



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL CASE NO. 138 OF 2015**

**PLATINUM PRIVATE LENDING LIMITED.....PLAINTIFF**

**VERSUS**

**GLOBAL MATRIX TRADING CO. LIMITED.....1ST DEFENDANT**

**KENYA COMMERCIAL BANK**

**COMPANY LIMITED.....2ND DEFENDANT**

**DIAMOND TRUST BANK LIMITED.....3RD DEFENDANT**

**CO-OPERATIVE BANK OF KENYA LIMITED.....4TH DEFENDANT**

**RULING**

The application dated 19th March, 2015 was brought by the Plaintiff, **PLATINUM PRIVATE LENDING LIMITED**.

It is an application seeking the following substantive relief:

*"THAT this Honourable Court be pleased to order that the 1<sup>st</sup> Defendant's funds deposited with the 2nd Defendant, 3rd Defendant and 4th Defendant Banks and co-mingled with monies claimed by the Plaintiff not be released pending the hearing and determination of the application."*

Although the application first came up exparte on 20th May, 2015, the Court directed the Plaintiff to serve the Defendants.

However, in order to safeguard the subject matter of the application, the Court ordered the 1st Defendant to ensure that its bank account at the **2nd, 3rd** and **4th** Defendants did not, in total, go below the sum of Kshs. 7,000,000/-, if such funds were in accounts held by those Defendants

The 1st Defendant, **GLOBAL MATRIX TRADING COMPANY LIMITED**, is alleged to have received the sum of Kshs. 7,053,289.64 from the Plaintiff. The said funds were described by the Plaintiff as an "advance" in respect to the **SUPPLY AND PROFIT SHARING AGREEMENT (SPSA)** which had been executed between the Plaintiff and the 1<sup>st</sup> Defendant.

According to the Plaintiff, the money which it had given to the 1<sup>st</sup> Defendant was deposited by that Defendant at its bank accounts at the three banks, **KENYA COMMERCIAL BANK COMPANY LIMITED** (2nd Defendant); **DIAMOND TRUST BANK LIMITED** (3rd Defendant); and **CO-OPERATIVE BANK OF KENYA LIMITED** (4th Defendant).

The Plaintiff told the Court that **JOSEPH MUTAMBAA MBITHI**, who was the Operations Director of the 1st Defendant passed away on 20<sup>th</sup> November 2014. It does appear that following the demise of Mr. Mbithi, the performance of the agreement between the Plaintiff and the 1<sup>st</sup> Defendant was frustrated. As a result, the Plaintiff wished to recover the money which it had advanced to the **1st** Defendant.

Regrettably, the widow of Mr. Mbithi, (who is named **EUNICE NTHENYA MUSYOKA MBITHI**), is said to have declined to assist the Plaintiff to recover the funds in question. The said widow was the only surviving Director of Global Matrix Trading Company Limited.

It is because Of those circumstances that the Plaintiff deemed it necessary to bring the current application.

When the application came up in Court on 24th March 2015, the Plaintiff had only served the 4th Defendant. Miss Mburu, the learned Advocate for the Plaintiff, sought and was granted an opportunity to serve the other three Defendants.

Curiously, on 4th May 2015, the Plaintiff failed to attend Court, although that date was fixed in the presence of their advocate.

By that date, the Plaintiff had served the 2nd and 3rd Defendants, as well; and all the three banks were present in Court.

As the Plaintiff was absent, the banks requested the Court to dismiss the application, and the Court dismissed it, for want of prosecution.

Thereafter, the Plaintiff filed an application seeking the reinstatement of the application dated 19th March, 2015. As the banks did not oppose the reinstatement, on 7th May, 2015, the Court reinstated the application.

However, the Plaintiff was still unable to serve the 1st Defendant.

On 2nd June 2015, this Court granted leave to the Plaintiff to serve the 1<sup>st</sup> Defendant by way of substituted service.

After the Plaintiff had effected substituted service, the parties agreed to prosecute the application by written submissions.

However, before the process of filing submissions could be completed, the 2nd Defendant (**KENYA COMMERCIAL BANK**) filed an application seeking to have the suit struck out.

The **3rd** Defendant, (**DIAMOND TRUST BANK**) also brought an application to strike out the suit against it.

On 1st December 2016, it was ordered by the consent of the parties, that the suit against the 3rd Defendant be struck out, with no order as to costs.

Thereafter, on 31<sup>st</sup> January 2017 it was ordered, by consent of the parties, that the suit against the 2nd Defendant be marked as withdrawn, with no order as to costs.

On 14th March 2017, the Court struck out the suit against the 4<sup>th</sup> Defendant (**CO-OPERATIVE BANK OF KENYA LIMITED**).

In effect, the only suit which is still subsisting is the one against the 1<sup>st</sup> Defendant.

In the circumstances, as the application is intended to have the effect of having funds remain in the "hands" of persons described as Defendants, but who are no longer Defendants, it cannot be granted.

In any event, a clear reading of the application reveals that even if it were granted, the applicant wished to have it last only until the application was concluded. As the application is now concluded, the Court notes that any orders sought within it, are spent.

However, if the applicant wished to have an order which would be in force until the suit was heard and determined, I find that the Plaintiff has failed to demonstrate that the banks, or any of them, actually received money from the Plaintiff.

The Plaintiff has not shown any nexus between the money it paid to the 1<sup>st</sup> Defendant and any of the money which the said Defendant might have in its account.

If the Court were to give an order to stop the release of funds to the Plaintiff, such an order would be speculative, because there is no evidence that any of the banks mentioned by the Plaintiff have any funds to the credit of the 1<sup>st</sup> Defendant.

In the event, the application lacks merit, and it is dismissed with costs.

**Dated, signed, and delivered at Nairobi this 4th day of June, 2018.**

**FRED A. OCHIENG**

**JUDGE**