



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 302 OF 2014

HASHIM MOHAMED KHER.....1ST PLAINTIFF

AL HEELAM HOLDINGS LIMITED.....2ND PLAINTIFF

VERSUS

GULF AFRICAN BANK LIMITED.....DEFENDANT

RULING

1. The application before me is a Notice of Motion which was brought by the plaintiffs. It seeks two substantive reliefs, which are as follows;

“(d) **THAT** a temporary injunction to issue, restraining the Defendant, its servants, employees and/or agents from interfering, frustrating the business relationship between the applicants and National Bank Limited or in any way demanding from the plaintiffs and their financiers, further payments relating to the suit herein pending the hearing and determination of the suit.

(e) **THAT** a mandatory injunction do issue compelling the defendant to reverse the charges of Kshs. 390,000.00 imposed upon the 1st applicant’s account number 01100091 at Gulf African Bank (the respondent Eastleigh Branch”).

2. The plaintiffs also asked the court to award them the costs of the application. The said application is dated 4th September 2014. It was prompted by events which took place subsequent to the institution of the substantive suit herein.

3. A brief history of the case will put everythig in perspective.

4. The plaintiffs, **HASHIM MOHAMED KHER** and **AL HEELAM HOLDINGS LIMITED** obtained credit facilities at **GULF AFRICAN BANK LIMITED** (the defendant). The said credit facilities were secured by charges registered against three (3) properties, namely;

a) L.R. No. 209/3687;

b) L.R. No. 7741/233; and

c) L.R. NO. 36/1/III.

5. According to the 1st plaintiff, **HASHIM MOHAMED KHER**, the facility secured by L.R. No. 209/3687 was cleared, and he therefore decided to sell that property. His intention was to utilise the proceeds of sale to settle the other credit facilities.
6. The defendant is accused of delaying the release of the relevant title documents, resulting in the loss of an offer of Kshs. 65,000,000/- from a potential buyer.
7. Indeed, the bank later revealed that the title documents had been lost by the courier who had been assigned the role of delivering the documents to the plaintiffs' lawyers.
8. Even though the title documents were lost at the hands of the banker's agent, the bank continued to debit interest to the plaintiffs' account.
9. Meanwhile, because the plaintiffs could not proceed with the sale of L.R. No. 209/3687 (as the title documents were missing), they opted to seek an alternative financial institution, which could charge them less interest compared to what the defenant was charging.
10. It is then that the **NATIONAL BANK OF KENYA LIMITED** came onto the scene. National Bank gave an undertaking to Gulf African Bank, to pay Kshs. 61,721,190.45, in exchange of the Discharge of the security L.R. No. 7741/33.
11. The undertaking was given on 12th November 2013. But it was not until June 2014 when the defendant discharged the charge.
12. Although the security was redeemed, the plaintiff sued Gulf African Bank because the bank had, allegedly charged exorbitant profit rates.
13. After the bank had lodged its defence to the claim, the said bank sent a Demand Notice to National Bank, demanding Kshs. 1,871,555.25. That demand was said to have been pegged to the undertaking which National Bank had given on 12th November 2013.
14. The plaintiffs have noted that the sums being claimed by Gulf African Bank were inclusive of Kshs. 390,000/- which was described as being in respect to payments made to Wamae & Allen Advocates.
15. As the plaintiffs had not had any dealings with that Law Firm, they believe that it was irregular, malicious and unprocedural for the defendant to burden them with money which the defendant had paid out to its own lawyers.
16. By debiting the plaintiffs' account with the fees which it paid to its lawyers, the defendant is deemed to have taken upon itself the task of finding the plaintiffs liable to pay costs which arose out of these proceedings whilst the court was yet to make a determination: That is the plaintiffs' position.
17. In the event, the plaintiffs fear that if the National Bank was compelled to pay the money demanded by the defendant, that would result in a strain in the relationship between the plaintiffs and National Bank. Indeed, the plaintiffs feel that the Gulf African Bank was intent on frustrating the relationship between the plaintiffs and National Bank.
18. It was for that reason that the plaintiffs described the conduct of the defendant as offensive, malicious, unprocedural and imbued with ulterior motives.
19. For that reason, the plaintiffs asked this court to stop the defendant from debiting further interests or other costs to their account. The plaintiffs aslo wanted the defendant to be compelled to reverse the debit entry into the plaintiffs account.
20. According to the plaintifffs, if the reliefs sought were not granted, they would suffer irreparable harm which could not be compensated by an award of damages.

. In my understanding of the application, the plaintiffs' complaints are founded upon two presumptions, which are as follows;

(i) *The sum of Kshs. 390,000/- was paid by Gulf African Bank to their own advocates, Messrs Wamae & Allen Advocates. The payment was in respect to*

“legal services provided by the firm of ALLEN AND WAMAE in defending this suit on behalf of their client (the respondent)”

(ii) *The National Bank had settled in full the money which was the subject matter of the undertaking which that bank had given to Gulf African Bank. Therefore, it was wrong for the defendant to make fresh demands on National Bank, some eight (8) months after National Bank had fulfilled the terms of its undertaking.*

22. In determining this application, I have first reminded myself that this is an interlocutory application. Therefore, it is vital that the court does not make findings that may compromise or prejudice the interests or rights of any of the parties when the substantive suit is thereafter canvassed.

23. The plaintiffs are entitled to particulars of the reasons why their account was debitted with money which the defendant paid to its own lawyers.

24. Currently, the defendant's explanation was that it was perfectly entitled to look to National Bank, on full indemnity basis, for all the costs which the defendant would have incurred.

25. Whether or not the defendant is right in that respect, cannot be an issue for determination in a case where National Bank was not a party.

26. It is National Bank which gave its undertaking to the defendant; and therefore it is to National Bank that the defendant would look, to recover any money which is due and payable pursuant to the undertaking.

27. If National Bank fails to honour its undertaking to the defendant, it would not be open to the defendant to seek to recover from the plaintiff whatever the defendant perceives to be due from National Bank. The reason for that is that there was no privity of contract between the plaintiffs and the defendant in relation to the undertaking which the National Bank had given to the defendant.

28. By the same token, it was thus not open to the plaintiffs to intervene in the dispute, if any, as between the defendant and National Bank.

29. Of course, I fully appreciate the fact that if National Bank makes payment to the defendant, pursuant to the Undertaking, the sums so paid would ultimately be the responsibility of the plaintiffs. But that fact alone, cannot clothe the plaintiffs with the requisite locus to raise issues in respect to an undertaking that he was not a party to.

30. Furthermore, National Bank is not a party to these current proceedings. Had they been a party to this suit, it may have been arguable whether or not they could seek to challenge the legitimacy of both the fees paid to Wamae & Allen Advocates, as well as the interest debitted to the account of the plaintiffs during the time when the defendant delayed in making available the plaintiffs' statement of accounts and the plaintiffs' title documents for the charged properties.

31. In any event, the sums which the defendant has asked for from National Bank are definitely easy to quantify. The defendant is not being asked to pay an indefinite sum which requires legal adjudication to determine how the final figure will be derived.

32. The sums being claimed by the defendant, from the National Bank were Kshs. 1,187,555.25 as at 30th December 2014. The sum had increased to Kshs. 1,871,555.25 as at 13th August 2014. Thereafter, the defendant indicated that as at 10th November 2014, the balance was Kshs. 2,024,014.84.
33. In effect, there was a method for calculating the sums which the defendant was claiming from National Bank.
34. But, because National Bank was not a party to these proceedings, their voice has not been heard by this court.
35. I am not saying that the defendant is right to have demanded either the further interest or the legal costs which have been demanded from National Bank.
36. The fact that the extra interest became an issue only because of delays attributable to the defendant makes that question of interest be a legitimate one.
37. Similarly, as to whether or not the defendant was entitled to pay its lawyers any amount of money, for the legal fees, simply because the defendant was thereafter entitled to be indemnified in full, is another legitimate issue.
38. Because of the legitimacy of those issues, I find that they need to be adjudicated upon by the court, after all the parties are given a full hearing.
39. However, at the present moment, I find that the plaintiffs have failed to prove a *prima facie* case with a probability of success. I also find that even if the court did not grant the interim injunction at this stage, the plaintiffs would not suffer irreparable loss or damage.
40. The sums which could be debitted to their account is easily quantifiable, and has been regularly quantified every so often, by the defendant.
41. The plaintiff has not shown, even on a *prima facie*, basis, that the defendant would be unable to repay to them, the sums in issue, if the plaintiffs finally succeeded in this case.
42. In my view, it would be premature to order the defendant to reverse the debit of Kshs. 390,000/-, whereas it has not been shown that the said debit was clearly wrong.
43. If anything, there might arise a question as between National Bank and the plaintiffs, concerning the scope of the undertaking which the National Bank gave to the defendant. The question would be whether or not the National Bank gave such a broad-based undertaking that ended up exposing the plaintiffs to pay to the defendant more money than the plaintiffs would have otherwise had to pay under the contract they had with the defendant.
44. Another possibility is that the National Bank could have sought to limit the scope of its undertaking, so that if the defendant's conduct became an obstacle to the payment of money owed by the plaintiffs, such conduct could exonerate National Bank from further interest.
45. I appreciate the fact that I am now in the realm of conjecture. But I have deemed it useful to point out these possibilities to demonstrate that the matters are not nearly as clear-cut as the plaintiffs would have the court believe.
46. In the result, there is no merit in the application dated 4th September 2014, and it is therefore dismissed with costs.
47. Before concluding this ruling, I deem it necessary to make one more point; the point relates to the language applied, in part, by the learned advocate for the plaintiffs.

48. In his submissions, he describes the replying affidavit as;

“woefully lacking in cogency and seemingly preposterous”.

49. He goes on to state as follows;

“(vii) The reliance placed upon clauses 4.1.21.1 and clause 4.1.21.6 of the Mortgage dated 29th July 2011 is infantile in the least and on the whole amounts to provocative daylight robbery...”

50. The colourful language, is laced with insults. It adds no value to the case. Instead, it gives rise to annoyance.

51. It is important, in my humble view, that each and every advocate should refrain from use of unbecoming language.

52. It one thing to argue your client’s case forcefully and with utmost vigour, but quite another to allow oneself to apply language which derides any person, be it the court, the other party or the advocate for the opposite party.

53. It is my sincere hope that henceforth, advocates will strive to treat themselves, their colleagues, the parties and the court, with utmost respect, which includes the use of language that is befitting members of the learned profession.

DATED, SIGNED and DELIVERED at NAIROBI this 4th day of March 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Isinta for Saende for the 1st Plaintiff

.....for the 2nd Plaintiff

Wawire for Gichuhi for the Defendant.

Collins Odhiambo – Court clerk.