



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. E012 OF 2021

JASON OKEMWA, OKEMWA AND

COMPANY ADVOCATES.....APPLICANT

-VERSUS -

DANIEL MUDANYI OCHENJA.....1ST DEFENDANT

RULING

The application before the Court is dated 15th January, 2020 and is brought under Section 1A & 3A of the Civil Procedure Act, Order 50 rule 1, Order 40 rules 1,2, and 3, Order 23 rule 1. Article 159 (2) (d) and all other enabling provisions of the law and seeks the following Orders:-

- 1. THAT a temporary injunction be issued against the Defendant from carrying out debit transactions or moving out funds from account Barclays Bank of Kenya Limited Busia Branch, A/C No. [xxxx] pending urgent hearing and determination of this application.**
- 2. THAT an interlocutory injunction be issued against the Defendant from carrying out debit transactions or moving out funds from account Barclays Bank of Kenya Limited Busia Branch, A/C no [xxxx] pending urgent hearing and determination of this suit.**
- 3. THAT the Honourable Court do forthwith freeze the Defendant's account Barclays Bank of Kenya Limited Busia Branch, A/C No. [xxxx] stopping any further drawings, withdrawals and/or debit transactions pending further orders and directions of the Honourable.**
- 4. THAT the Barclays Bank of Kenya Ltd, (Now Absa) Headquarters and Busia Branch be served with the order of the Honourable Court and ensure enforcement until further directions.**
- 5. THAT orders 2, 3 and 4 be confirmed by the court pending hearing of the main suit or other orders and directions of the Court.**
- 6. THAT in the alternative and without prejudice, the Defendant do deposit into Court a sum of Kshs. 6,133,850 or in the alternative a joint interest earning account of the parties advocates within 5 days of the Courts orders.**
- 7. THAT judgment be entered for a liquidated claim of Kshs. 6,133,850 against the Defendant.**
- 8. THAT without prejudice to the above the Honourable Court Fast Track the hearing of the main case on urgent and priority basis.**
- 9. THAT the Honourable Court do give and other orders it may deem just and expedient to grant in the circumstances.**
- 10. THAT costs be provided.**

The application is supported by the affidavit of JASON OKEMWA sworn on 15th January, 2021. The respondent filed a replying affidavit sworn on 26th January, 2021. The parties agreed to have the application canvassed by way of written submissions which were dated 16th February and 23rd February, 2021 for the applicant and the respondent respectively.

It is the applicant's case that the respondent had engaged his legal services over an employment dispute between him and his employer, the Judicial Service Commission. The parties in an agreement dated 7th December, 2019 agreed that the applicant would provide legal services

to the defendant at a consideration of 1/3 of the judgment/award of the court together with costs and that the respondent would pay Kshs. 20,000 court filing fees and other expenses. It is the plaintiff's submission that the plaintiff indeed paid Kshs. 20,000 on signing of the agreement as agreed.

Subsequently, the applicant filed a suit in **Nairobi ELRC Cause No. 146 of 2018- Daniel Mudanyi Ochenja v Judicial Service Commission** on 20/12/2018 and the Employment and Labour Court rendered its judgment on 14th June, 2019 reinstating the defendant and ordered payment of all back pay and salaries. On appeal, the Court of Appeal upheld the decision of the Employment and Labour Court and awarded the respondent Kshs. 28,000,000 on account of damages and back dated salaries and allowances. It is the applicant submission that after the respondent was paid Kshs. 26,653,799.80 on 18th December, 2020 he started evading him and later on 29th December, 2020 sent the applicant Kshs. 25,000 via Mpesa.

The applicant argues that its entitled to Kshs. 6,133, 850 out of the net sum of Kshs. 18,401,575 paid to the respondent's bank account. He is seeking for orders of injunction restraining the respondent from carrying out any transactions from his account No. [xxxx] at Barclays Bank of Kenya Limited Busia Branch. The applicant has also prayed for a freezing order against the respondent's Bank Account at Barclays Bank of Kenya Limited Busia Branch. The applicant is also seeking the deposit of Kshs. 6,133,850 in court or in a joint interest earning account of the parties advocates.

The applicant relies on the case of **Baber A. Mawji v United States International University & Another [1976] eKLR** where the court held:-

“Until the Court is able to determine the issue both justice and the equities in the case, demand that the status quo be preserved so that, if the plaintiff succeeds, he will not be left with an empty victory, the just fruits of which he cannot realise; and justice would be defeated.”

The respondent on the other hand does not dispute the existence of the advocate-client relationship between the applicant and the respondent and the agreement dated 7th December, 2019. It is the respondent's contention that the issue in dispute is the interpretation of the agreement dated 7th December, 2019. On the injunctive orders sought, the respondent submit that the applicant has failed to establish a prima facie case with high chances of success for the reason that the respondent has not withdrawn instructions from the applicant hence making the suit premature.

The respondent further submit that the applicant will not suffer any irreparable harm that cannot be compensated by damages. It is the applicant's contention that if the plaintiff succeeds in this suit he may be awarded costs which will be adequate compensation and that the respondent being a man of means the same will be settled.

On balance of convenience, the respondent urges the court to consider the constraints occasioned by the existing orders and the orders being sought on the respondent *vis a vis* the convenience that the plaintiff is enjoying. It is the respondent's submissions that the orders issued on 22nd January, 2021 be vacated and the court orders that a minimum of Kshs. 6,133,850 should be frozen in the respondent's bank account at Barclays Bank Limited. The respondent urged the court to dismiss the application and referred to the case of **Wild Living Company Limited v Varizone Limited [2019] eKLR** where the court declined to grant an order of injunction.

Analysis;

The principles on which the court will grant an injunction is well laid down in the case of **Giella v Cassman Brown Co. Ltd 1973 E.A. 358**. Similarly, in the case of **Nguraman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR** the Court of Appeal held that:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,***
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and***
- (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.***

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.”

It is worth noting that the parties have extensively argued this application and their entire case in their detailed pleadings and submissions. It is however, the principle of law that at an interlocutory stage, a court is not required to make any definite findings so as not to prejudice the entire case and parties positions and as such this court will only address itself to the application dated 15th January, 2021.

It is not disputed that the parties entered into an advocate- client agreement dated 7th December, 2019 and that it is this agreement on settlement that is the basis of the dispute before court. Both parties are also in agreement that a sum of Kshs. 6,133,850, being the amount claimed by the applicant, be set aside.

In the case of **Mrao Ltd v First American Bank of Kenya Ltd(2003)eKLR**, the Court of Appeal held that a prima facie case is more than an arguable case, there must be evidence showing an infringement of a right, and the probability of success of the applicant's case upon trial. The Court further stated that it is a case that a tribunal properly directing itself will conclude that there exists a right which has apparently

been infringed based on the material presented to court.

The respondent admit that he engaged the legal services of the applicant. The only difference is the interpretation of the agreement. The final interpretation can be made when the dispute is finally heard and determined. At this stage the court is satisfied that the applicant has established a prima facie case with a probability of success. There is the probability that the court will interpret the agreement in the applicant's favour. Although this is merely a probability, that is the very essence of the requirement of a probability of success. The applicant is not required at this stage to prove that the court will definitely find in its favour. I am satisfied that a prima facie case has been established. The respondent is equally agreeable to have the claimed sum of Kshs.6,133,850 secured and the account be unfrozen.

I do therefore find that the application dated 15th January 2020 is merited and is hereby granted in the following terms:-

- 1) THAT the defendant either deposit in court or in a joint interest earning account of advocates for both parties within five (5) days hereof.**
- 2) For purposes of complying with Order one (1) above, the interim orders freezing the respondent's account No. [xxxx] shall be unfrozen to the extent of Kshs. Seven (7) Million within five (5) days hereof.**
- 3) Upon the deposit in court or in a joint interest earning account of the sum of Kshs.6,133,850 as per orders (1) & (2), the respondent's account number [xxxx] at Barclays Bank of Kenya Limited (Now Absa Bank) Busia Branch, shall be unfrozen and the respondent shall be at liberty to freely transact his account.**
- 4) Costs shall follow the outcome of the main suit.**

DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF MARCH, 2021

.....

S. CHITEMBWE

JUDGE