



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

COMMERCIAL DIVISION

CIVIL CASE NO. 56 OF 2017

MIDDLE EAST BANK KENYA LTD.....PLAINTIFF

VERSUS

WIDAD HUSSEIN BADRU.....1ST DEFENDANT

HASSAN SALEH MANSWAB.....2ND DEFENDANT

RULING

The Application

1. What is before this Court for determination is a Notice of Motion application dated 22/5/2017 and the following orders have been sought;

a.Spent

b. pending the hearing and determination of this suit, or until further orders of this Honourable Court, the Defendant and each one of them, as well as their servants agent and others acting on their behalf, behalf, be restrained from selling, transferring, charging or otherwise dealing with Firstly all that piece of land being sub-division number 7645 Section I Mainland North comprised in Certificate of Title registered as CR26909/1 and Secondly all that piece of land being sub-division number 7646 Section I Mainland North comprised in Certificate of Title registered as number CR26910/1(herein together referred to as “the properties”)

c.pending the hearing and determination of this suit, or until further orders of this Honourable Court, a Receiver be appointed to take over the management of the properties with the power to collect the rent and profits thereof;

d.Alternatively, the Defendant or either one of them do produce and place at the disposal of this Honourable Court the properties or the current market value thereof as may be sufficient to satisfy the decree to be passed herein; or

e.pending the hearing and determination of this suit this Honourable Court do direct that the properties be conditionally attached ;and

f.Costs of this Application be provided for.

2. The Notice of Motion is premised upon four(4) grounds appearing on the face of it and supported by the Affidavit of **Solomon Okach Odiero,the Applicant’s Head of Internal Audit Department**, sworn on 19/5/2017.The deponent states that

a. he received a call from the Applicant’s acting CEO on the 14/7/2016,directing him to visit their Mombasa branch either that evening or early morning the following day and to carefully examine entries in the Branch’s Transit Deposit Account and carry out a surprise count of the cash balances in the safe at the branch. He came to learn that some customer’s accounts had been overdrawn without authority. i.e. MwawasiEmmie-Kshs.35,242.43, Ghalib Swaleh Manswab-Kshs.384,876, Tegoswood Limited Kshs.186,283.35.

b. the officers in Mombasa branch quickly credited the aforementioned customer accounts before the verification, but it is the source of the money that aroused a lot of suspicion. At the end of the verification exercise the actual cash in the vault as at close of business on the 14/7/2016 was Kshs. 2,095,000.00; USD\$ 2,282.00;EUR 14,000.00; and GBP650.00.On the other hand the Branch Bank accounts at close of business on the14/7/2016 was Kshs.14,095,000.00; USD\$2,282.00;EUR 14,000.00 and GBP

650.00. Therefore, there was a discrepancy between the amount declared by the Mombasa Branch and the amount that was actually held by the branch in the vault and in their cashiers till at the close of business on the 14/7/2016.

c. on the 18/7/2016 he reported the loss of cash at the branch to Banking Fraud Investigation Unit as the keys of the safe was held by **Wildad, Gabriel and Jamshid**. Hence, they were all suspended from duty including all the affected staff. Further, on the same day One Ghalib brought five million shilling in cash to the Mombasa branch in cash as part of the refund of the lost cash. He further deposited 1 million shillings on the 28/7/2016 toward the repayment of the missing cash ;

d. the Mombasa branch lost Kshs. 13,023,000.00 and various customers visited the branch and reported that money was missing from their accounts and it is obvious that **Wildad** constructed the properties with monies stolen from the bank.

3. In response to the Application, the 1st Respondent filed two Replying Affidavit sworn on the 20.7.2017 by the 1st Defendant and **Ghalib Swaleh Manswab**, who is described as the Husband to the 1st Respondent. The 1st Defendant deponed that her explanation as per the Applicant's exhibit C was procured by deceit and false misrepresentations made to her by **Solomon Odiero** regarding the shortfall of cash at the Mombasa Branch. She therefore informed her husband on the banks plan to settle the matter amicably

4. Mr. Ghalib, depones that in July 2016, his wife informed him that there was a shortfall of cash at their Mombasa branch and that the Bank was willing to retain her services without involving the Court process if the money missing from the safe was recovered. And in a bid to secure his wife's employment, he proceeded to the Applicant's Mombasa branch where he met one **Solomon Okach Odiero**, and proposed to pay a part of the missing money. To prove his financial capability, he informed him that he had a property in the form of rented flats in Bamburi, Mombasa and even took him and some officers to the same.

5. It is deponed that Mr. **Solomon Okach** informed the 1st Defendant that he would seek directions from the Plaintiff's Managing Director and would revert to them with his instructions. Unfortunately, there was no response from the Plaintiff' Managing director or Mr. **Okach**. They then decided to sell the flats in Bamburi to pay part of the short fall at the Bank. On the other hand, the 2nd Defendant herein **Hassan Saleh Manwsab** who is his brother declared interest in the suit properties and because of the urgency, the said properties were sold to him in cash for a sum of Kshs.6,000,000/= .Consequently, he is a *bonafide* purchaser for value with indefeasible title and the Act of valuation of the said properties by the Plaintiff amounts to trespass to property.

6. The 1st Defendant further depones that she only offered to pay part of the missing money but never offered to deposit the titles to the suit properties to the Plaintiff' as security. Unfortunately, the Bank made a complaint to the Banking Fraud Investigation Unit and sealed the fate of an out of Court negotiation.

7. The 1st Defendant depones that she purchased the suit properties in the year 2010 at a cost of Kshs.2, 400,000/= with money from her salary and savings. Her Husband began construction of sixteen (16) flats using funds from his personal Account No.003100000000774, ABC Bank Mombasa and funds from Outback Investment Limited(a company he is a signatory to) Bank Account Number 004201779100-Chase Bank and the allegations that the flats were constructed with funds allegedly embezzled by his wife were baseless.

8. The 1st Defendant depones that the cash vault opens by keys and combination/password which she and one **Gabriel** had but the password was only known to One **Jamshid**. Therefore, the cash vault would not have been accessed without the password combination. She also stated that the allegation of embezzlement of a sum of Kshs.85,711,358.09 from the cashier till, the cash vault and various client accounts against her are false and scandalous as the Plaintiff during the period of alleged embezzlement had in its employment officers who are experts i.e. internal and external Auditor who could have detected the embezzlement and the same would have reflected in the customers bank financial statements.

9. The 2nd Defendant ,in opposition to the Notice of Motion application filed a Replying Affidavit sworn on the 24.7.2017 by **Said Abed Salim**, who had a power of attorney to swear this affidavit on behalf of the 2nd Defendant. He deponed that

a. he entered into the sale agreement because of the brotherly love towards his brother and in order to help his brother's wife to secure her employment. He conducted his due diligence on the properties and he was satisfied that the properties did not have any encumbrances. Therefore, the Plaintiff did not have any interest in the said properties.

b. he approached the firm of **Sherman Nyongesa & Mutubia Company Advocates**, who drew the sale agreement and in consideration, paid a sum of Kshs.5,000,000/= in cash to the 1st Defendant and he is aware that the amount was paid to the Plaintiff by the 1st defendant.

c. there exists no law that outlaws sale of properties between close relatives. Therefore, the Plaintiff cannot purport that the sale was fraudulent. Further, allegations of fraud are not enough to impeach his ownership, as the said allegations need to be proved.

10. In response to the replies by the Defendants, the Plaintiff filed a further affidavit sworn on the 5.9.2017 by **Solom Okach Odiero**. He deponed that:

a. all there were three custodians of the cash at the Mombasa Branch including the 1st Defendant, who acknowledged in writing that a sum of Kshs.13, 000,000/= was missing as at 14.7.2016 and together they signed exhibit

b. on his supporting affidavit. Further, the 1st Defendant in her own handwriting admitted that she had removed Kshs.11,000,000/= in cash from the vault in June 2016 as evidenced on exhibit

c. he did not have any authority to make any representation to the 1st Defendant and he did not in any way or induced her to make or sign the aforementioned confirmation and that he merely wanted an explanation as part of his investigations.

d. the 1st Defendant, together with the Branch Manager (Gabriel Ngunjiri) and Jamshid Abdulla, conspired to defraud the Plaintiff Bank by circumventing all the Plaintiff's controls put in place to create a three-tier level of verifying, authenticating and approving each transaction on a customer's account. Through forged instructions and signatures for withdrawal of funds from customers' accounts for their own use and hoodwinked customers by issuing them with forged statements of account and forged deposit receipts making them believe that their account were intact.

e. on the 7.10.2016, the 1st Defendant's husband was requested to explain the transaction made by him as evidenced on page 33 to 35 of the Plaintiff's bundle. Unfortunately, he refused to produce any supporting document and instead instructed his advocates who vide letter dated 26.10.2016 said that the 1st Defendant's husband had many transactions daily and monthly and the same were lawfully made.

f. he was certain that the suit properties in Bamburi were bought with monies stolen from the account of **Kamalkhan** and the construction costs were from other monies stolen by the 1st Defendant from the Plaintiff.

11. In response to the Plaintiff's further affidavit sworn on the 5.9.2017, the 1st Defendant filed a Supplementary Affidavit sworn on the 6.2.2018. She averred that;

a. she had been coerced into signing the confession letter as she had been locked in **Mr. Okach's** office for over 5 hours and no attempt was made by him to follow the leads given by her.

b. the Plaintiff has been unable to produce an audit report of the alleged fraud. Consequently, Criminal Case No. CRC 1613 of 2016 was withdrawn under Section 87(a) of the Criminal Procedure Code. Therefore, she was never found guilty of committing fraud.

c. the Plaintiff has conveniently produced the statement of its deceased customer **Mr. Khamalkhan**. However, there is no complaint of forgery of his signature by his estate and that he was the only custodian of his Cheque book and all entries regarding the deceased account were posted and authorized by the Branch Manager **Mr. Gabriel Ngunjiri**.

d. she was a signatory to her husband fixed bank account and there was nothing irregular if she withdrew from or made deposits into the account and that she purchased the suit properties using her personal savings and from sale of personal effects and jewelry.

12. The 2nd Defendant in response to the Plaintiff's further affidavit filed a further affidavit sworn on the 30.7.2018. He deponed that the allegations that the suit properties were acquired from proceeds of fraud are unfounded, remain mere suspicion and they remained unproved. Further, barring him from dealing with his property acquired legally amounts to an infringement of his right to enjoy a quiet possession.

SUBMISSION.

13. **Mr. Esmail**, Learned Counsel for the Plaintiff submitted that the 1st Defendant admitted and signed exhibit B confirming that Kshs.13,000,000/= was missing from the Mombasa Branch Vault. Further, she admitted that she had stolen Kshs.11,000,000/= in cash. Her husband offered to pay the stolen cash provided that the theft was not reported to the police.

14. **Mr. Esmail**, also submitted that the transaction of transferring the suit properties to the 2nd Defendant was fraudulent void as no valuation of the properties was carried out for the purposes of stamp duty.

15. Counsel also submitted that when one acquires property through stolen money equity steps in to provide the wronged party with a remedy. Reliance was placed on the case **Hussey v Palmer (1972) ALL ER744, the Court of Appeal of England**.

16. **Mr. Hamza**, Learned Counsel for the 1st Defendant submitted that the Application is based on the grounds in Criminal case No.1613 of 2016 that was withdrawn by the Plaintiff because of lack of evidence. Therefore, the current Application is based on unsubstantiated allegations and there is no iota of evidence that the 1st Defendant stole from its customers and no customer has filed any claim against the 1st Defendant.

17. Counsel further submitted that the Plaintiff has failed to meet the threshold in **Giella vs. Cassman Brown Bros Ltd (1973)E.A.358** as the Plaintiff has failed to prove that the transfer was meant to defraud the Plaintiff and the Plaintiff has not sought a declaration that the 1st Defendant is fraudulent and therefore void.

18. **Mr. Bwire**, Learned Counsel for the 2nd Defendant relied on the 2nd Defendant's Replying affidavit and further Affidavit.

Determination

19. I have considered the filed affidavits, the annexures thereto; submissions by both parties' advocates on record, the relevant applicable law and precedents relied upon.

20. **Order 40 Rule 1** of the **Civil Procedure Rules**, which is one of the enabling provisions cited by the Plaintiff, provides that:

"Where in any suit it is proved by affidavit or otherwise--

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."

21. The first issue for determination is whether on the evidence and material placed before court, the plaintiff has satisfied the conditions upon which a temporary injunction can be granted.

22. The principles guiding the grant of interlocutory application are now well settled. Those principles were set out in East African Industries vs. Trufoods [1972] EA 420 and Giella vs. Cassman Brown & Co. Ltd (supra). In Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR, where the Court restated the law as follows:

"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) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

23. The 1st Defendant's employment with the Plaintiff at the time the theft occurred is not in dispute. In fact, on the part of the plaintiff, the 1st Defendant impliedly admitted the theft of Kshs.11,000,000/= in cash from the Plaintiff's Branch in Mombasa when she and her husband even offered to refund the amount of money stolen by her on condition that the said matter was to be resolved amicably without the involvement of the police. Following the proposal by the 1st Defendant, Kshs.5,000,000/= was returned to the Plaintiff in cash on the 18.7.2016 and 10 days later, the 1st Defendant's husband deposited another kshs.1,000,000/= in the Plaintiff's bank.

24. Does the Plaintiff/Applicant have a 'genuine and arguable case' and therefore a *prima facie* case? Before I can go any further to set out my deductions herein, I must point out to the parties that my findings herein are not conclusive and must await the full trial of this suit. This position is buttressed by the decision in the case of Airland Tours & Travels Ltd versus National Industrial Credit Bank Milimani High Court Civil Case No. 1234 of 2002, where the court held as follows:

"In an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law."

25. With that background laid down, I turn to assessing whether or not the Plaintiff has met the three conditions for the grant of a temporary injunction. Firstly, I must assess whether the Plaintiff has established a *prima facie* case with a probability of success at the main trial.

26. The Plaintiff has demonstrated at pages 3, 4 and 5 of its supporting affidavit that the 1st Defendant admitted to stealing from it and even offered the suit properties to the Plaintiff as an assurance of its ability to return the stolen cash. At common law, The Bank is entitled to invoke the doctrine of tracing stolen property. That doctrine was discussed in the case Lennox Industries (Canada) Ltd. v. Canada, 1987 CanLII 5321 (FC), [1987] 3 FC 338, thus:

"To turn now to the plaintiff's second argument: certain assets, in any event, belong to the plaintiff by virtue of the doctrine of tracing. The starting point is the principle that stolen goods in the hands of a thief, or a trustee who has misappropriated funds, are not his or her property; they remain the property of the person from whom they were stolen. This principle is expressed in Underhill's Law Relating to Trusts and Trustees, 12th ed. (1970), at p. 243, as follows: "a court of equity covers a party who has obtained property by fraud into a trustee for the party who is injured by that fraud":....."

[14] The moneys stolen or acquired by fraud are thus impressed with a trust and may be followed and recovered by the true owner, unless they are acquired by a bona fide purchaser for value without notice of the theft or fraud. In Banque Belge pour l'étranger v. Hambrouck et al., [1921] 1 K.B. 321 (C.A.) at p. 335, the principle is expressed in the following terms:

If, following the principles laid down in In re Hallett's Estate, it can be ascertained either that the money in the bank, or the commodity which it has bought, is "the product of, or substitute for, the original thing," then it still follows "the nature of the thing itself." On these principles it would follow that as the money paid into the bank can be identified as the products of the original money, the plaintiffs have the common law right to claim it, and can sue for money had and received."

27. The Plaintiff has not only established, *prima facie*, that the 1st Defendant stole various sums of money from it, but also, again *prima facie*, that at least some of these monies ended up acquiring and/or developing the suit properties in the in issue.

28. The Plaintiff's has also cast doubt on the procedure that was undertaken by the 1st Defendant in the sale and transfer of the suit properties from the 1st Defendant to the 2nd Defendant. Bearing in mind that the Plaintiff never responded to the 1st Defendant's proposal of repayment of the stolen money without involvement of police, it is suspect why the 1st Defendant was in a hurry to sale the suit properties to the 2nd Defendant who is her brother in law at a throw away price.

29. Since the Plaintiff's cause of action is founded on conversion. Its case is that the Defendants stole its money, bought and/or developed the suit properties with the same. This Court, in the preliminary is satisfied that the Plaintiff has an arguable case and is persuaded that the Plaintiff has a right to trace and acquire property acquired using funds stolen from it as was held in the case of **A vs. C [1980] 2 All ER 347**, it was held that:

"...where the remedy sought by the plaintiff was tracing of property which in equity belonged to him, the court had power not only to grant an interlocutory injunction restraining disposal of the property but also to make an interlocutory order directed to ascertaining the whereabouts of the property ... the order ... requiring disclosure of the amounts in the defendant's bank accounts was necessary for the purposes of both the mareva injunction and the tracing claim."

30. Also, a consideration of the prayers that have been sought by the plaintiff/applicant, I find that they involve 3rd parties who are not named as parties to this suit and granting some of the prayers sought would amount to condemning them unheard. Further, I find the application ambiguous as the properties in issue have not been named.

31. In view of the fore-mentioned findings, it is my view that orders sought by a party/ies should be enforceable and therefore cannot issue in vain. In the circumstances, this Court directs that this suit goes the whole hog for the claims sought to be proved.

32. The application dated 22.5.2017 is therefore allowed in terms of prayer No.(b) The temporary injunction granted herein to remain in place pending the disposal of the suit or the further orders of the Court.

33. The parties to prepare and set down the suit for hearing within sixty 60 days from the day of this ruling.

DATED, SIGNED and DELIVERED at NAIROBI this 14TH day of MAY, 2020.

D.O. CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the COVID-19 pandemics, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020. This ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil disputes