



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. E062 OF 2019

BRITAM GENERAL INSURANCE CO. LIMITED.....PLAINTIFF/APPLICANT

VERSUS

ELSIE WANJIKU NJANJI.....1ST DEFENDANT/RESPONDENT

ISABELLA WANJIKU.....2ND DEFENDANT/RESPONDENT

RULING

1. Before this Court is the Notice of Motion Application dated **2nd April 2019** by which the Plaintiff/Applicant **BRITAM GENERAL INSURANCE CO. LIMITED** seeks the following Orders: -

“1. SPENT

2. SPENT

3. SPENT

4. THAT A permanent injunction do issue restraining the Defendants from removing and/or withdrawing any money deposited in Account No. 790xxxxxxx held at CBA Bank Limited and Account No.011xxxxxxxxxxx held at Cooperative Bank of Kenya Limited, from the jurisdiction of this court or disposing, interfering with, charging or otherwise dealing with the monies in the accounts aforementioned in any way whatsoever, pending the hearing and determination of this suit.

5. THAT a permanent injunction do issue against the Defendants from removing and/or selling, transferring or otherwise disposing motor vehicles registration numbers KCN 294H Toyota Auris and KCM 898X Toyota Vanguard Station Wagon, from the jurisdiction of this court pending the hearing and determination of this suit.

6. THAT an order do issue directing Commercial Bank of Africa Limited and Cooperative Bank Kenya Limited to deliver upon transfer to the Plaintiff of all such monies deposited by the Defendants in Account No.790xxxxxxx held at CBA Bank Limited and Account No.011xxxxxxxxxxx held at Cooperative Bank of Kenya Limited.

7. Any further relief that the Court deems it fit in the interest of justice.

8. The costs of this application be borne by the Respondents.

2. The Application was premised upon **Section 3A and 63(b) (e) of the Civil Procedure Act, Order 39 Rules 1(a) (ii)(iii) and (b) and 5, Order 40 Rules 1 and 10 and Order 51 Rule 1 of the Civil Procedure Rules** and all other enabling provisions of the law. The same was supported by the Affidavit of even date sworn by **ANGELA TUSABA**, the Chief General Officer of the Plaintiff/Applicant.

3. The 1st Defendant/Respondent **ELSIE WANJIKU NJANJI** opposed the application through her Replying Affidavit dated **2nd May 2019** whilst the 2nd Defendant/Respondent **ISABELLA WANJIKU GITONGA** also filed a Replying Affidavit dated **2nd May 2019** opposing the application.

4. The application was canvassed by way of written submissions. The Plaintiff/Applicant filed its written submissions on **31st May 2019**. The 1st Defendant/Respondent filed her written submissions on **22nd July 2019**, whilst the 2nd Defendant/Respondent filed her submissions on **11th July 2019**.

5. At the outset I do wish to apologize for the delay in delivery of this ruling. This was occasioned by the volume of work in the Commercial & Tax Division, as well as by the interruption caused to court proceedings as a result of the Global Corona Virus pandemic and finally due to a bout of ill-health on my part. The inconvenience to parties is sincerely regretted.

BACKGROUND

6. The 1st Defendant **Elsie Wanjiku Njanji** was an Accounts assistant of the Plaintiff Company. The Plaintiff/Applicant alleged that in that capacity the 1st Defendant/Respondent fraudulently made certain payments to her personal account as well as the account of the 2nd Defendant/Respondent (who at the material time was a student) which payment totaled an amount of **Kshs.23,571,954.11**. It is further alleged by the Plaintiff/Applicant that in perpetrating this alleged fraud the 1st Defendant used three major disbursement accounts as follows: -

i. Citibank Account No.401xxxxxx – for General Insurance claims, Suppliers and Intermediary Commissions.

ii. Commercial Bank of Africa Account No.663xxxxxx – for medical payment to hospitals and medical reimbursements to clients and

iii. Equity Bank Account No.018xxxxxxxxxx – for cheque payments to lawyers and Judgment Awards.

7. Once these suspicious payments came light the Plaintiff/Applicant suspended the 1st defendant from duties and commissioned a Forensic Investigation which uncovered several anomalies. This Forensic investigation revealed that 29 transactions amounting to a total of **Kshs.23,571,954.11** had been irregularly paid into accounts belonging to the two Defendants.

8. The Plaintiff/Applicant then on **11th June 2018** commissioned the audit firm of **Ernst & Young and Eezam Associates** to review and prepare bank reconciliations for the period from **1st January 2015 to 31st December 2017** on the **Commercial Bank of Africa Account No.6631200777**. That reconciliation process revealed certain discrepancies which included inter alia the following: -

i. The transactions highlighted were paid in the bank but without any corresponding general ledger entries in the cashbook of the same bank account and in any other cashbooks.

ii. The reconciliation prepared the 1st Defendant for the same bank account between January 2017 and March 2017 shows that the items have been cleared from the bank reconciliation and have not been reported as unreconciled.

iii. The payments were intentionally matched off with unrelated postings in the cash book in order to clear them from the bank reconciliation.

iv. The items remained unreconciled and appear as debits in the bank which cannot be matched off with any credits in the general ledger.

9. Following these discoveries the matter was reported to the Criminal Investigations Department. The two Defendants were arrested and are currently facing charges in the Magistrates' Court Vide **Criminal Case No.1935 of 2019** which is still ongoing.

10. The Plaintiff/Applicant claims that the Defendants have utilized the money irregularly acquired to purchase various assets which include but are not limited to:-

- Motor Vehicle Registration KCN 294 H Toyota Auris

- Motor Vehicle Registration KGM 898 x Toyota Wagon both owned by the Defendants.

The Plaintiff/Applicant submit that they have been exposed to colossal loss without any tangible security whatsoever. They seek orders to trace and preserve the Defendant's assets in order to secure the decretal amount. The Plaintiffs claim that they are not aware of the other assets owned by the Defendants hence the need to freeze the Defendants accounts. That there exists a real risk that the Defendants may move to dispose their assets with the result that the Plaintiff/Applicant will only be left holding a paper judgment, if the court ultimately decides in its favour.

11. As stated earlier the application was opposed by both the 1st and the 2nd Defendant. In her reply the 1st Defendant conceded that she worked for the Plaintiff as an Accounts Assistant. The 1st Plaintiff further confirms having processed the financial transactions in question but avers that at all times she acted under the instructions of one **Mr. Steve Nyutu**. The 1st Defendant denies all allegations of fraud and of illegal and improper conduct on her part.

12. The 2nd Respondent in her reply confirms that she and the 1st defendant are facing criminal charges before the Chief Magistrates Court over the transactions in question vide **Criminal Case No.1935 of 2019**. The 2nd Defendant therefore asserts that the institution of these civil proceedings against her by the Plaintiff/Applicant amounts to an abuse of Court process. Finally, the 2nd Defendant denies having been part of any fraudulent scheme to siphon funds from the Plaintiff/Applicant.

ANALYSIS AND DETERMINATION

13. I have carefully considered the written submissions filed by both parties. I find that the following issues arise for determination:-

a. Whether Civil proceedings can proceed concurrently with Criminal proceedings in respect of the same set of facts.

b. Whether the prayers seeking to attach the accounts and vehicles held by the 1st and 2nd Defendant pending full hearing and determination of the suits are merited.

c. Whether prayer (6) seeking the transfer of the funds deposited and held in the disputed accounts ought to be granted.

a. Whether Civil Proceedings can proceed concurrently with Criminal Proceedings

14. It is common ground that a report having been made to investigative agencies by the Plaintiff/Applicant, the 1st and 2nd Defendants were both arrested and are currently facing charges vide **Criminal Case No.1935 of 2019** in relation to this matter. Following the institution of those criminal

proceedings the Plaintiff/applicant filed this civil suit seeking inter alia recovery of the sum of **Kshs.23,571,654.11** from the 1st and 2nd Defendant/Respondents. In her Replying Affidavit dated **6th May 2019** the 2nd Defendant avers that the pursuit of concurrent criminal and civil proceedings by the Plaintiffs over the same facts amounts to an abuse of court process.

15. **Section 193A of the Criminal Procedure Code** provides as follows:-

“193A Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

16. The clear import of the above provision is that it is quite in order and indeed is permissible to have civil proceedings running concurrently with criminal proceedings over the same matter. This position has been upheld severally by the courts. In **REPUBLIC –VS- CHIEF MAGISTRATE CRIMINAL DIVISION & ANOTHER Ex Parte MILDRED MBUYA JOEL [2014] eKLR Hon Justice George Odunga** in dealing with a similar situation held as follows:-

“In this case it is the applicant's case that the subject of the criminal proceedings is similarly subject of pending civil proceedings in which the ownership of the disputed parcel of land is pending determination. However, as stated hereinabove, the mere fact that the facts disclose both criminal offence as well as civil liability does not entitle the Court in judicial review proceedings to bring to a halt the criminal proceedings. Similarly, the mere fact that there are pending civil proceedings on the same subject matter does not ipso facto warrant the halting of otherwise prima facie criminal proceedings. It is however upon the person seeking that the criminal proceedings be halted to justify the grant of such orders. [own emphasis]

The 2nd Appellant has claimed that the current civil proceedings amount to an abuse of court process in light of the ongoing criminal proceedings.

In the Ex Parte Mildred Mbuya Joel case [supra] Hon Odunga proceeded to observe thus:-

..... There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an "abuse of process", is a "manipulation", "amounts to selective prosecution" or such other processes, or even supposing that the applicants might not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on, the same facts. As rightly submitted on behalf of the Respondents Section 193A of the Criminal Procedure Code Cap 75 laws of Kenya provides for concurrent Civil and Criminal proceedings.....”

17. The 2nd Defendant has failed to demonstrate any malice and/or manipulation of the Court process by the Plaintiff/Applicant in filing this civil suit. Accordingly, I find and hold that the present civil suit does not amount to an abuse of court process and the same is properly before this Court.

b. Merits of the Injunctive Orders sought.

18. By prayer (5) of the application the Plaintiff/Applicant sought a permanent injunction to prevent the Defendants from removing and/or selling, transferring or disposing of the two motor vehicles pending the hearing and determination of the suit. The Defendants claim that the two motor vehicles were purchased using the funds allegedly fraudulently transferred into the Defendant’s accounts. The Plaintiff/Applicants submit that they are apprehensive that the two motor vehicles may be disposed by the Defendants before this suit is fully heard and determined.

19. On their part the Defendants submit that the issue relating to the said motor vehicles is live before the court handling the **Criminal Case No.1935 of 2019** wherein the trial court made its ruling in regard to release of the two motor vehicles. The Defendants further submit that there is pending before the **High Court Misc Application No.173 of 2019** seeking similar orders as those now being sought by prayer (5) of this application.

20. Firstly, the question of whether or not the two motor vehicles were purchased using ill-gotten funds is a matter for trial and cannot be determined at this preliminary stage. Motor vehicles are deteriorating assets. They are assets whose value can be easily assessed and quantified and if the Plaintiffs succeed at trial then an award of damages will be sufficient compensation. Secondly no evidence has been tendered before this court to show much less to prove that the Defendants have any intention of disposing the two vehicles in question. No Sale Agreement or Transfer Form has been exhibited to show that the Defendants intend to sell or to transfer the said vehicles. Given that a court of concurrent jurisdiction being the High Court Criminal Division is hearing an application relating to the release of the two vehicles I am loathe to make any orders which may embarrass that court. In the circumstances, I decline to grant prayer (5) of this present application.

Transfer of Funds to the Plaintiff/Applicant

21. By Prayer (6) of this application the Plaintiff/Applicant seeks an order directing Commercial Bank of Africa as well as Co-operative Bank of Kenya to deliver up and transfer to the Plaintiff all monies deposited into the two accounts held by the Defendants.

22. In my view, this prayer is premature. The Court can only determine after a full trial whether the funds in question were fraudulently obtained and whether said funds actually belong to the Plaintiff/Applicant. At this interlocutory stage no such determination can be made. As such I decline to grant orders for transfer of the funds to the Plaintiff in terms of Prayer (6).

23. Having said that, it is my view that the funds in the said accounts ought to be preserved pending the final determination of this suit. The 1st Defendant in her, Replying Affidavit dated 2nd May 2019 did concede that she did in the course of her duties as an employee transfer funds into the respective accounts. The question of whether or not such transfer of funds was fraudulent is a matter to be determined at trial. In the interim and to prevent any loss of said funds those funds out to be preserved until such determination is made. The status quo ought to be maintained. In line with the conditions for grant of interlocutory injunction set out in the case of **GIELLA –VS- CASMAN BROWN [1973] E.A**, I am of the opinion that a prima facie case has been established.

I therefore issue a temporary injunction in the following terms:-

A temporary injunction do issue restraining the Defendants from removing and/or withdrawing any money in Account No.790xxxxxxx hold at Commercial Bank of Africa Bank Limited and Account No. 011xxxxxxxxxxx held at Co-operative Bank of Kenya from the jurisdiction of this court or disposing, interfering with, charging or otherwise dealing with the monies in the accounts aforementioned in any way whatsoever, pending the hearing and determination of this suit.”

Each party to bear its own costs for this application.

DATED IN NAIROBI THIS 11TH DAY OF JUNE, 2021

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JUSTICE MAUREEN A. ODERO