



Habaswein Designers Ltd v Co-operative Bank of Kenya (Commercial Suit E796 of 2021) [2021] KEHC 98 (KLR) (Commercial and Tax) (1 October 2021) (Ruling)

Neutral citation: [2021] KEHC 98 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL SUIT E796 OF 2021
A MABEYA, J
OCTOBER 1, 2021**

BETWEEN

HABASWEIN DESIGNERS LTD PLAINTIFF

AND

CO-OPERATIVE BANK OF KENYA DEFENDANT

RULING

1. Before Court is a Motion on Notice dated 13/09/2021. It is brought under Order 40 Rule 1 and 2, Order 51 of the *Civil Procedure Rules, 2010*, and section 1A, 1B, 3, 3A & 63 (e) of the [Civil Procedure Act](#).
2. It seeks orders to restrain the respondent from restricting access, continued freezing and preventing the applicant from dealing with bank account no. 0119xxxxxxxxxxx, held at Kimathi Street, Branch with the defendant (hereinafter “the account”), pending the hearing of the application.
3. The application also seeks a mandatory order to compel the respondent to unconditionally lift the freezing order that it had placed on the said account and allow the applicant access thereto and withdraw Kshs. 15,000,000/=.
4. The application is supported by the affidavit and supplementary affidavit of Yvonne Akinyi Owuor sworn on 14/09/2021 and 15/9/2021, respectively. She is the applicant’s director. It is the applicant’s case that it had opened the account with the respondent but the latter froze the same on 4/09/2021 under the Know Your Client regulations (hereinafter “KYC”). That despite complying with all of the respondent’s requests, the respondent has declined to unfreeze the account.
5. The applicant contests that it is on the verge of bankruptcy and business failure as it cannot access the money in the account. That it needs to withdraw a sum of Kshs. 15,000,000/= in order to remain



- afloat and pay its employees, rent and other expenses. That it had received threats from its debtors and a report has been made to King'ero Police Station under OB No. 23/15/09/2021.
6. The application is opposed vide the replying affidavit of Samuel Osero sworn on 27/09/2021. He is the respondent's head of security. He states that the respondent confirmed that the applicant had opened the account on 15/07/2021. It indicated that it was in the business of selling foodstuff, rice and oil, and that its estimated annual sale turn over would be up to Kshs. 10,000,000/=.
 7. That the account remained in-active until 2/09/2021 when a credit of Kshs. 22,000,000/=, being settlement from Safaricom Mpesa till, was made. Almost immediately and on the same day, the applicant transferred Kshs. 21,000,000/= through RTGS using the respondent's internet banking platform. A further sums of Kshs. 12,000,000/= and Kshs. 10,000,000/- were paid into that account on 3/09/2021 and 4/09/2021, respectively.
 8. Following these transactions, the respondent invited the applicant for a meeting to confirm the source of the funds in compliance with CBK Circular No. 1 of 2016. The respondent was unsatisfied with the applicant's explanation as it contradicted the information in the account opening form.
 9. For this reason, the respondent proceeded to freeze the account as per regulation 21 (2) of the Proceeds of Crime and Anti-Money Laundering Regulations, 2013 which prohibits institutions such as the respondent from performing transactions in the absence of evidence of identity.
 10. The respondent further contends that it has frozen the account in line with CBK Prudential Guidelines which requires institutions to have internal measures to ensure detection and prevention of money laundering and terrorism financing. It has restricted further withdrawals pending KYC documents, as the MPESA statement provided was not sufficient to support the credits to the account.
 11. That investigations had revealed that the applicant is suspected to be involved in illegal pyramid schemes which defrauds members of the public. It produced social media print outs adversely mentioning the applicant. Safaricom has since written to the respondent confirming this fact and requesting the respondent do withhold the funds in the account to enable a refund to the victims of the fraud.
 12. The applicant filed its submissions dated 28/09/2021. It submitted that both the Proceeds of Crime and Anti-Money Laundering Regulations and the CBK Prudential Guidelines only required the respondent to report suspicious transactions to the Financial Reporting Centre and the CBK, but did not allow the respondent to freeze or restrict withdrawals. That both regulations required the applicant to furnish the respondent with evidence of identity and it had provided this information.
 13. That KRA's preservation notice expired in accordance with section 43 of the Tax Procedure Act, to wit, 10 working days from the date of notice. An extension of 60 days may be granted by the Court although it expired on 29/09/2021.
 14. It is further submitted that the applicant has a right to access the account so long as it is on credit. That the applicant is allowed to terminate the banking relationship with the respondent by withdrawing all the funds in the account, even in cash. That the application meets the threshold for granting of injunctive orders.
 15. In its submissions dated 28/09/2021, the respondent submitted that the application did not meet the threshold for granting injunctive orders. That to date, the applicant has not sufficiently explained the source of over Kshs. 40,000,000/= credited into the account in a span of 3 days. That this contradicted the initial disclosure that it traded in foodstuffs with an annual estimated turn-over of Kshs. 10,000,000/=.



16. It was further submitted that the respondent was obliged to observe various regulations including KRA's preservation notice for ten working days and regulation 21 (2) (c) of the Proceeds of *Crime and Anti-Money Laundering Regulations 2013*. The latter allowed the respondent to decline to perform a transaction. That failure of the applicant to provide information relating to the substantial deposits and withdrawals entitled the respondent to decline any withdrawals.
17. I have carefully considered the parties' pleadings, evidence, and submissions. This is an application for an injunction. The principles were well set out in the *Giella vs Cassman Brown & Company Limited* (1973) EA 358 case. where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction. That an applicant must establish 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.
18. On prima facie case with a probability of success, I note that the basis of the dispute is the insistence by the respondent for the production of satisfactory information as to the nature of the large credits and withdrawals into the account of the applicant. The respondent requested for this information. It was unsatisfied with the explanation given as the MPESA statements furnished failed to shed light on the nature and purpose of the transactions. In the premises, it decided to freeze the accounts.
19. The Court notes that what the respondent sought was information in the sole custody of the applicant. It was the latter to explain the transactions that had been undertaken in the account. It was the applicant to explain where the initial Kshs. 22,000,000/= came from and to whom Kshs. 21,000,000/= was paid to.
20. On the freezing of accounts, the applicant strongly contended that none of the regulations relied on by the respondent empowered the respondent to freeze the account. I have looked at exhibit "SO-2" which is the CBK Guidelines on Proceeds of Crime and Money Laundering Prevention-CBK/PG/08. These guidelines are meant to enable financial institutions, such as the respondent, to be in the forefront in the prevention of money laundering.
21. The applicant submitted that this regulation did not empower the respondent to freeze the account, but only report the suspicion.
22. I have looked at those regulations. Clause 2.3 of the regulations imposes on the financial institutions, the responsibility of establishing appropriate policies and procedures to ensure identification of customers, their source of funds, and the use of the said funds. Such policies ought to ensure the effective prevention, detection and control of possible money laundering activities and terrorism financing.
23. Clause 4.1 provides for the specific measures to be taken, and 4.1 9 (c) provides for establishment of internal control measures which would assist in the prevention and detection of money laundering activities. There is nothing in that clause that limits the internal control measures to be implemented by financial institutions.
24. In view of the foregoing, it is clear that freezing an account with suspected money laundering activities might be considered to be an internal mechanism of controlling money laundering. It could not be that financial regulators only empowered institutions such as the respondent to only report suspicious activities and fail to stop any dealings with such suspicious accounts.



25. The regulations not only empower the respondent to ask for information to determine the source and use of funds, but also to take internal control measures. These include restricting access or denying a transaction in the account to prevent money laundering activities.
26. Further, Clause 4.3 provides that;

“... In order to judge whether a transaction is or is not suspicious, an institution needs to have a clear understanding of the pattern of its customer’s business as its relationship with the customer develops.”
27. The respondent was well in order to call for a meeting to understand the sudden, large and short spanned transactions. Being unsatisfied with the explanation given, the respondent had the right to request for more information to explain the transactions. The applicant failed to produce the same, though well within its knowledge. In this regard, the respondent acted within its power to freeze the accounts as an internal control measure.
28. The applicant also submitted that the respondent had no investigatory powers. This submission is not correct. There were sudden and unusual transactions in the account. Clause 4.4.2 of the regulations provide for internet and cyber banking. It provides that ‘unusual transactions should be investigated and reported if found to be suspicious’.
29. The applicant failed to provide satisfactory information to enable the respondent determine the legitimacy of the funds and the transaction. There was an allegation that the applicant was involved in a pyramid scheme which may be fraudulent against the public. The public must be protected from such dealings. Trading in Kshs. 40,000,000/= within 4 days is not a mean fit. It is expected that the applicant would have paper trail on these transactions. Having failed to produce the same when required, it cannot blame the respondent.
30. In this regard, the Court holds that the applicant has not established a prima facie case with any probability of success.
31. In light of this finding, the court need not interrogate the other conditions for granting an injunctive order.
32. On irreparable harm, the applicant contended that it was a going concern, and without access to the money in the account, it will be unable to pay salaries, rent and rent arrears among other expenses. On this note, the applicant prayed that it be allowed to access Kshs. 15,000,000/= to keep it afloat.
33. This contention was not supported. The applicant did not demonstrate why it needed such a large sum of money. There was no tabulation of the alleged expenses by way of rent due, payroll or the number of employees in question and many more. In the circumstances, that prayer cannot be granted.
34. No doubt, financial institutions such as the respondent, have a duty of care to its customers as well as members of the public. They are obligated to guard against accounts held by them from being used to further illegal activities.
35. In *Standard Chartered Bank Kenya Ltd -v- Intercom Services Ltd and 4 others* (2004) Eklr, it was held:

“In this matter, taking into account that the proceeds of cheques drawn in favour of a different entity was being withdrawn in cash in large sums over a short period, we find that there was a sufficient basis for the appellant Bank to be suspicious of the manner in which the 2nd respondent was operating and withdrawing cash from the account. We thus find that the appellant Bank was negligent and violated the CBK Prudential Guidelines and failed



to obtain a written statement from the 2nd respondent who was its customer to explain the large sums of cash being withdrawn over the counter. We thus find the trial court did not err in arriving at the conclusion the appellant Bank was negligent and it violated the CBK Prudential Guidelines”.

36. See also *Shalimar Flowers Self Help Group -v-Kenya Commercial Bank* [2016] eKLR wherein it was held: -

“All the red flags were waving in this case in my view but the Defendant by not exercising reasonable care and skill, missed or ignored them, thereby allowing the withdrawal, in quick succession, of large sums of money donated to flower workers as commissions. I find on a balance of probability that the Defendant bank was negligent in the manner in which it handled and approved the nine payments and is 100% liable.”

37. In this regard, I hold that the applicant will not suffer loss and damage that cannot be compensated by an award of damages.

38. The upshot is that the application is without merit and the same is dismissed with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 1ST DAY OF OCTOBER 2021.

A. MABEYA, FCI Arb

JUDGE

