



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 464 OF 2014

PETER MURIUKI RWAGI.....PLAINTIFF

VERSUS

STANDARD INVESTMENT BANK LTD.....DEFENDANT

RULING

Obligation of Stock broker to holder of share

[1] I have before me a Motion dated 14th October, 2014. It is supported by the affidavit of PETER MURIUKI RWAGI sworn on 14 October, 2014. The deponent is the Plaintiff and the administrator and sole beneficiary to the estate of Yvonne Marie Lewin who died on 4th September, 1979. He is the holder of letters of administration to the estate which was confirmed by the High Court of Kenya at Nairobi. He annexed as PMR 1(a) (b) (c) copies of the death certificate for Yvonne Marie Lewin, Letters of Administration and Certificate of Confirmation of grant respectively.

[2] After obtaining the Certificate of Confirmation of Grant from the High Court in 2012, the Applicant approached the Respondent to facilitate the transfer of Eighty Six Thousand Three Hundred and Twenty Eight (86,328) East African Breweries Limited (EABL) shares from the Estate of Yvonne Marie Lewin to him. The shares were transferred to him and he was issued with a share certificate for 86,328 East African Breweries Limited (EABL). He annexed a copy of the counterfoil for the share certificate no.430402 marked PMR 2. He opened a Central Depository System Account through the Respondent, Account No.B20/B-0000015295430/L1-0, to facilitate immobilization of the shares certificate to the Central Depository System (CDS). He filled the necessary forms in June 2013 to facilitate the immobilization of the shares and lodged them with the Respondent. The shares were immobilized and deposited with the CDS on 30th July 2013. He annexed and marked PMR 3 copy of the CDSC statement for the month of July 2013.

[3] On 31st July, 2013, he instructed the Respondent to sell Twenty Thousand Shares (20,000) at a minimum price of Three Hundred and Thirty five Shillings (Ksh.335/=). He annexed and marked PMR 4 copy of the order form dated 31.7.2013. He was advised by the Respondent to write instruction letter and advice the Bank account through which the proceeds of sale of the shares will be channeled. He accordingly obliged and wrote instruction letter as advised on 31st July 2013. A copy of the instruction letter dated 31.7.2013 duly acknowledged by the Respondent is annexed and marked PMR 5.

[4] He made further depositions. The shares were sold for six million five Hundred and Seventy Six Thousand Seven Hundred and Twelve shillings (Kshs. 6,576,712.00), and after deduction of commission, the Respondent paid to the Applicant an advance of Three Hundred Thousand Shillings (Kshs. 300,000/=) by open cheque on 1st August 2013. I was orally advised to wait for three days for the balance of Six Million Two Hundred and Seventy Six Thousand Seven Hundred and Twelve (Kshs. 6,276,712.00) to be deposited into his bank account as per the instructions he had given to the Respondent.

[5] The balance was not deposited in his account within the three days as promised and expected. The Applicant averred that he went to the Respondent's office on 5th August 2013 to inquire why the balance had not been credited to the account and one of the Directors told him that he will not release the funds unless he received a confirmation letter from the Share Registrars for East African Breweries Ltd.

[6] The Applicant then reported the matter to Capital markets Authority on 9th August 2013 as a complaint against the Respondent. The Capital Markets Authority wrote to the Applicant on 13th August 2013 advising him that they will investigate the matter and revert to in due course. He annexed and marked PMR 6 a copy of the letter form Capital Market Authority.

[7] The narration did not stop there. In addition to refusal to pay he proceeds of the sale, the Respondent also refused to allow the Applicant to sell, change broker or in any other way transact with the residual 66,328 East African Breweries' Shares. Despite his relentless and persistent follow-up with the Respondent to release the funds and also allow him to transact on the shares, the Respondent has ignored his pleas thus greatly inconveniencing him. He annexed and marked PMR 8 copies of Letters that he has written to the Respondent but were ignored.

[9] He contended that he also followed up the matter with the Regulator, Capital Markets Authority to rectify the injustice being occasioned by the Respondent but they have not resolved the issue, hence, this suit. He annexed and marked PMR 9 various email correspondence between the Capital Markets Authority and him.

[10] The Applicant is partially deaf, in need of medical attention and the continued withholding of the funds herein will greatly prejudicing his medical condition and investment opportunities. He annexed and marked PMR 10 copies of treatment notes/diagnosis from KEF-SWEDISH HEARING AID CENTRE.

[11] The Applicant stated that he is the bona fide owner of the shares and the money being withheld by the Respondent since he has a valid certificate of confirmation of Grant and he has been receiving dividends payable on the shares. He verily believes that the orders sought will serve the interest of equity, fairness and justice.

The Respondent's side of the story

[12] The Respondent filed Grounds of Opposition that:

1. ***The Defendant does not hold any money on behalf of the Plaintiff.***
2. ***The Plaintiff has not shown that he has a prima facie case with a likelihood of success to warrant the grant of the injunction sought.***
3. ***The Defendant is able and willing to sell the shares and pay the Plaintiff if so ordered by the Court on the understanding that no liability would attach to the Defendant should the initial transfer of shares to the Plaintiff ever be proved to have been fraudulent.***
4. ***Further grounds as set out in the Replying Affidavit of Donald Waweru Wangunyuu.***

[13] The Respondent also filed Replying Affidavit sworn by Donald Waweru Wangunyuu on 22nd January 2015. He avers that he is the Operations Director of the Respondent and he is

familiar with the subject matter of this suit. He is also duly authorized to make the affidavit on behalf of the Respondent.

[14] He averred that he read the Supporting Affidavit of Peter Muriuki Rwagi, had it explained to him by the Respondent's advocates and he understood both the affidavit and the application herein. With that knowledge and information, he made the following reply to the application:

- a. *That he does not know the circumstances in which the Plaintiff came to be in possession of the Share Certificate of one Yvonne Marie Lewin.*
- b. *That a Central Depository system account number B20/0000015295430/L1-0 was opened in the name of the Plaintiff with the Respondent company as Central Depository Agent pursuant to the provisions of the Central Depositories Act, 2000.*
- c. *That subsequent to opening the CDS Account, the 86,328 Ordinary shares in the capital of East Africa Breweries Limited (EABL) were deposited following a transfer thereof from one Yvonne Marie Lewin.*
- d. *That the Respondent has seen the Death Certificate of one Yvonne Marie Lewin, and the Letters of Administration and Certificate of Confirmation of Grant of the estate of Yvonne Marie Lewin as exhibited in the Supporting affidavit.*
- e. *That on 31st July 2013, the Plaintiff asked the Respondent to sell 20,000 of the EABL shares on his behalf, and at the same time asked for an advance payment of Kshs.300,000/=.*
- f. *That following the sale of the shares so deposited and the request to pay out the proceeds including the advance payment, the matter was referred to the Deponent and he was immediately concerned that they could be dealing with a case of fraud.*
- g. *That fraud is not uncommon in the capital markers industry and that usually this is perpetrated through the unlawful transfer of shares belonging to the estates of old, usually non-indigenous persons.*
- h. *That each case of frauds tend to have some distinguishing hallmarks which include the following:*
 - a. *The securities most targeted are of old companies, such as East Africa Breweries;*
 - b. *The securities would have been acquired a long time ago;*
 - c. *The beneficial owner would usually have died a long time before the attempted fraud or very old;*
 - d. *There would usually be an attempt by the fraudsters to sell a small portion of the shares to "test the waters" before ordering a massive sale;*
 - e. *The shares would usually be in an account which has not had any buying or selling activity.*
 - f. *The shares would usually have been bought way before the fraudster would have been in a position to purchase the shares himself.*

[15] The Deponent deposed further that this particular case ticked every box above, and that is why the Respondent got suspicious. Further suspicious was occasioned by the speed at which the Plaintiff moved in the matter after a long lull in the estate. The noted the following sequence of events is notable:

- a. *The previous beneficial owner was said to have died on 4th September, 1979;*
- b. *Death was registered on 5th September, 1979;*
- c. *Death certificate was issued on 15th March 2012 – 33 years after the death;*
- d. *Grant of letters of administration was issued on 29th August, 2012;*
- e. *Confirmation of grant was on 7th September, 2012;*
- f. *Transfer of shares to the Plaintiff occurred immediately after that;*
- g. *Certificate for the Shares in the name of the Plaintiff was issued on 15th January 2013;*
- h. *Shares were deposited in the CDS account on 30th July 2013;*
- i. *Instructions to sell some of the shares were given on 31st July, 2013.*

[16] According to the Respondent, it is evident from the foregoing, that there was great haste to obtain, confirm and act on the letters of administration after a lull of 33 years since the death of the deceased, which is another hall mark of fraudulent cases.

[17] In light of all the above, and the suspicion aroused by all the red flags stated above, the Respondent decided not to release the proceeds of sale until the matter had been investigated. They wrote to the Custody & Registrar Services limited, the shares registrar of EABL, on 1st August 2013, to seek relevant clarification. A copy of the letter is attached at page 1 of the exhibit. Custody & Registrar Services Limited responded by letter dated 7th August 2013 (page 2 of the exhibit) which merely confirmed the shares were in the Plaintiff's name at the time. They also reported the matter by their letter dated 8th August 2013 (page 3-4 of the exhibit), to the regulator Capital Markets Authority ("the authority") who referred the matter to the Directorate of Criminal Investigations.

[19] While the Directorate seem to have cleared the transaction by their letter dated 23rd December, 2013, the Respondent wrote to the Capital Markets Authority again on 8th January, 2014 expressing their further concern, and asked that they be allowed not to be involved in the matter any further, or in the alternative, if the Authority felt that the matter was completely above suspicion, to indemnify the defendant against any future claims which could arise if in fact there was fraud. They attached the letter from the Directorate of Criminal Investigations dated 23rd December, 2013 and their letter of 8th January 2014 to the Capital Markets Authority (pages 5-8 of the Exhibit). Unfortunately, the Authority has to date not agreed to indemnify the Respondent. They communicated their position to the Plaintiff's advocates by the letter dated 7th May 2014 (page 9-10 of the exhibit) following their demand letter of 30th April 2014 (pages 11-12 of the exhibit).

[20] The deponent averred that the Respondent has no personal vendetta against the Plaintiff as alleged as they have no other relationship except that of a broker and client. In order to protect the interests of the Plaintiff so that he does not lose value, the Respondent re-bought the share that had been sold and as a result suffered a loss of Kshs. 318,866.50 on account of the amount they had paid to the Plaintiff. they now hold a total of 86,328 EABL shares (66,328 in the Plaintiffs account and 20,000 which they re-bought in an account provisionally open to hold the re-bought shares in trust). Pages 13-14 set out two statement of account that show these share holdings.

[21] Accordingly, the Respondent is not holding any money on the Plaintiff's behalf, regarding which any mandatory injunction can be issued. They, however, hold 86,328 EABL shares.

[22] Whereas they are not of the opinion that the Plaintiff is a fraudster, but they still insist that the movement of the shares in question is suspicious and the Respondent Company is not in a position to determine if any fraud has been committed or not. Their advocates on record Mboya Wangongu & Waiyaki Advocates perused the Succession File Number 1120 of 2012 and they advise that while it would appear that the confirmation of grant was hastily given, the same appears to be genuine. It is produced and marked as exhibit "DWW1". The deponent, therefore, opposes the application but with request for the court to give directions on the disposal of the said shares without liability accruing on the Defendant.

The Determination

Interlocutory Mandatory injunction

[23] This is an interlocutory application but seeking orders of a final nature; i.e. mandatory injunction and permanent injunction. The grant of orders sought in the application will in fact result into granting relief in the plaint, thus compromising almost the entire suit at this stage. The law on the subject is as was postulated in the case of **Kenya Airport Authority vs. New Jambo Taxis NBI Civil Appeal No 29 of 1997 (C.A)**, where the Court of Appeal, while applying the

decision of Megary J. (as he then was) in **SHEPHERD HOMES V SANDHAM [1979] 3 WLR 348**, held that:

“...an order which results in granting a major relief claimed in the suit, which may not be granted at final hearing, ought not to be granted at an interlocutory stage.”

In the above case of **Kenya Airport Authority case** (ibid), the Court of Appeal cited with approval the passage in **“Halsbury’s Laws of England,”** Volume 24, at paragraph 948 to the effect that:

“A mandatory injunction can be granted on an interlocutory application, as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff ... a mandatory injunction will be granted on an interlocutory application.”

[24] Ringera J (as he then was) in the case of **Showind Industries Ltd vs. Guardian Bank Ltd & Another [2002] 1 EA 284 (CCK)** also gave a good rendition on the test in the grant of mandatory injunction as follows:

“As I understand the law, an interlocutory mandatory injunction is granted very sparingly and only in exceptional circumstances such as where the applicant’s case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the applicant’s conduct does not meet the approval of a court of equity or his equity has been defeated by laches”.

[25] Therefore, in law, a relief of mandatory and or permanent injunction may be granted at interlocutory stage even if it may result into granting the major or relief sought in the suit, thereby substantially or completely compromising the entire suit. Except, such relief should only be granted at interlocutory stage in exceptional cases which are clear, straight forward, strong or where it is clear the Defendant wants to steal a march from the Applicant. In such instances, it would be unfair and contrary to justice to allow a belligerent Defendant the advantage of time which ordinarily attends to a hearing. This is the test I will apply in this case.

[26] The Respondent is a brokerage Company dealing in shares and other stocks investments within our security and stock market. The regulator is the Capital Markets Authority. There is no doubt that the deceased Yvonne Marie Lewin who died on 4th September, 1979 was a shareholder and held 86,328 shares in East African Breweries Limited (EABL). There is also no doubt that the Applicant is the Administration of the estate of late Yvonne Marie Lewin and the sole beneficiary of the said 86,328 shares in East African Breweries Limited (EABL). He obtained letters of administration and confirmation thereto in NBI SUCC CAUSE NO 1120 OF 2012. He has annexed copies of the death certificate, letters of administration and Certificate of Confirmation of grant.

[27] Again, it is not in doubt that, after obtaining the Certificate of Confirmation of Grant from the High Court in 2012, the Respondent facilitated the transfer of the said 86,328 shares in East African Breweries Limited (EABL) from the Estate of Yvonne Marie Lewin to the Applicant. And upon the transfer of the shares, the Applicant was issued with a share certificate No.430402 for 86,328 shares in East African Breweries Limited (EABL). Further, doubtless that the Applicant opened a Central Depository System Account No.B20/B-0000015295430/L1-0 through the Respondent as the agent/broker which is a legal requirement in order to facilitate immobilization of the shares certificate to the Central Depository System (CDS). The Applicant filled the necessary forms in June 2013 to facilitate the immobilization of the shares and lodged them with the Respondent. The shares were immobilized and deposited with the CDS on 30th July 2013. A copy of the CDSC statements for the month of July 2013 is annexed and marked PMR 3.

[28] All the foregoing facts are not controverted. Indeed they are admitted and confirmed by the Respondent.

[29] The story does not end there. From the record and the evidence produced, it is clear that, on 31st July, 2013, the Applicant instructed the Respondent to sell 20,000 shares at a minimum price of Kshs.335/=. A copy of the order dated 31.7.2013 is annexed and marked PMR 4. On the advice by the Respondent, the Applicant wrote the instruction letter and gave details of the Bank account through which the proceeds of sale of the shares will be paid. A copy of the instruction letter dated 31.7.2013 duly acknowledged by the Respondent is annexed and marked PMR 5.

[30] The record and averments of both parties show that the Respondent sold 20,000 shares on the above instructions for Kshs. 6,576,712.00), and after deduction of commission, the Respondent paid to the Applicant an advance of Kshs. 300,000/= by open cheque on 1st August 2013.

[31] All the above facts are not controverted and indeed are confirmed by the Respondent.

[32] Trouble started when the Applicant demanded for payment of the balance of Kshs. 6,276,712.00 which he stated he had been orally advised shall be paid into his account as per his instructions in three days after the initial deposit of Kshs. 300,000 paid to him on 1.8.2013. The balance was not deposited into the Applicant's account within the three days as promised. The Respondent confirmed this was not done. Their explanation is that, the quick succession of events from obtainance of the letters of administration to transfer of shares to sale of shares raised red flags. The Respondent says that it became apprehensive that there could be some fraud in the matter. The suspicion was also based on experience in the market where unscrupulous fraudsters target and steal shares for the aged or deceased persons or on accounts which have been dormant or inactive for a long time.

[33] Well and good. The Respondent is expected to act where there is suspicion in a transaction for transfer or sale of shares especially because the Respondent occupies a fiduciary position and is also under obligation to be vigilant and report any suspicious transactions under the law including the Proceeds of Crime and Anti-money Laundering Act and Capital Markets Act. The Respondent accordingly reported the matter to the Regulator, CMA as well as the Directorate of Criminal Investigations (DCI). The DCI conducted investigations into the matter and gave the Respondent a report dated 23rd December, 2013. The Report stated that the transfer of shares to and obtainance of letters of administration to the estate of the late YVONNE MARIE LEWIN by the Applicant was in order. They gave minute and meticulous details of how the late bequeathed the shares to the Applicant. The report did not detect any fraud in the entire transaction.

[34] The Respondent seems not to be satisfied with the report and continued to ask the CMA to absolve them of any liability should it occur in the future that there was fraud in the acquisition of the shares in question.

[35] More is yet to come. The Respondent admitted that they sold 20,000 shares but re-bought them; they claim that in the process they suffered a loss of Kshs. 318,866.50 on account of the amount they had paid to the Plaintiff. They claim that the sum of Kshs. 300,000 they paid to the Applicant was an advance payment without disclosing the purpose of the payment. These set of disclosed facts are problematic. One, if the Respondent was as diligent and mindful not to fall for a fraud in the acquisition of shares by the Applicant as it claims, on what basis did they pay advance money to the Applicant? The entire circumstances of the acquisition of shares was known to them and the red flags too when they paid the Kshs. 300,000. It is important to note that the Respondent has not claimed to have had any financing arrangement with the Applicant. The only relationship between the two was that of broker-client. Therefore, the allegation by the Respondent that they made advance payment to the Applicant is only aimed at justifying their argument that they did not hold any money for the Applicant. I find it curious that in the same breadth of admitting that it sold 20,000 shares and later re-bought them, the Respondent can say

that it does not hold any money for the Applicant. The dishonesty on the part of the Respondent is quite clear here. The court should ask; why did they re-purchase the shares and on whose instructions and from which funds it so re-purchased the shares? What did they wish to achieve? These questions are revealing but one thing is clear that they sold the shares for Kshs. 6,576,712.00 on account of the Applicant. Why do I say this? The shares and the CDSC account are in the name of the Applicant. The Applicant is the administrator and sole beneficiary of the shares in question. Legally, the Applicant is the owner of the shares, and any proceeds of sale of those shares. The Respondent seems to use the unfounded apprehensions it has held for so long about the shares as a way of depriving the Applicant of and access to his shares, and also not to account for the proceeds of sale of the 20,000 shares. These things are in the plain sight of the court and are easily discernible from the documents tendered and depositions of the parties. It should not be lost that the Respondent stands in a very important position in the running of the Applicant's account and shares. They also hold a fiduciary capacity and role in the affairs of the Applicant in the shares where trust and utmost good faith is paramount.

[36] The foregoing narration of events and facts of the case reveal a very strong case that the Respondent intends only to steal a march on the Applicant. The facts are plain, clear and not obscure; the Applicant is the administrator of the estate of the deceased and the sole beneficial owner of the shares in question. It is also plain that the CDSC account on the shares is in the name of the Applicant. Similarly, there is no doubt that 20,000 shares were sold for Kshs. 6,576,712.00 and the Applicant received only Kshs. 300,000 from the Respondent. And in all these things, the Respondent has not any shred of proof of fraud by the Applicant on the entire transaction. They admitted that they are not of the opinion that the Applicant is fraudulent. The Advocates confirmed that the Applicant is the administrator of the estate of the deceased and it was properly obtained from a court of competent jurisdiction. That is not all; the DCI did not detect any fraud and made a report in writing. In the face of all these, why is the Respondent holding on to suspicion which is based on no concrete facts or evidence? Accordingly, in the absence of evidence to the contrary, the Respondent has no reason of holding on to the shares or the money herein. They are merely seeking for a justification to hold on to the Applicant's money and shares, and perhaps conceal their actions to re-purchase shares without instructions. In this field of stock market, absolute diligence and adherence to instructions and the law must be emphasized. Non-adherence with strict laws and rules in the stock markets has seen serious leakages in the market by stock brokers of investor funds, and also deregistration of or penalties on brokerage firms. I hope the regulator, CMA will give this case a much intense scrutiny and thoroughly investigate the Respondent on the manner it handled the account of the Applicant.

[37] This case presents exceptional circumstances such that the Applicant's case is very strong and straight forward. The case is clear and one which the court thinks ought to be decided at once, as the act complained about is one which can be easily remedied. Again, taking this kind of case through the motions of a hearing will be aiding the Respondent to steal a march on the plaintiff. Moreover, the Applicant's conduct meets the approval of a court of equity. Accordingly, this is a case falling within the limited class of cases where interlocutory mandatory and permanent injunctions should be granted. The upshot is that I grant the application dated 14th October, 2014, and more specifically:

a) I grant a mandatory injunction and order the Respondent to release the sum of Kshs. 6,276,712 to the Applicant forthwith.

b) I grant a permanent injunction and hereby restrain the Respondent whether by itself, its servants and or agents or advocates or any other person on their instructions either individually or jointly from interfering with the Applicant's rights of ownership, or of possession, or of disposing, or of selling, or of transferring or of dealing with the shares held in CDS Account No B20/B-0000015295430/LI-0. This restraint does not, however, affect any actions by the Respondent on the CDS Account which have are taken upon express instructions of the Applicant.

c) *I award costs of the application to the Applicant. It is so ordered.*

Dated, signed and delivered in court at Nairobi this 5th day of March 2015

F. GIKONYO

JUDGE