



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO.169 of 2016

**EQUATORIAL COMMERCIAL BANK
LIMITED.....PLAINTIFF/RESPONDENT**

VERSUS

PARAMOUNT UNIVERSAL BANK 1ST DEFENDANT/APPLICANT

JAMES MWANGI KANYI T/A

MIRAGE SUPPLY& CONTRACTOR.....2ND DEFENDANT/APPLICANT

R U L I N G

1. The Application that now comes before the Court par resolution was filed by the Defendant. The timing is interesting as it was made immediately after the Plaintiff's Application to Cross - examine the Deponent of the Replying Affidavit. The Application was filed on 16th June, 2016 and is brought *Under Section 7 of the Magistrate's Court Act Number. 26 of 2015, Section 1 A, 1 B and 3A of The Civil Procedure Act, Cap 21 and Order 51 Rule 1 of the Civil Procedure Rules, 2010.* The Application seeks the following Orders:

- (1) **THAT** Honourable Lady Justice F. Amin be pleased to recuses herself from this matter.
- (2) **THAT** this matter be placed before the Presiding Judge of the Division for issuance of directions on transferring the matter to the Magistrate's Court to hear and determine the matter.
- (3) **THAT** the costs of this application be provided for.

The Application is brought on the following Grounds:

- (1) **THAT** the 1st Defendant/ Applicant has reasonable apprehension that the Honourable Judge is not able to handle this matter dispassionately.
- (2) **THAT** the Honourable Judge has shown open bias in the conduct of this matter.
- (3) **THAT** the Judge's prejudicial statement in open Court accusing the 1st Defendant/ Applicant of 'money laundering' even before the Applicant had responded to pleadings filed against it, indicates that the Judge has a prejudiced mind as against the 1st Defendant.

(4) **THAT** the Judge's prejudicial statement in open Court accusing the 1st Defendant/Applicant of 'money laundering' even before the Plaintiff's Interlocutory / Application dated 11th May, 2016 has been canvassed indicates that the Judge has a prejudiced mind as against the 1st Defendant.

(5) **THAT** the Pleadings filed by the Plaintiff/ Respondent have not alleged that the 1st Defendant/ Applicant has been involved in 'Money Laundering' which the Learned Judge has openly accused the 1st Defendant/ Applicant of.

(6) **THAT** by her actions, the Learned Judge has become an active litigant in this matter by being an accuser, prosecutor and Judge in the matter which offends the trite principles of Natural Justice.

(7) **THAT** the 1st Defendant/ Applicant herein thus has reasonable apprehension that it is unlikely to get a fair hearing before the said Judge.

(8) **THAT** justice must not only be done but must manifestly be seen to be done.

(9) **THAT** it is in the interest of Justice that the Honourable Judge recuses herself from this matter.

(10) **THAT** further, the Magistrate's court by law is empowered to hear and determine this matter and the same ought to be transferred to the said Court for determination.

2. On the same day the Plaintiff / Respondent filed its Grounds of Opposition. They oppose the application on Grounds that:

(1) The Applicant has not disclosed any ground to merit the granting of the orders sought in the application.

(2) There has been no bias exhibited in the handling of the matter before the Court.

(3) The Application is a disguise form of forum shopping and thus offends the duty of the Applicant and its counsel to the Court under section 1B of the Civil Procedure Act, Chapter 21 Laws of Kenya.

(4) The filing of the Application does confirm the need for an inquiry as to the affidavit of Timothy Kimani and his conduct in the matter both as Counsel and the Legal Officer of the 1st Defendant.

(5) The Application offends the Practice Notes issued with respect to the transfer of matters from the High Court to the Chief Magistrate's Court.

(6) The claim is both monetary and non-monetary and the damages sought shall be in excess of the monetary jurisdiction of the Chief Magistrate's Court, and

(7) Such other grounds and reasons to be adduced at the hearing hereof.

The Plaintiff also provided the Court with a copy of **Gazette Notice Number 1756**.

"All High Court stations are hereby directed to observe the provisions of Order XLVI of the Civil Procedure Rules with regard to the filing and hearing of suits in the High Court Central Registry and in the District Registries and to ensure their compliance and enforcement.

The parts the Plaintiff relies on are **Section 11** which provides:

‘Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more sub-ordinate courts than one with jurisdiction in the same district competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in any one such sub-ordinate courts.’

Section 18 (1 a) on the other hand provides thus ‘ *On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court sub-ordinate to it and competent to try or dispose of the same.*’

Magistrates Act Section 7.

7(i) A magistrate’s court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed ...[the amounts therein listed]

3. The gist of the Defendants application is firstly, that the Judge currently hearing the matter recuse herself. The second prayer - it is not clear whether this should be concurrent consecutive - that is after the supposed recusal.

4. On 15th June, 2016, the Court gave directions for the Cross-examination of the Deponent of the Replying Affidavit Mr. Kimani. The Direction was for the matter to be heard on 20th June, 2016 at 2.30p.m. Unfortunately, the Registry listed the matter as a mention at 9.00am. The Parties attended (save the aforesaid Deponent and Counsel with conduct)for the Mention but as the matter was supposed to be heard in the afternoon it proceeded then. The day after the directions for hearing was given the Defendant filed its application.

5. On 20th June, 2016 although the Parties were aware of the Application, there was no copy on the Court File. The Court was informed that ‘**Mr Wachira was not ready to proceed because he was in the Meru High Court in Hcc. No. 60 of 2015**’ no doubt, signifying the relative importance of the two matters. Counsel for the Plaintiff asked for the order for Cross-examination of the Deponent to extend to the Supporting Affidavit. The Court ordered the matter to proceed at 2.30p.m. On 20th June 2017, as previously directed. At that point it was resolved that the Application for recusal should be heard first. However, as argued by Plaintiffs’ counsel, the Supporting Affidavit refers to facts and matters that took place when the Deponent was not in Court, therefore the cross –examination becomes part of the hearing for recusal application. The matter was relisted on 13th July, 2016. The Interim orders were extended but have never been complied with.

6. A further issue arose on 20th June, 2016 and that related to service on the second Defendant. The Plaintiff requested the 1st defendant to provide those details because of the Bank – customer relationship. The 1st defendant declined.

7. On 13th July, 2016, the witness was said by Mr. Wachira to be unwell and needed to go to hospital. In fact the witness was present in Court. It is recorded that the Court and Plaintiff were ready to proceed. Mr. Wachira asserted for the record that he too was ready to proceed. The matter was re-listed for 7th September 2017. On that occasion, the Plaintiffs counsel made request to the Court that the matter be mentioned before the Presiding Judge to expedite the matter. The court declined that request on the basis of the principles of independence of the judiciary. Mr. Wachira responded by withdrawing his application for recusal and the cross-examination proceeded then, and after being adjourned part heard resumed on 24th October, 2016. On that

date Counsel for the Defendant wanted to interrupt the cross-examination for the file to be transferred to the Lower Court. The Court decided that it was better use of resources for the decision on transfer to be made after it had recorded the oral evidence. Thereafter the Application was heard. The 1st Defendant asked for the file to be transferred to the Presiding Judge for him to decide the issue of transfer. The Plaintiff argued that was an attempt to forum shop.

8. The Defendant argued that the Court should apply the hierarchy of norms and the Plaintiff argued for application of the Practice Direction as set out in the Gazette notice.

9. Counsel for the 1st Defendant sought leave to withdraw his application for recusal again but wished for the matter to proceed with the Application for transfer starting with transfer to the presiding judge of the Division. That Application was objected to by the Grounds filed by the Plaintiff on 16th June 2016 and also in argument. In summary the Plaintiff accuses the 1st Defendant of forum shopping and being in breach of **Practice Notes**. Counsel for the Plaintiff argued forcefully for the court not to entertain the Defendant's shenanigans which are simply an exercise in delaying these proceedings.

10. The Plaintiff's Claim, in substance, seeks restitution of funds transferred to the Defendant Bank either by mistake and/or due to a fraudulent transaction. The ins and outs of those concerns are yet to be decided. The evidence before the Court is that the allegations were serious enough to institute an inquiry by the Banking Fraud Unit. Their findings have not been placed before the Court. Secondly the Defendant Bank was fully aware of the allegations almost immediately after the transfer was made. It seems the Defendant Bank failed to put in place any restrictions on the use of the funds by the 2nd Defendant and the funds were dissipated.

11. The Plaintiff seeks repayment of the monies paid. Both Parties were aware by 2nd September 2015 that the sum of KShs9,450,210/= were paid by mistake and the Plaintiff was seeking a refund. The relationship between the two Banks is not strictly contractual but is one that is governed by practice and usage as well as the good faith of the proponents. The Plaintiff's Application in substance seeks restitution of funds transferred to the Defendant Bank either by mistake and/or due to a fraudulent transaction. The ins and outs of those concerns are yet to be decided. The evidence now before the Court is that the allegations were serious enough to institute an inquiry by the Banking Fraud Unit. Their findings have not been placed before the Court. Secondly, the Defendant Bank was fully aware of the allegations almost immediately after the transfer was made. It seems the Defendant Bank failed to put in place any restrictions on the use of the funds by the 2nd Defendant and the funds were dissipated. The Court made interim orders that were not complied with by the Defendant Bank.

12. The Plaintiff as pleaded seeks repayment of the monies paid in the sum of KShs.9,450,210 therefore it seeks rescission and damages that are neither particularised nor quantified. Although the Plaintiff does not quantify the damages, Counsel informed the Court that the Plaintiff is claiming damages in the region of KShs30,000,000/= (30 million shillings). That is a very large sum and the Court is not in a position at this stage of the proceedings to evaluate the likelihood of that being reached or not. It is this Court's view that pleadings need to quantify the potential damages being claimed whatever the quantum, rescission of KShs9,450,210/= will not amount to a final resolution IF the Plaintiff is successful.

13. In oral argument Counsel for the 1st Defendant withdrew his Client's Application for recusal again but wished to proceed with the Application for transfer. That Application was objected to by Grounds of Opposition filed by the Plaintiff on 16th June 2016 together with oral argument. In summary the Plaintiff accuses the 1st Defendant of forum shopping and being in breach of the Practice Notes. Counsel for the Plaintiff argued forcefully for the Court not to entertain the Defendant's shenanigans as they are simply an exercise in delaying these proceedings.

14. On the 1st Defendant's Application for the matter to be transferred either to the Lower Court or a different Judge of this Division, notwithstanding the inconsistency, this Court is of the view that such application is premature until the Plaintiff has definitively set out – by direction if necessary – the

quantum of its claim. Any decision resting on those considerations cannot be final until that is done to avoid re-transfer at a later stage.

15. For those reasons the Application is dismissed by the Plaintiff is hereby granted leave to renew the Application once the Plaint has been particularised. In any event, as regards the second limb of the Application providence has smiled on the 1st Defendant as this matter must proceed before a different judge due to the transfer of the incumbent to a different Division. In the circumstances, it is also ordered that this file be mention before the Presiding Judge of the Division for re-allocation.

Costs follow the event. The Applicant/1st Defendant to pay the Plaintiff's costs of the Application.

8th February

Ruling delivered in Open Court.

ORDER:

1. Plaintiff is directed to file Further and better particulars of its Quantum of damages
2. Leave to Appeal the refusal to transfer
3. Place before the Presiding Judge for mention and allocation.

Order accordingly

FARAH S. AMIN

JUDGE

Signed and Delivered on the 8th day of February 2016.

In the Presence of:

Court Assistant: Mr Keplalah

Applicant/1st Defendant: Mr Wachira

Defendants/Respondents: Mr Salumi