber Summons dated 17th October, 2003 and filed in court on the same day, under O. XIX rules 1 and 2 of the Civil Procedure Rules, and S. 3A of the Civil Procedure Act. The application seeks an order that this court be pleased to order the defendant to render to the

plaintiffs a full, true and accurate account of all its financial dealings with the late Shobhagchandra Ratilal Shah as prayed in the plaint, and in particular-

(a) a full, true and accurate account of all the financial dealings between the defendant and the late Shobhagchandra Ratilal Shah giving full and separate statements for each transaction from inception to conclusion as at 1st February 2003 being the date of demise of the deceased showing all the advances, payment from the accounts and payments into the accounts.

(b) Certified copies of all agreements and security documents against each of the advances made to the deceased.

(c) A true and accurate disclosure to the plaintiffs of the details and/or particulars set out in paragraphs (i), (ii), (iii), (iv), (v) and (vi) therein.

The grounds upon which the application is based are that the defendant has failed, neglected and/or refused to render a full true and accurate statement of account of all the financial dealings between himself and the late Shobhagachandra Ratilal Shah to the administrators of the estate without any reasonable cause and instead has continued to appropriate the estate of the deceased. Secondly, the defendant failed to enter appearance within the prescribed period as a result of which interlocutory judgment was entered on 26th September, 2003, and there is no preliminary question pending between the parties relating to the accounts. Finally, it is not possible for this court to determine the issues in question in this suit without the defendant rendering a true and full account of all its transactions with the deceased. The application is also supported by the annexed affidavit of ERIC BENGI, the advocate for the plaintiffs/applicants.

In his affidavit, Mr. Bengi traces the history of the case from the date it was filed to the date when interlocutory judgment was entered. He also avers that the defendant continues to appropriate the assets of the deceased without disclosing what the deceased owed them. There is therefore imminent danger that the property and assets of the estate will be wasted unless a full and true account is rendered to the plaintiff. He concludes his affidavit by stating that he believes that it is not possible for the court to determine the issues in dispute between the parties until a true and full account is rendered by the defendant.

While canvassing the application, Mr. Kamau referred the court to O.XIX rules 1 and 2 of the Civil Procedure Rules. Rule 1 states-

"Where a plaintiff prays for an account, or where the relief sought or the plaintiff involves the taking of an account, if the defendant either fails to appear or does not after appearance by affidavit or otherwise satisfy the court that there is some preliminary question to be tried, an order for the proper accounts with all the necessary inquiries and

directions usual in similar cases shall forthwith be made."

Mr. Kamau submitted that the position in this matter falls

squarely under the provisions of O.XIX r. 1. Firstly, the plaintiff seeks an account; secondly, the defendant has failed to appear and interlocutory judgment has issued. He therefore submitted that the plaintiff has satisfied all requirements for orders sought, and prayed that these accounts be furnished within 14 days.

This is a very sensitive matter. It touches upon the estate of a deceased person who passed away suddenly without revealing to any living soul his affairs and transactions with the defendant, and without any or any proper account of such affairs and transactions. Between the administrators of the estate of the deceased and the defendant, only the latter is in the know as to the nature and extent of its dealings with the deceased. No doubt the defendant knows why it instructed auctioneers to go to the deceased's business premises and attach motor vehicle registration number KAH 758C, a Mercedes Benz Prime Mover, and it alone knows the circumstances under which the life insurance policies which the deceased had taken out with Axa Equity & Law, United Kingdom, being Policy Numbers

J/H64793, J/H64794, J/H64795 and J/H64796 were assigned to it.

Upon the defendant's failure to enter appearance and file a defence, and its subsequent failure to respond to any or both of the above applications by way of a replying affidavit or affidavits, or by grounds of opposition, the defendant has elected to play its cards close to its chest instead of playing them on the table, facing upwards. As a result, the applicants are none the wiser.

In his submissions on the application dated 31st July, 2003, Mr. Kamau contended that the applicants have satisfied the formula laid down in GIELLA V. CASSMAN BROWN & CO. LTD T19731 E.A. 358 for the grant of interlocutory injunctions. In that case, Justice Spry, V.P of the then Court of Appeal for East Africa, immortalized

that formula at page 360 in the following words-

"The conditions for the grant of an interlocutory injunction are now... well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be

compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience'

An interlocutory judgment has already been entered in this

matter. Only formal proof stands between the applicants and a final judgment, In view of that interlocutory judgment, one is entitled to think that, on the face of the record, and as matters stand now, the applicants have established a prima facie case with a probability of success. Secondly, it would be relatively easy to assess damages for the loss to the estate of the motor vehicle. However, it is not equally easy, I think, for the applicants to evaluate the loss to the estate in respect of the insurance policies unless they know the liability, if any, of the deceased to the defendant. It becomes imperative therefore that the defendant should provide an account of their transactions with the deceased, otherwise they will never know what they may be losing. This court is not in any doubt that the applicants have satisfied the first two prongs of the test laid down in Cassman's case. For that reason, I need not look into the third limb of that test. But if

I had any doubt, I would take the view that as the record stands, the balance of convenience tilts in favour of the applicants.

As said earlier on, the respondent did not deem it fit or proper to respond to these applications. It did not file any replying affidavit, or any grounds of opposition.; On the day for the hearing of the applications, it did not attend. The applications are therefore unopposed. By reason thereof, the court hereby orders that the defendant/respondent do, within 14 days of the date of service of these orders-

- 1. Release and deliver to the plaintiffs/applicants the motor vehicle registration number KAH 758C.**
- 2. Deposit in court all the payments they received from M/s Axa Equity & Law in respect of the deceased's policies numbers J/H64793, J/H64794, J/H64795 and J/H64796 pending the determination of this suit.**
- 3. Render to the plaintiffs a full, true and accurate account of all its financial dealings with the late Shobhagchandra Ratil Shah as prayed in the plaint and particularized as follows:**

(a) A full, true and accurate account of all the financial dealings between the defendant and the late Shobhagchandra Ratil Shah giving full and separate statements for each transaction

from inception to conclusion as at 1st February, 2003 being the date of demise of the deceased showing all the advances, payment from the accounts and payments into the accounts.

(b) Certified copies of all agreements and security documents against each of the advances made to the deceased.

(c) A true and accurate disclosure to the plaintiffs/applicants and the details and/or particulars of the following:-

(i) all documents and securities pledged, lodged or assigned to the defendant by the late Shobhaganchandra Ratilal Shah whether in his capacity as the proprietor of Lento Agencies or through his nominees, assigns, agents, or businesses as security for the financial facilities or accommodation that was advanced or availed by the defendant

(ii) certified true copies of all the statements issued by the defendant to the late Shobhaganchandra Ratilal Shah whether in his capacity as the sole proprietor of Lento Agencies or in any other manner howsoever, from the time of the opening of the accounts until the date of this order.

(iii) A disclosure of all concluded accounts and disclosure of all the proceeds received from any repossessed assets of the deceased supported by all relevant vouchers, receipts and statements.

(iv) A full, true and accurate account of all monies and or payments received from M/s Axa Equity & Law in respect of the deceased's life policies numbers J/H 64793, J/H64794, J/H64795 and J/H64796 taken out in the name of the deceased plus an account of any disbursements for which the policies form security.

(v) Disclosure of all securities/assets for the time being held by the defendant.

(vi) Disclosure of the rate(s) of interest(s) charged in each account.

Costs of both applications to be borne by the defendant/respondent.

Dated and delivered at Nairobi this 23rd day of January 2004

L.NJAGI

JUDGE

By admitting the description in the plaint, however, the defendant led the plaintiff to believe that all was well only to surprise the plaintiff at the trial by revealing its true identity at the last moment. For that reason, the defendant will meet the costs of this application. Orders accordingly. Dated and delivered at Nairobi this 27th day of January, 2004.

L.NJAGI

JUDGE