



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 107 OF 2015

EDERMANN PROPERTY LTD. ::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::
PLAINTIFF/APPLICANT

-VERSUS-

DEVELOPMENT BANK OF KENYA LIMITED ::::::::::::::::::::::::::::::::::::::::::::
DEFENDANTS/RESPONDENT

RULING

INTRODUCTION

1. The application before the court is a Chamber Summons dated 2nd April 2015 filed by the Plaintiff. The Chamber Summons seeks to secure the following orders:-
 1. *That pending the inter partes hearing and determination of this Application or until further orders of this Honourable Court:-*
 - a. *The Defendant, be compelled by an order of the court, inter alia, to deposit in court Kshs 229,304,008.22 amount illegally and unlawfully debited and charged against the plaintiff from account number 200763032 and account number 200763009 and other accounts held with Development Bank of Kenya or alternatively the amount of Kshs 229,304,008.22 be deposited in an escrow account to be opened in a different bank from defendant and to be jointly operated by advocates of the parties to this suit.*
 - b. *The Defendant, be restrained from debiting, withdrawing and or deducting of money and deposits under plaintiff current bank account No 200763009 and collection account 200763025 or other accounts held with Development Bank of Kenya or any of the plaintiff bank account.*
 3. *That pending the hearing and determination of this suit:-*
 - a. *The account be taken and the plaintiff and defendant to jointly appoint a consultant (s) to prepare and file a joint account report on accounts in respect to the status, credits and debits balances, outstanding balances entitled to parties in respect on all accounts under Great Wall apartment phase 1 including bank account No 200763009 and collection account 200763025 held at Development Bank of Kenya and created under the Memorandum of Understanding*

- dated 21/05/2008 and that the consultant's joint report be filed and adopted and or certified in court within 21 days.*
- b. *That all the amounts found to be entitled to the plaintiff on the joint account report prepared and filed by a joint consultant(s), be released and transferred to the plaintiff within 7 days pending the hearing of the suit and or referral of the dispute for arbitration.*
4. *That the Defendant do bear the costs of this Application.*
2. The application is premised on the grounds stated therein, and is supported by the affidavit of **Zyuyu Yang** sworn on **2nd April 2015**, and a Supplementary Affidavit sworn by the same deponent on **24th April 2015**. To these affidavits are many annexures referred to herein.

THE PLAINTIFF'S/APPLICANT'S CASE

3. The Plaintiff's principal claim in the suit against the defendant is recovery of Kshs.229,304,008.22/= being specific amount unilaterally and illegally withdrawn and debited by the defendant from plaintiff current bank account No 200763009 and collection account 200763025 and other accounts held with Development Bank of Kenya. The Plaintiff alleges that the Defendant continues to withdraw and debit the above account on monthly basis reason whereof the plaintiff is losing on business capital and credit worthiness. The above figure of Kshs.229,304,008.22/= was per the accounts made and including 05/08/2014 and the same continues to accrue due to the monthly withdraw and debit by the Defendant. Copies bank statements for bank account No 200763009 and collection account 200763025 are annexed to the supporting affidavit and marked "ZY2" and "ZY3" respectively. In the bank statements the debit are referred to us **"Misc Debit"**.

BACKGROUND FACTS

4. The Plaintiff's case is that on or about 21 /5/2008, the plaintiff and the defendant entered into a memorandum of understanding in relation to construction of high density low cost housing scheme which was to be undertaken by the plaintiff on Land reference Number 12715/450 situated in Mlolongo area within Machakos County .The said scheme was known as Great Wall Apartments situated within the said County. ***(A copy of memorandum of understanding dated 21/5/2008 is annexed to the supporting affidavit and marked "ZY4")***.
5. Plaintiff alleges that it executed a charge dated 6/12/2007 over property LR No 12715/450 Syokimau/Mlolongo and a mortgage dated 6/12/2007 over property LR No 76/317 Kiambu respectively in favour of the Defendant to secure the sum of US \$ 3,732,000 aforesaid. ***(A copy of charge and mortgage dated 6/12/2007 are annexed to the supporting affidavit and marked "ZY5" and "ZY6" respectively)***.
6. The Plaintiff states that it observed its obligations under the said charge and mortgage documents and fulfilled each one of them including inter-a-lia regularly availing the monthly instalments.
7. On or about 8/07/2009 the Plaintiff alleges to have fully prepaid the entire loan and interest which was plainly and clearly reflected as zero balance in the loan account number 200763008 opened and maintained with the defendant. ***(A copy of account statement for account 200763008 is annexed to the supporting affidavit and marked "ZY7")***. The Plaintiff developed 528 house units under the said Great Wall apartment scheme and which were to be sold to interested members of public through an independent and separate mortgage arrangement to be entered between the defendant and the interested third parties. The Defendant was to finance third parties interested in the purchase of the 528 house units developed by the plaintiff through a mortgage scheme and more specifically the memorandum of understanding provided inter alia that the defendant was to provide mortgage finance for qualifying applicants at an interest rate of 10% per annum and for a period up to 15 years.
8. The said memorandum of understanding provided under clause 1 (f) that upon execution of the memorandum of understanding the plaintiff would open a collection account with the defendant into which all payments towards purchase of the house units would be made. The account was to be jointly signed by the defendant and the Plaintiff. in the said memorandum of understanding the

plaintiff and defendant agreed under clause 3(g) that immediately upon receipt of the executed sub-lease documents the defendant was to release the loan proceeds to the plaintiff to reduce its liabilities and charge to the respective purchasers of the units respectively. The interested third party purchasers paid to the collection account 10% deposit for their units within the scheme and the balance was to be paid by the defendant to the said collection account through the set up mortgage scheme. The said memorandum of understanding provided that each singular purchaser of the singular unit within the scheme developed by the plaintiff would be issued with a letter of offer from the defendant and which was to include all charges payable by these purchasers including and not limited to facility fees, advocates legal fees and mortgage interests. Notwithstanding the mutual agreement of parties on the running , operation and mode of disbursements of the funds in the collection account, the defendant unilaterally and without consent and notice to the plaintiff has been, fraudulently and unlawfully withdrawing substantive amount from the said joint collection account and thereby debiting the collection account with a colossal sum of Kshs 229,304,008.22 which money the plaintiff claims. The act of illegal debiting and withdrawing from the joint collection account is ongoing and the same is undertaken on monthly basis.

9. The development of these low cost houses was completed and handed over to the plaintiff on 15/12/2009. The architect and project engineer issued practical completion certificate on 30/10/2009 and thereafter the occupational certificate was issued on completion being the said date of 15/12/2009. The defendant was duly notified of completion of the project and was issued with copies of certificate of completion, certificate of practical completion and handing over certificate. ***(A copy of handing over certificate is annexed to the supporting affidavit and marked "ZY 10")***. However despite completion and handover of the house project to the plaintiff on 15/12/2009 the defendant continued to charge facility fees and interest against the Plaintiff.
10. The Plaintiff alleges that during reconciliation of accounts it came to the notice of parties that due to mistake and or error on tracking by the Defendant, 68 house units out of 528 had been sold to more than one purchaser which resulted to double payment made to the plaintiff. The amount reconciled included advance made in accordance to the memorandum of understanding. The amount refundable to the defendant from the reconciled accounts was Ksh.182,900,000/= while at the same time, the defendant debt to the plaintiff over withdrawn and illegal debit on charges and interest stood at Ksh.183,960,035.95/=. On or about 27/07/2011 the plaintiff wrote to the defendant authorising it to do a set off in respect to Ksh.182,900,000/= the plaintiff owed the defendant and against Ksh.183,960,035.95 debt the defendant owed the plaintiff. The difference was a credit of Ksh.1,060,035.35 in favour of the plaintiff and which amount the plaintiff requested to be credited in its current account number 200763009.
11. The Defendant received and acknowledged the letter of 27/07/2011 authorising settlement of accounts and a set off upon reconciliation. However despite the reconciliation, settlement of accounts and set off the defendant allegedly continues to illegally withdraw and debit plaintiff account which amount stands at Kshs.229,304,008.22 as at 05/8/2014.
12. The Applicant alleges that despite the fact that Mortgage interest was charged illegally against the plaintiff, the defendant proceeded to deduct the same against the mortgagees and purchasers of the completed units. It's the Plaintiff's case that the Defendant would have been expected at the very least to reimburse the Plaintiff deducted interest and facility fees upon levying charges against the mortgagees. The Defendant benefited twice by illegally deducting the interest and facility charges from the Plaintiff and legally deducting the same item from the respective mortgagees.
13. Any purchaser of the individual unit within the scheme ,entered into a mortgage contractual arrangement with the Defendant. Any interest, charges and or fees on these mortgage facility was to be a liability of the respective mortgagees to whom the mortgagor had a loan contractual relationship. The Plaintiff avers that it did not undertake or guarantee to pay interest and or facility fees in favour of any of the mortgagees. The Mortgage contract with each respective mortgagee, which the Plaintiff was not a party to, provided that the Defendant was to provide the mortgage finance for the qualifying Applicants at an interest rate of 10% per annum.
14. In addition to aforementioned the letters of offer signed on mortgage facility executed by mortgagor and mortgagees was plain and express on both the issue of interest and facility fees which provided inter-alia that;

- a. ***On interest the mortgagee was to pay interest at defendant's prevailing base interest (currently 15.25% p.a) minus a margin of 1.25% which translated to 14% p.a.***
- b. ***On Facility fees it was to be charged at the rate of 1% of the mortgage amount and was to be payable in full by the mortgagee.***

15. The Plaintiff alleges that it has never guaranteed any of such mortgage facility to any of the third party mortgagee with the Defendant and the plaintiff has throughout remained a stranger to such mortgage contractual arrangements between the defendant as mortgagor and individual mortgagees. The Plaintiff alleges that it has suffered untold damage and loss of business due to the breach of contract which it exclusively blames on the Defendant. The defendant's letter of offer to respective mortgagees provided that repayment of the principal, interest and facility fees would commence upon completion of construction of the projects.

16. In view of the foregoing circumstances, the Plaintiff's case is that its imperative to have accounts taken by an expert and a certificate be issued.

THE DEFENDANT'S RESPONDENTS CASE

17. The Defendant oppose the application through a replying affidavit sworn by **Jacob Mananda** on 17th April 2015 with annexures thereto. The Defendant states that it is evident from this application that the Plaintiff does not intend to set down this dispute for trial and possible determination of the core issues of fraud, illegality and breach set out in the Plaintiff. Instead, the Plaintiff proposes that the sum of Ksh.229,304,008.22/= be paid by the Defendant to Court or into escrow account first and then the accountant consultant do determine. The Defendant has raised the following questions, whether:-

- i. ***The Defendant illegally debited the accounts of the Plaintiff with any sum of money;***
- ii. ***The Defendant acted illegally towards the accounts of the Plaintiff; and***
- iii. ***Based on the dealings and contracts reached between the parties, the Plaintiff is entitled to a refund of Ksh.229,304,008.22/= or any portion thereof.***

18. The Defendant's case is that the claim as framed and filed in Court is specific on the sum sought to be Ksh.229,304,008.22/= and what remains is for the Plaintiff to lead evidence to prove that it is entitled to that sum of Ksh.229,304,008.22/= or part thereof. Instead of under-taking pre-trial procedures and setting down the matter for trial, the Plaintiff has chosen to escape the burden placed on every litigant under the law to call evidence and prove its case. The Plaintiff wants the consultant to take over the role of this Court and certify the claim and allow it to obtain the judgment prior to trial.

19. The Defendant's case is that when a party pleads fraud and illegality, that party must give specifics of that fraud and lead evidence to prove them. In the present case the Plaintiff has made vague and general allegations of fraud and illegality against the Defendant and engaged in figure dropping to show a colossal sum of Ksh. 229,304,008.22/= from the Defendant before accounts can be taken or prove its purported loss. The Defendant is accused of fraudulent conduct, which accusation strikes at the core of its banking business as a Bank and the Plaintiff remains under duty to discharge its obligations. That fraudulent conduct must be strictly proved beyond a mere balance of probabilities as was held so in **CENTRAL BANK OF KENYA LIMITED -V- TRUST BANK LIMITED & 4 OTHERS [Civil Appeal No. 215 of 1996] (UR)**, and cited with approval in **PAMBA ONG'WENO AMILA V JOHN JUMA KUTOLO [2015] ECLR**.

20. The Defendant's case is that a civil court, when considering a charge of fraud will require for itself a higher degree of probability than that which it would require when asking if negligence is established. Does the claim before court provide a reasonably credible material which could establish a prima facie case of fraud? Whereas the Plaintiff has annexed the bank statements, it has failed to point out which entries on the statements are fraudulent or illegal and the same cannot be referred to an accountant to establish what is legal or illegal. That is a question for this Court to determine at trial. The Defendant case is that the question whether the Defendant breached its contract with the Plaintiff or it was fraudulent or acted illegally are serious questions of law which cannot be determined on affidavit evidence or by an accountant as proposed by the Plaintiff. The

- matters of fact alleged by the Plaintiff in the Supporting Affidavit are highly contested by the Defendant and oral evidence is obviously required.
21. The Defendant's case is that the scope of inquiry required to establish the Plaintiff's claim is very wide while the ability of the Court to deal with contested facts of this case at interlocutory stage and on the basis of affidavit evidence is very limited. The suit raises complex and contentious questions of fact and law calling for an in-depth examination and cross-examination of the people involved in the transactions spanning more than three (3) years and perusal of voluminous documents before a just final and informed decision can be made on the fraud and illegality alleged.
 22. The Defendant stated that the Plaintiff enjoyed customer relationship with the Defendant Bank for a long time and regularly received bank statements for its account, took loans and repaid them only to turn around and make this claim. Why bring this suit late and under certificate of urgency? No sufficient explanation has been offered for failure to bring this suit earlier in the normal way. Why the hurry to take accounts, spend resources and time on taking accounts and sidestep the Court process of bringing a suit, preparing the matter for trial and actual trial of the matters in dispute? The Defendant's case is that the prayers sought contradict the very reasons given for the urgency of the application. The Plaintiff brought this application under Certificate of Urgency on the ground that its projects may stall if it is not given the sum of Kshs.229,304,008.22/= to complete those projects yet in the same application, the Plaintiff prays that the money be deposited in Court or an escrow account in a different bank in the joint names of the Parties hereto, the result of which is not to benefit the applicant, but merely to harm the Defendant. The other ground for bringing this application is that the Plaintiff has fallen into serious deficit in excess of Kshs.200,000,000/= with the Defendant Bank yet without making any attempt to repay that acknowledged debt, proceeds to ask this Court to snatch the Defendant Bank the Ksh. 229,304,008.22/=. Again, the Plaintiff seeks to harm the interests of the Defendant by this order. In view of the admitted debt, the Defendant prays that the application be dismissed.
 23. The Plaintiff submitted that it is now settled that the Court has discretionary Powers to Order accounts under Order 20. That this being an Application for taking of accounts, the Court only needs to be satisfied that the **Provisions of Order 20** has been met.

Order 20 Rule 1 provides that:-

Where a plaintiff prays for an account, or where the relief sought or the plaintiff involves the taking of an account, if the defendant either fails to appear or does not after appearance by affidavit or otherwise satisfy the court that there is some preliminary question to be tried, an order for the proper accounts with all necessary inquiries and directions usual in similar cases shall forthwith be made.

Under Order 20, Rule 4:-

On hearing of the application, the court may, unless satisfied that there is some preliminary question to be tried, order that an account be taken and may also order that any amount certified on taking the account to be due to either party be paid to him within a time specified in the order.

24. This position in law was authoritatively stated In the Authority; **ALLOYS KAYIHURA KAVEN T/A ALLOYS KAVEN & CO BAKERY VS KENYA COMMERCIAL BANK HCCC No. 224 of 2003 [2009]** and which position was reiterated in **JISEPH KAMAU MWANGI VS KENYA COMMERCIAL BANK (2004) eKLR**,

“ . . . “Order 43, rule 1(2) [of the Supreme Court Practice] is substantially the same as, (or as they used say in law school in Pari Materia to) Order XIX rule 1 of our Civil Procedure Rules. Where a plaintiff prays for an account or where the relief sought or the plaintiff involves the taking of an account, if the defendant either fails to appear or does not after appearance or otherwise satisfy the court that there is a preliminary question to be tried an order for proper accounts with all necessary inquiries and directions usual in similar

cases shall forthwith be made. The Supreme Court Practice provides" "that the court may unless satisfied that there is some preliminary question to be tried, order that an account be taken and may also order that an amount to be due to either party be paid to him within a time specified in the order. The English Rule is discretionary, "may order if there is no preliminary question to be determined."

The similar Kenya rule is mandatory that an order for account shall be made unless there is some preliminary question to be determined by the court. The Defendant raised no preliminary question to be tried. In the absence of such question, this court is bound by the said Order XIX rule 1 to grant an order for proper accounts to be taken. The said order also provides that the court shall not only make the order for an account but also all necessary inquiries and discretions usual in similar cases."

25. The Applicant submitted that where accounts are in disputes on amounts involved and for purposed of justice the court has held that accounts can be ordered to be taken. In the case of **OFFICE QUIP SERVICES LIMITED VS COOPERATIVE BANK OF KENYA LIMITED HCCC Civil 22 of 2005 [2005] eKLR**, the court stated that,

"It is now accepted principle in these cases that a dispute as to accounts is no ground for granting an injunction. This being so, the principle also imposes upon the Defendant/Respondent mortgagee a corresponding duty to show that it had not only a right to vary or increase the rate of interest, but that the variation and increase in the rate of interest was not exercised dishonestly or for an improper motive and was not made arbitrarily, capriciously or unreasonably. The Plaintiff/Applicant has complained that the rates of interest have been increased by as much as 59% - 69%. In the circumstances, it will serve the interest of justice to both to parties if the Defendant/Respondent would prepare an account showing in accordance with the manner of keeping of ordinarily bankers books."

26. The Applicant submitted that the Defendant has not sought any preliminary issue to be determined, and the plaintiff therefore seeks that the application dated 2/4/2015 be allowed as prayed. Despite the fact that the defendant is averse to taking of accounts the plaintiff states that a case on account has been established amongst the following reasons;

- a. *The pleaded claim amount of Kshs 229,304,008.22 is disputed.*
- b. *The defendant wrongly assumes Kshs 229,304,008.22 includes disputed account opening balance, Loan facility fee, overpayment and lawyer charges.*
- c. *Defendant holds that the amount of Kshs 229,304,008.22 was in respect to a loan of Kshs 750,000,000 and 1,200,000,000 which has no single document to prove including a letter of offer or security document.*
- d. *The plaintiff figure of Kshs.229,304,008.22/- is disputed but no counter figure provided.*
- e. *The plaintiff pleads that Mortgage Interest was payable until 30/10/2009 or date of completion while the defendant charged the same until August, 2014.*

27. On their part, the Defendant submitted that the Plaintiff has not shown that the Defendant is at risk of closure to warrant the orders sought. An order to deposit money into an escrow or joint account must be preceded by a clear demonstration that (1) the Plaintiff has a proper title to the money, and, (2) that there is imminent danger of the money being lost if the money was left with the Defendant. Under the Letter of Offer, the Plaintiff drew a loan of US \$ 3,732,000/= and undertook to repay it with interest. Through various letters, the Plaintiff has continuously acknowledged its indebtedness to the Plaintiff and its obligation to pay interest and other charges on behalf of its customers, and wrote many times authorizing the Defendant to debit its account to offset its liabilities. The court ought to determine, upon hearing the Parties and their witnesses, whether the MOU, which forms the Plaintiff's cause of action, was a binding document with legal consequences overriding the borrowing by the Plaintiff and repayment of interest. The amount claimed was lawfully paid to the Defendant in accordance with the Plaintiff's obligations on the borrowing. The Court also ought to determine whether by agreement and conduct the Parties

varied or waived the terms of the MOU.

28. In any event, the Defendant submitted that it is a reputable Bank capable of paying the said sum should the Court upon trial so order. The Plaintiff has not demonstrated that the Defendant Bank will be unable to pay any sum that this Court may, upon full hearing of the Parties, order to be paid to the Plaintiff. The Defendant cited the case of ***KWA-MATINGI FARMERS CO-OPERATIVE SOCIETY LTD V TROPICAL FARM MANAGEMENT (K) LTD [2014]eKLR*** where the Court, while declining to order for taking of accounts, stated as follows;

“The Applicant has not shown what risk or loss or damages it stands to suffer or incur should the said amount of Kshs. 23,703,953/= not be deposited into Court as per its application. In any event, it has not demonstrated that the Defendant company would not be unable to repay that or any amount certified after taking of accounts or any decretal sum as may be ordered by the Court after the hearing of the matter.”

DISPOSITION

29. I have considered the application, the opposing affidavits and submission of parties. In my view there are only two issues for determination herein, and these are:
- a. ***Whether the application raises preliminary questions whose determination must precede the orders sought.***
 - b. ***Whether the application satisfied the threshold for the grant of restraining orders or of taking accounts.***
30. On the first issue that this suit raises preliminary questions whose determination must precede the orders sought herein, it is to be noted that the allegation by the Plaintiff against the Defendant is that there were debits made to its account which are fraudulent and illegal. It is upon this Court to determine whether there was any fraud or illegality in the said debits as a preliminary issue.
31. At paragraph 36 of the Plaint, the Plaintiff alleges that the Defendant has breached the MOU, for which reason it claims entitlement to the sum sought. Whether the MOU was binding and capable of breach, is a question that remains for determination at trial and this Court cannot at this interlocutory stage condemn the Defendant to have breached the MOU before full ventilation of the issues. It is noted that the Plaintiff has prayed for a declaration that the Defendant has breached the MOU and as a consequence the Plaintiff be compensated in the sum of Ksh.229,304,008.22/=. The preliminary issue arising from such a prayer is that the Court, upon full ventilation of the issues before it, ought to come to a determination as to whether the MOU was a binding contract with legal obligations. Prior to such ventilation and final determination, it will be un-procedural and illegal to order the payment of the sum sought and wait for the trial of the question as to whether the MOU was a binding contract capable of being breached. This Court, will again be called upon to determine at the trial whether the issuance of Certificate of Completion to the Plaintiff by its architect and project engineer resulted in obligation upon the Defendant Bank not to charge interest or amount to completion and handing over of vacant possession contemplated in law. This Court will be called upon to determine if this Certificate of Completion was capable of triggering the transfer of obligations to pay interest and facility fees from the Plaintiff to the respective buyers. This issue raises preliminary questions for determination which must precede the orders sought herein. Order 20 of the Civil Procedure Rules empowers the Court to order for taking of accounts only in cases where there is no preliminary question to be tried. In ***SAMWEL MWANGI KINGORI & ANOTHER V STANDARD CHARTERED BANK (K) LTD [2014]eKLR***, the court declined to order for taking of accounts on application on the ground that the defendant had raised preliminary questions that could only be determined by hearing the suit. In doing so, the court stated as follows;

“I have considered the application, supporting affidavits, replying and further affidavits and do find that the application herein is based on the provision of Order 5 rule 1 and 20 rules 1 and 2 of the Civil Procedure Rules .

This rules provides that where a plaintiff prays for an account or where the relief sought or plaintiff involves the taking of an account, if the defendant fails to appear or does not after

appearance by affidavit or otherwise satisfy the court that there is a preliminary question to be tried an order for proper accounts with all necessary inquiries and directions usual in similar cases shall forthwith be made.

In the suit before me, the defendant appeared and filed defence on 21/9/2000. The statement of defence was amended on the 16/2/2011 and filed on 17/2/2011.

Does this application satisfy the requirements of Order 20 rules 1 and 2?

To begin with the plaintiff has not prayed for an account in the plaint, but has prayed for a refund of Kshs.1,948,270.51 plus interest and costs which might require the taking of an account. However, the defendant has appeared and filed the defence that raises preliminary questions that can only be determined by hearing the suit. The application herein is therefore dismissed with costs.”

32. In the case of ***JOSEPH KAMAU MWANGI V KENYA COMMERCIAL BANK (2004) eKLR***, the court stated that it cannot order taking of accounts where there is a preliminary question to be tried. Moreover, the Plaintiff's authority of ***OFFICEQUIP SERVICES LTD V CO-OPERATIVE BANK OF KENYA LTD [2006] eKLR*** is distinguishable on the ground that the dispute therein related to variations in interest rates, and not the whether the document relied on created legal obligation in the first place. It is the finding of this court that preliminary issues raised in the suit and the application needs to be verified through a clear process of trials. In that regard, interim orders cannot be granted until those preliminary issues are determined.
33. With regard to the second issue, the Plaintiff has not satisfied the threshold for granting restraining orders to stop the Defendant from continuing to debit or carry out withdrawals on the Plaintiff's account. The restraining orders sought by the Plaintiff amount to an injunction, and the Plaintiff must therefore be held to the standards for the grant of an interlocutory injunction. The principles governing the grant of injunctions are well known and an applicant must rise to the thresholds set in the case of ***GIELLA VS CASSMAN BROWN [1973] E.A 358***. That the Applicant must establish a prima facie case with a probability of success, that he stands to suffer harm not compensable in damages and if in doubt, the court will decide the matter on a balance of convenience.
34. In ***MRAO –VS- FIRST AMERICAN BANK LTD & 2 OTHERS (2003) KLR 125***, the Court of Appeal defined prima facie case as a case where on the material presented to the court, a tribunal properly directing itself will conclude that there was a right that had been breached by the other party as to call for a rebuttal. In the present case, it is to be noted that the MOU upon which the Plaintiff seeks to found its right is yet to be found binding after a trial. At this stage, the said MOU is at best disputed. Further, amount alleged to have been debited and withdrawn from the accounts of the Plaintiff has been quantified as Ksh.229,304,008.22/=. The Plaintiff having claimed illegality by the Defendant, has a duty to prove its case by showing the illegality in such payments. The Plaintiff has neither argued nor presented any evidence to prove that it has a prima facie case. Neither has the Plaintiff shown that it will suffer harm not compensable in damages. The Defendant is a reputable Bank with viable business, and should the court, after trial order for any sums to be paid, the Defendant Bank is capable to repay the sums claimed.
35. I also agree with the Respondent that an order of taking account will burden the parties with extra unnecessary costs and will occasion delay in the finalisation of this matter.
36. The upshot of the foregoing is that the Plaintiff's application by way of Notice of Motion dated 2nd April 2015 is dismissed with costs to the Defendant/Respondent.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 6TH DAY OF OCTOBER 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Gathogo for the Plaintiff

M/s Mumba holding brief for Ojiambo for the Defendants

Teresia – Court Clerk