



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI**

**CIVIL SUIT NO. 247 OF 2018**

**ANASTACIA WAGICIENGO..... PLAINTIFF/APPLICANT**

**VERSUS**

**SICHANGI PARTNERS ADVOCATES..... 1<sup>ST</sup> DEFENDANT/RESPONDENT**

**CYRUS MAINA..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**GEORGE SICHANGI.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. Before this court are two applications that have come up for determination. On the first application the applicants filed a notice of motion dated 19/10/2018 brought pursuant to **Order 40 Order 50 Rule 1 of the Civil Procedure Rule; Section 1A, 3A of the Civil Procedure Code and Article 159 of the Constitution** seeking the following:

***a. Spent***

***b. Spent***

***c. Spent***

***d. Spent***

***e. That this honorable court be pleased to issue orders restraining the respondents from withdrawing, transferring or dealing in any way with the applicant's funds in the 1<sup>st</sup> respondents account No. [...] domiciled at the Cooperative bank of Kenya an any accounts held by the respondent pending the hearing and determination of the suit***

***f. That this honorable court be pleased to issue orders compelling the respondents to transfer to the applicant such funds they are still holding on account of the funds they received from Cooperative vide their letter of instructions dated 18/10/2012 pending the hearing and determination of this suit.***

***g. That this honorable court be pleased to issue orders compelling the respondents to furnish the applicants with certified copies of the extracts of the 1<sup>st</sup> respondents clients account No. [...] demonstrating the movement of the applicant's funds or any parts thereof from the point of receipt to date pending the hearing and determination of this suit.***

***h. That cost of the application be provided for***

2. The application is based on the grounds stated on the face of it. In the supporting affidavit of Anastacia Wagiciengo is stated that in the year 2013 she entered into talks with the directors of St. Claire Primary School to purchase the school and instructed the respondents to be her legal representatives. She applied for a financial facility of Ksh. 32,000,000 through Cooperative Bank to finance the purchase. The respondents advised the plaintiff that because the agreement had not yet crystallised, she deposits the money into their clients account which she did.

3. It happened thereafter that the said agreement did not take shape and therefore she instructed for part of the funds to be credited to accounts that she indicated. Ultimately, there was a balance of Ksh. 17,500,000 which she asked for only to find out that it has been transferred to 3<sup>rd</sup> parties without her consent. This led to her falling behind making payments to the bank and they have threatened to dispose of her property.

4. The application was opposed by the 1<sup>st</sup> respondents ground of opposition dated 14/6/2019 where they claimed that the application by the plaintiff has no basis in law to ask for blanket orders aimed at crippling the respondent personal and corporate transactions. It was their reasoning that there was nothing to support their allegations that the aforementioned amount was in their possession not to mention that the 1<sup>st</sup> defendant is a body corporate as per section 6 (2) of the Limited Liability Partnership Act and section 10 partners cannot be liable for an alleged breach of obligation in contract or tort.

5. On the second application the 2<sup>nd</sup> respondent filed a motion dated brought pursuant to **Section 6 of the Civil Procedure Act, Limitation of Action Act, Order 2 Rule 15 of the Civil Procedure Rules 2010** seeking that the suit herein be struck out or in the alternative there be a stay of proceedings pending the hearing and determination of Milimani HCCC No. 515 of 2016 Barizi Limited v. Julius Ndungu Kaberere; Milimani HCCC No. 165 of 2013 Lumadi Investments Limited v. Diamond Shield International Limited and Milimani CMCC No. 8669 of 2016 Barizi Limited v. Moses Mbuthis Migwi.

6. The application is based on the grounds in the application together with the supporting affidavit of Cyrus Maina who deposed that there were other cases where the subject matter herein and the claim were the same. He admitted that the plaintiff deposited monies in their client account and instructed them to make payments out of the funds which included payments to her former advocates, repaying her loans to 3<sup>rd</sup> party banks, disbursements to her personal accounts, payment to the plaintiffs associated companies ie. Kawa Commercial Limited and loans to her friends.

7. The amount in issue herein being 17,500,000 was distributed as follows as per the instruction of the plaintiff; the plaintiff being a director of Lumadi limited instructed the respondent to send 10,500,000 to the said company which was used to invest on Diamond Shield International for the procurement, packaging and supply of rice. Later though the plaintiff's investment suck and resulted in the institution of HCCC No. 165 of 2013 Lumadi Investment Limited v. Diamond Shield International.

8. Secondly, the plaintiff through her nominee Barizi limited, which the 2<sup>nd</sup> defendant is a nominee director executed a loan agreement of Ksh 2,000,000 in favour of Moses Mbuthis Migwi and Ksh. 5,000,000 in favour of Julius Ndungu. They subsequently failed to repay the said loans and this led to the inception of Milimani CMCC No. 8669 of 2016 Barizi Limited v. Moses Mbuthia Migwi and Milimani HCCC No. 515 of 2016 Barizi Limited v. Julius Ndungu Kaberere.

9. The application was opposed by the reply affidavit of the Anastacia Wagiciengo who contended that she is not a party of any of the aforementioned suits. That a quick look at the pleadings marked "CM-2" in the 2<sup>nd</sup> defendant's affidavit clearly shows that he is the deponent of the verifying affidavits in his capacity as director of Barizi Limited and the claims made therein are on behalf of the company. Furthermore, she is not associated with Barizi Limited neither as a shareholder nor a director therefore any payments made to the company would not benefit her.

10. It was the plaintiff's further contention that she has never consented to being a director of Lumadi Investment Limited and the fact that the documents from the registrar of companies indicated otherwise which came as a shock to her and would mean that it was done fraudulently.

11. Evidentially no monies were paid to the said companies but to individual accounts who included employees of the 1<sup>st</sup> defendant. A closer look at the agreements dated 17/1/2013 and 30/1/2013 revealed that the 2<sup>nd</sup> defendant executed a resolution on behalf of Barizi Limited facilitating the 2<sup>nd</sup> defendant to transfer fund from the 1<sup>st</sup> defendant to their associates. The 2<sup>nd</sup> defendant is therefore hiding behind the corporate veil to try and mask his fraudulent activities

12. The Plaintiff however admitted to authorizing some transactions especially towards repayment of loans however, contrary to what the respondents allege they have still failed to render proper accounts to account for the Ksh 17,500,000 that is the subject of this suit.

13. I have carefully perused through the applications, affidavits and submissions and the issued for determination;

**a. Whether this suit is subjudice?**

**b. Whether to grant the temporary orders as prayed?**

**c. Whether to grant orders compelling the respondents to transfer the remaining funds that they are still holding and furnish certified copies of extracts from A/C No. [...]?**

14. The res sub judice rule is codified in Section 6 of the Civil Procedure Act as follows:

**6.No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.**

15. The Supreme Court of Kenya in **Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others [2020] eKLR** had occasion to pronounce itself on the subject of sub judice. It aptly stated: -

**[67] The term 'sub-judice' is defined in Black's Law Dictionary 9th Edition as: "Before the Court or Judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances**

of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

[68] In the above context, it cannot be denied that the issues and prayers sought by the Petitioner in the two Constitutional Petitions generally call for the interpretation and application of provisions of Chapter Six of the Constitution. The issues and orders in the two Constitutional Petitions substantially ascend from the criteria for the implementation of the provisions of Chapter Six of the Constitution. For the High Court to sufficiently pronounce itself in the two Constitutional Petitions, it has to interpret and apply the provisions of Chapter Six of the Constitution on leadership and integrity.

[69] In Constitutional Petition No. 142 of 2017, the Petitioner challenges the constitutionality of the Working Group as well as the criteria on the implementation of the provisions of Chapter Six of the Constitution as established by the Working Group. The High Court has therefore been tasked to examine the constitutionality or otherwise of the criteria so established by the Working Group.

[70] In Constitutional Petition No. 68 of 2017 the Petitioner therein challenges requirement for clearance by the state and private organs on grounds that it threatens and violates the provisions of the Constitution. For the High Court to determine the constitutionality of the requirement for clearance challenged by the Petitioner in Constitutional Petition No. 68 of 2017 or the Working Group criteria as well as the 'Resolution on Complimentary Framework of Collaboration by Agencies to Ensure Compliance with Leadership and Integrity Requirements in August 2017 General Elections' and 'Compliance with Leadership and Integrity Requirements in the 2017 General Elections' challenged in Constitutional Petition No. 142 of 2017, it has to examine, interpret and apply the provisions of Chapter Six of the Constitution.

[71] In so doing, the High Court shall be compelled, to determine whether a Constitutional test is set up in Chapter Six of the Constitution, whether the set test (if any) is fit and proper, objective or subjective, the scope of application of the test, the implementing organs and bodies. These are substantially the same issues subject of the Advisory Opinion sought by the Applicant comprised at pages 13 to 19 of the Reference before this Court.

[72] We therefore find that this Reference, as framed, mainly raises issues of constitutional interpretation. These issues are also substantially in issue before the High Court in Constitutional Petition No. 68 of 2017 and Constitutional Petition No. 142 of 2017. In view of Article 165 of the Constitution, the High Court is the Court of first instance with regard to jurisdiction for interpretation and application of the Constitution and that Court has already been moved.

[73] Guided therefore by these principles, and in exercise of our discretion, we decline to exercise our jurisdiction under Article 163(6) of the Constitution. This Reference is sub-judice and this Court will not usurp the High Court's jurisdiction under Article 165 (3).

16. The sub judice rule like other maxims of law has a useful purpose. The basic purpose and the underlying object of sub judice is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief.

17. It was the 2<sup>nd</sup> respondents case that the plaintiff has instituted several cases seeking to recover the suit money. However, on examination of the record revealed that HCCC No. 515 of 2016 is between Barizi Limited and Julius Ndungi seeking to recover Kshs. 13,990,440 that had been loaned to the defendant. Secondly, Civil case No. 8669 of 2016 is between Barizi Limited against Moses Mbutia also seeking to recover a loan but for Ksh 2,000,000 and finally according to the respondent HCCC No. 165 of 2013 is between Lumadi Investment Limited versus Diamond Shield International where the amount sought is to the tune of Ksh. 10,500,000. It is therefore clear that the above cases do not meet the required ingredients as the parties and subject matter in each case is different. This subsequently means that the application by the 2<sup>nd</sup> respondent fails and is therefore dismissed.

18. On the second issue, the plaintiff seeks a freezing injunction. A freezing order is not an interim injunction and the threshold to be attained for it to be issued is also distinct from those attending a temporary injunction set out **Giella –vs- Cassman Brown** case. A freezing order is an order of the court which is usually issued in personam restraining or enjoining a person from dissipating an asset directly or indirectly.

19. It is ordinarily issued ex parte for it is intended to serve a useful purpose of preservation of assets. The basis for freezing order is the inherent jurisdiction of the court. The same may be issued alone or with other injunctive orders or orders calling for security for satisfaction of an existing or a judgment which may be issued by the court in the case.

20. However, a freezing order is not to be used to pressure a defendant or as a type of asset stripping (forfeiture) or as a conferment of some proprietary rights on the plaintiff upon the assets of the Defendant. The purposes of any order that should be issued under Order 39 Rules 5 of the civil Procedure act is to prevent the Defendants or would be judgment-debtor from dissipating his assets as to have the effect of obstructing or delaying the execution of any decree that may be passed against him See the case of International Air Transport Association & another v Akarim Agencies Company Limited & 2 others [2014] eKLR. What then is the threshold for the grant of freezing order?

21. In **Goode in Commercial Law 4th Edition** at pg 1287, the authors state:

**“the grant of a freezing injunction is governed by principles quite distinct from those laid down for ordinary interim injunctions. Before granting a freezing injunction the court will usually require to be satisfied that:**

- a. **The claimant has a good arguable case based on a pre-existing cause or action.**
- b. **The claim is one over which the court has jurisdiction.**
- c. **The defendant appears to have assets within the jurisdiction.**
- d. **There is a real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted.**
- e. **There is a balance of convenience in favour of granting the injunction.**
- f. **The court can also order disclosure of documents or the administration of requests for further information to assist the claimant is ascertaining the location of the defendant's assets.**

**Where there is a relationship of trust, tracing of the assets as an equitable remedy can issue.”**

22. A “good arguable” case in the context of a freezing order is one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success. This was the holding in the case of **AFRICAN BANKING CORPORATION LIMITED –VS- NETSATAR LIMITED & 6 OTHERS NAIROBI MILIMANI HCC NO. 299 OF 2009 (UR)**. Bearing these principles in mind, I shall turn to the facts of this case.

23. It is undisputed that the applicant herein instructed the respondent to represent her in the purchase of St. Claire Primary School a deal that fell through. It was also not in dispute that she deposited 32 million shilling to the 1<sup>st</sup> respondent's clients account to facilitate the transaction. What is in dispute however is the balance which is owed to the applicant which she claims to amount to Ksh. 17,500,000. The respondents on the other hand have denied the same and stated that all the funds were returned and/or utilized as per the instruction of the applicant.

24. At this stage it seems that the plaintiff has a good arguable case based on the allegations. It is also not in doubt that this court has jurisdiction to deal with the case herein.

25. However, it was the applicant's argument that the management of the 1<sup>st</sup> respondent has been rocky and may run into headwinds and also added that the 2<sup>nd</sup> respondent is no longer an employee of the 1<sup>st</sup> respondent. On examination of the record, this court noted that the plaintiff did not produce concrete evidence to support her assertions making them mere allegations. Having established the above, I find that the plaintiffs prayer for a freezing injunction must as a result fail.

26. On the final issue it is this court view that compelling the respondent to transfer the suit balance to the applicant goes to the crux of the matter which cannot be dealt with at this stage. In view of the above I make the following orders:

- a. **The application dated 19/10/2018 and 6/12/2018 are found to be without merit, the same are dismissed.**
- b. **In the circumstances of this case a fair order on costs is to order which I hereby do, that each party should met its own costs**

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 5TH DAY OF MARCH, 2021.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the 1<sup>ST</sup> Defendant

..... for the 2<sup>nd</sup> Defendant

..... for the 3<sup>rd</sup> Defendant