



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 15 OF 2014

INTERNATIONAL AIR TRANSPORT ASSOCIATION.....1ST PLAINTIFF

MERCANTILE INSURANCE COMPANY LIMITED.....2ND PLAINTIFF

VERSUS

AKARIM AGENCIES COMPANY LIMITED1ST DEFENDANT

AHMED SHEIKH ISSACK2ND DEFENDANT

IBRAHIM S.I. KHANYARE3RD DEFENDANT

RULING

INTRODUCTION

Application for injunctions, freezing order and accounts

[1] I have before me a Motion dated 17th January, 2014 which seeks for:

a) Account and delivery of records of transactions relating to, and the proceeds of sale of tickets in the sum of Kshs. 115, 633,360.60 and USD \$ 1,446,906.06.

b) A warrant of arrest against the 2nd and 3rd defendants to show cause why they should not furnish security for full payment of the sum of Kshs. 115, 633,360.60 and USD \$ 1,446,906.06 and their appearance in court.

c) A temporary injunction to restrain the defendants, or by their servants, or agents or otherwise howsoever from selling, transferring, or in any manner dealing with any shares they own in any listed company in the Nairobi Stock Exchange and the Central Depository and Settlement Corporation, and freeze any or all of such accounts held by the defendants.

d) A temporary injunction restraining the defendants each of them whether by their servants, or agents or employees or advocates or otherwise howsoever from removing, transferring, disposing or charging or in any manner interfering

with any of their assets whatsoever, including land, shares and monies deposited in their accounts relating to the ticket sales amount to the sum of Kshs. 115, 633,360.60 and USD \$ 1,446,906.06, and held in all and any banks operating in Kenya, from the jurisdiction of this court.

e) Any other relief that the court deems fit in the interest of justice.

f) Costs of the application.

[2] The prayers sought have been put in an elaborate manner. But I understand them to relate to; 1) Accounts; 2) Arrest to provide security; 3) Delivery of documents and or records; 4) Preservation Orders; a temporary injunction and freezing order.

APPLICANTS' SUBMISSIONS

[3] **Mr Allen Gachui**, argued the application on behalf of the Applicants. He relied on the affidavits of Mohammed Hassim Pondor and Shem Nyamai, the grounds on the face of the application and arguments he presented in court. He also cited judicial decisions which he filed in court. Counsel for the Applicants submitted that he is seeking prayers No. 2-8. He urged that Mohamed Hasin Pondo's affidavit reveals there was a Passenger Sales Agency Agreement which was made on 30th March, 1994 between 1st Plaintiff and 1st Defendant. In that agreement, the 1st defendant was appointed by the 1st plaintiff the travel agent to sell tickets for air passenger transportation on the services of the Carrier in Kenya. *The sale of air passenger transportation means all activities necessary to provide a passenger with a valid contract of carriage including but not limited to the issuance of a Valid Traffic Document and collection of monies thereof. The agent is also authorized sell all such ancillary and other services as the Carrier may authorize.* All monies collected by the Agent for transportation and ancillary services and remit to the 1st plaintiff. All these things are not disputed. The terms of the contract places mandatory contractual obligations especially on 1st Defendant, and that has not been disputed. There is no dispute that all ticket sales and proceeds thereof were held in trust for 1st plaintiff. Secondly, the 1st defendant shall keep records and accounts together with supporting documents and shall avail to the 1st plaintiff all such documents and records on sales.

[4] Between the months of September and October, 2013, tickets were sold by 1st plaintiff in the amount set out in the plaint i.e. *the sum of Kshs. 115, 633,360.60 and USD \$ 1,446,906.06.* Notification was given for immediate remittances but to no avail, which prompted issuance of demand on default and termination of contract. None of these processes elicited any response or explanation from the defendants. This is highest default in Kenya history of agency on ticket sale. That may have serious repercussions in the travel industry. The 2nd and 3rd defendants executed indemnities for payment of all sales to the 1st plaintiff by the 1st defendant. They have set out particulars of breach of contract and fraud. They have not provided any proof on the ticket sales or what happened to the proceeds of sale. They are merely relying on extraneous issues. The plaintiff is not aware of any property of the defendants. The Applicants referred the court to cases 1, 2 and 4 in their list of authorities. Facts are the same as the ones for this case. Status of parties is the same. Judgment was entered into summarily. They did not account for the sales. See case No. 1 at page and 2- it is on them to prove they have paid for the tickets sold. No court can re-write a contract for parties where intention is clear. See No. 6 - The order has not been discharged. They have evicted burden of proof to show they will pay back. See court of appeal case page 35 at letter High Court application.

[5] According to the affidavits filed herein on behalf of the Applicants, the 1st defendant sold the tickets without the intention of remitting the proceeds of sale. In contravention of the agreement herein, the 1st defendant neither gave the Applicant any account for the said sales nor details of all the transactions relating to the said sales of tickets as agreed. Further, the fraud by the

defendants is deduced from the following facts: In order to induce the 1st plaintiff to give it a Passenger Sale Agency Agreement, the 1st defendant through its directors, the 2nd and 3rd defendants (an in particular the 2nd defendant), furnished the 1st plaintiff with its Annual Audited Financial Statements as at 30th June, 2013 vide a letter dated 6th August, 2013. The said accounts were intended to show the sound credit worth of the 1st defendant. Later, by a letter dated 13th August, 2013, the 1st defendant's auditors Kihunyu Mungai & Co Associates informed all concerned that it had rectified its earlier Audited Report of 30th June, 2013 in respect of the 1st defendant. The first set of audited accounts induced the 2nd plaintiff to renew the 1st defendant's Agency Default Program (IPP Insurance Policy). There were fraudulent representations by the 1st defendant through the audited reports which were later altered. The accounts as changed affected and altered the status of the financial position of the 1st defendant. Thus, the earlier audited accounts did not reflect the true financial position of the 1st defendant.

[6] For those reasons the Applicants contend that they are entitle to orders to trace the assets of the defendants because; 1) there is a trust which is a fiduciary relationship between the 1st Applicant and the 1st defendant; 2) that trust has been breached; 3) that there is imminent danger that the property of the trust may be lost making any judgment moot; 4) the Applicants do not know of the assets of the defendants trust; and 5) it is against every grain of justice to allow the defendants to reap the benefit of their fraud. They pray further for freezing orders of all the assets of the defendants.

RESPONDENTS OPPOSED THE APPLICATION

[7] **Mr Ataka** argued the case for the 1st defendant. He referred the court to the affidavit of Aden Ibrahim. He submitted that in paragraph 2 of the said affidavit, the 1st defendant has denied any default and amount claimed. Indeed the Paragraph denies the airlines and the amount credited on the account of those airlines belong to the 1st plaintiff. They are not members of IATA Airways and he attached a of IATA airways. They claim the contract herein does not, therefore, apply to those airlines. In any case, the 1st plaintiff in October, 2013 withdrew the 1st defendant's access to the system which permits the 1st defendant to transact e-ticketing business and also keep record. That system is paperless and is e-ticketing. It does not allow 1st defendant to keep paper record. He further urged that the Default Indemnity Policy in the agreement is under scrutiny by the Commissioner for Monopolies for being contra the Competition Act, 2012. They relied on the authorities in their List of Authorities. He took issue with the documents at page 11-12 of the plaintiff's bundle of documents which purports to have the record of all tickets sold and amount owing. The list is not dated, not signed, not described. See 1st defendant list of authorities' case at page 3 is clear on documents that are not signed. They are worthless.

[8] Prayer No. 2 is predicated on tracing of assets. But the prayer seeks disclosure, production and inspection of documents. See Stephen Muruki case that courts cannot assist a party in disclosure orders. They are trying to shift burden of proof i.e. evidential burden. Disclosure can only be sought when there is proof that the other party is in possession and in control of the documents. See the case of N.S.S.F v. Dr. Sally Kosgei. Documents sought must also be relevant to the case. On order 39 of CPR relate to orders of attachment before judgment and the Plaintiff must satisfy the conditions in order 39. See the case of A.W.O Shariff Mohammed v. Caltex Oil. A party must show:

- a. The defendant intends to abscond.
- b. The defendant intend to dissipate assets and
- c. The disposal is to defeat possible outcome of the case.

[9] He introduced another angle to the case when he argued that there is a serious legal implication of an order compelling production of documents which are to be used for purposes of

a criminal proceedings i.e. misappropriation of trust property. This is tantamount to self-incrimination. The right against self-incrimination extends to a case such as this which although outside criminal sphere will lead to criminal responsibility. He referred the court to the cases they have filed in court. Allen Gachuhi did not disclose that case No. 550 of 2006 which he did not attach was against his position. The plaintiff has not incurred any liability as to seek indemnity from 2nd defendant. See the Pinnacle case – where the plaintiff had paid out everything. It is a different scenario as the Plaintiff had filed documents to proof their case unlike here. Assets have to be specified as it was in the case of **BGM HCCC NO OF 2013** and conditions were not under order 39. He prayed for the application to be dismissed.

[10] **Mr Omwenga** prosecuted the case by the 2nd defendant. He relied on the replying affidavit by 2nd defendant to oppose the application. He also informed the court that he had filed a Preliminary Objection (P.O) on the arbitration clause. He referred the court to the plaint filed herein. It discloses no cause of action against 2nd defendant. It is only paragraph 14 of plaint which talks of indemnity. Further, the Contract provides for arbitration in the event of a dispute. He referred to page 8 item No. 14. On that basis, he submitted that this matter is premature as arbitration had not been utilized. Procedure for terminating the relationship is set out in the contract itself and he was of the view that the 2nd defendant can rely on the clause of arbitration because the cause of action is one. The case of **MUKISA BISCUITS** is clear and arbitration is a point of law.

[11] Order 39 rule 5 of CPR provides for conditions of attachment before judgment. The Applicants are not alleging that the 2nd defendant is about to leave the jurisdiction of the court or is about to dispose of any of his property or to remove any property from the jurisdiction of court. Properties to be attached shall be disclosed but in the present application, they want to attach anything they suspect belongs to the 2nd defendant. He distinguished the cases quoted by the Applicant and submitted that they do not apply. Lastly, he took issue with the power of attorney relied on by the deponent of one of the affidavit in support and submitted that it is not a power of attorney as by law required. It is neither registered nor witnessed in accordance with the law. Prayer No. 3 is quite objectionable as it seeks arrest warrant. For those reasons he asked the court to dismiss the application.

[12] **Mr Aden** pleaded the case by the 3rd defendant. He relied on the replying affidavit and list of authorities filed by the 3rd defendant. He was vehement that the applicants are seeking for orders before trial which will give them undue advantage over all the other parties. The 3rd defendant fastened another quarrel with the orders being sought; they are final in nature and cannot be granted at this stage. Parties need to be heard on the merits of the substantive issues. He continued. Ayatta represents certain airlines not all airlines or what he called Universal Airlines. BSP system is used in the business where users are given passwords. All transactions are conducted in that window and it is electronic. They are computer generated. In case of dispute the password is blocked and once shut down, the 1st defendant will have no record absolutely. The systems were shut down by the 1st plaintiff. The 1st plaintiff should therefore not expect any records from the defendants. In circumstances such as these, an order of production cannot issue since the documents are in the custody of the plaintiff.

[13] He was surprised at the kind of arrangement the plaintiffs have coiled in the filing of the suit. It is the first time he has witnessed the injured party and the Insurer filing a combined suit against the policy holder. In addition, the Insurance Policy is valid until 2014 and he cannot fathom why the insurer opted to file suit with the 1st plaintiff instead of paying for default or loss. This case is a classic example of collusion between the Insurers with the 1st plaintiff to sue the policy holder.

[14] He made submissions on Tracing of assets which he stated presumes a lost property. But this case is simply speculative and ambiguous. Therefore, the orders for tracing cannot be granted

lightly. The threshold set out in the case of **GILELLA V. CASSMAN BROWN** on the grant of temporary injunctions have not been satisfied especially, establishment of a prima facie case with probability of success. This case is of great public policy and should be looked as such. He reminded the court not to allow shift burden of proof. He prayed for the suit to be dismissed.

Applicant's reply

[15] **Mr Allen Gachuhi** made a brief reply: that the defendants have not denied contents of the agreement. The documents they are asking from the defendants are the receipts of money paid to them upon the sale of the tickets. Self-incrimination does not arise in contractual matters. They are not saying anything about the money they received. They did not answer Demands which specified the amount in question. They have not discharged evidential burden. See Evidence Act. See also clause No. 1 and 1.1 of Indemnity that a single demand of default raised indemnity. They are seeking for security in the event the case succeeds. They have also cited section 1A of CPA. The defendants were dealing with money held in trust. They should provide security. They have not provided any security or details that they will be able to meet their obligations in the case. He sought for interim orders but the court did not issue any interim order against the 1st and 3rd defendants because they gave professional undertakings through their lawyers not to do anything prejudicial to this case. The court, however, issued a temporary order restraining the 2nd defendant from doing anything in respect of his assets which may be prejudicial to the proceedings while the ruling is pending.

COURT'S RENDITION

A preliminary issue: self-discrimination

[16] This issue bears preliminary connotations and I intend to dispose of it as such. Mr Ataka argued that the order production of documents will have serious legal implication for it entails a compulsion to produce documents which are to be used for purposes of a criminal proceedings i.e. misappropriation of trust property. That will be tantamount to self-incrimination. According to him the right against self-incrimination extends to a case such as this which although outside criminal sphere will lead to criminal responsibility. Mr Gachuhi on the other hand is of the view that self-incrimination does not extend to contractual matters. The argument is quite attractive and is tenable in a criminal investigation. It may not, however, be available in contractual or fiduciary relationships where one of the terms of the contract or instrument creating the trust is that the defendant should keep record and provide documents of all the transactions constituting the contract or the trust. The entire regime of discovery, disclosure, production and inspection of documents is permitted in a civil process. And when it is invoked in a civil claim founded on breach of contract or trust, does not amount to self-incrimination. Any contrary view would be an absurdity for it tramples upon the ability of parties to agree that a party should keep records of transactions of the contract and produce them for inspection by the beneficial owner. The Constitution neither envisaged nor placed any such restriction on the ability of parties to enter into commercial contracts with a component of production of documents. It does not also restrict the power of the court to issue production orders in a civil process. The restriction has been limited by the law to criminal process and does not apply to enforcement of contractual obligations. I rest the issue there.

Issues

[17] The 1st defendant admits it had agency relationship with the first plaintiff which was created by the Passenger Sales Agency Agreement dated 30th March, 1994. The agreement was explicit that the relationship created a trust and anything done and all monies received are done and received in trust for the 1st plaintiff. In the circumstances what I need to determine is whether the Applicants are entitled to the orders sought-temporary injunction, freezing order, accounts, production of documents and information- which entails an inquiry on whether the threshold for

the grant of those orders have been met.

[18] As I stated earlier, the orders sought are elaborately stated and are various. But they may be classified as relating to; 1) Accounts; 2) Provision of Security and Arrest to provide security; 3) Discovery, Delivery or Production of Documents and or Records; 4) Preservation Orders; a temporary injunction and freezing order.

[19] I propose to deal with the prayers which have been sought under Order 39 and 40 of the CPR first. Then I will proceed to deal with the freezing order and the other reliefs which, although are stand alone, but for purposes of this ruling are auxiliary to the freezing order. These orders are; 1) production and inspection of documents; 2) accounts; and furnishing of security.

Arrest and Injunction under O. 39 and 40 of CPR

[20] Order 39 of the CPR is titled – **ARREST AND ATTACHMENT BEFORE JUDGMENT**. Rule 1 deals with instances where the defendant may be called to furnish security for appearance and provides as follows:-

1. *Where at any stage of a suit, other than a suit of the nature referred to in paragraphs (a) to (d) of [section 12](#) of the Act, the court is satisfied by affidavit or otherwise—*
 - a. *that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him—*
 - i. *has absconded or left the local limits of the jurisdiction of the court; or*
 - ii. *is about to abscond or leave the local limits of the jurisdiction of the court; or*
 - iii. *has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof; or*
 - b. *that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,*

the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance:

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the court until the suit is disposed of or until the further order of the court.

Rule 5 of Order 39 of the CPR provides as follows:

Where the defendant may be called upon to furnish security for production of property

- 5(1) *Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him—*
 - a. *is about to dispose of the whole or any part of his property; or*
 - b. *is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court,*

the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be

sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

[21] ORDER 40 of the CPR is titled – **TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS**. I am concerned with rule 1 and 5 of Order 40 which the Applicants have invoked. Rule 1 provides as follows:-

Cases in which temporary injunction may be granted

1. *Where in any suit it is proved by affidavit or otherwise—*
 - a. *that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or*
 - b. *that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,*

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

Power to order interim sale

9 *The court may, on the application of any party to a suit, order the sale, by any person named in such order, and in such manner and on such terms as it thinks fit, of any movable property, being the subject-matter of such suit, or attached before judgment in such suit, which is subject to speedy and natural decay, or which for other just and sufficient cause it may be desirable to have sold at once.*

Scope of relief under Order 39 rule 1 & 5

[22] The court had occasion to consider the scope of Order 39 of the CPR in **BGM HCCC NO 5 OF 2013 KANDUYI HOLDINGS LIMITED v BALM KENYA FOUNDATION & ANOTHER [2013] eKLR** and had the following to say;

“...Our Order 39 Rules 5 and 6 could be said and is a statutory codification of an interlocutory relief known as Mareva Injunction or freezing order in the UK....Accordingly, Order 39 Rules 5 and 6 of the CPR should operate within known dimensions of law drawing from the above case [Mareva Compania Naviera SA v International Bulkcarriers SA [1975] 2 Lloyd dis Rep 509] and other judicial precedents on the subject. Order 39 rule 5 and 6 of the CPR is not to be used to: 1) to pressure a defendant; or 2) as a type of asset stripping (forfeiture); or 3) as a conferment of some proprietary rights on the plaintiff upon the assets of the Defendant. The purposes of any order that should be issued under Order 39 Rules 5 and 6 of the CPR is to prevent the Defendants or would be judgment-debtor from dissipating his assets as to have the effect of obstructing or delaying the execution of any decree that may be passed against him”.
[Underlined text is my addition]

[23] Order 39 rule 1 and 5 of the CPR is about giving security for appearance or satisfaction of a decree which may be passed against the Respondent. The Respondent may be arrested or he may

be called upon to show-cause why he should not give security for his appearance or satisfaction of the decree which may be passed against him. Rule 1 is more draconian and may result into the arrest of the Respondent. I think, in my own view, it applies in desperate cases where the person has absconded or is on the verge of leaving the jurisdiction of the court or has sold or removed his property from the jurisdiction of the court, such that there is no time to issue a notice to show-cause why he should not furnish security. See the conditions to be satisfied under rule 1. Rule 5 on the other hand is milder and deals with situations where the Respondent is about to dispose of or remove property from the jurisdiction of the court. I think in my own view, it fits situations where the property is still available but is about to be removed from the jurisdiction and that is why it adopts less intrusive method of calling upon the Respondent by notice to appear and show-cause why he should not furnish security. But both of these rules share two common things, namely; 1) both serve the purpose of preventing the Respondent from doing any act that will obstruct or delay execution of the decree that may be issued against the Respondent; and 2) the standard of proof is that set out in the case of **GIELLA v CASSMAN** i.e. establish prima facie case of the conditions set out in the particular rule.

[24] From the record and affidavits filed by the applicants, there is no concrete evidence that the respondents have absconded or are about to abscond or have disposed of or removed their property from the jurisdiction of the court. The two rules require cogent evidence to be produced to demonstrate absconding or disposal of property or real possibility of absconding or disposing of property. The property to which has been disposed of or is about to be disposed of or removed from the jurisdiction must also be specified if an order is to issue under those two rules. Order 39 especially rule 1 is not an easy and will not be satisfied by mere allegations without evidence. I will not therefore, issue the order for arrest. But the Applicants have sought for freezing order and other equitable remedies namely; Tracing Assets, Freezing Order, Production of Documents and Accounts. I propose to deal with these reliefs in a structured and systematic way by looking at the overarching order of freezing first and its efficacy in the circumstances of the case. I will then consider the others and the interconnection between them and the freezing order. That judicial discourse will have a direct bearing on Order 40 and Order 39 rule 5 of the CPR.

FREEZING ORDER AS AN EQUITABLE REMEDY

[25] I have determined that orders of arrest are not meritorious. I now need to carry out a careful consideration of the facts and the circumstances of this case to determine the prospects or otherwise of a freezing order. Meanwhile, **let me determine the principle of following and tracing of assets on which Mr Gachuhi has laid considerable emphasis.**

Following and Tracing Assets

[25] Mr Gachuhi, counsel for the Plaintiffs has placed a lot of emphasis on the fact that the funds involved are trust funds which entitles him to the remedy of *‘Following and Tracing of assets’* and freezing of assets belonging to the defendants. Trust property or other property, or property into which it has been converted, may, so far as it is capable of being identified or disentangled, be followed, traced and recovered. See **HALSBURY’S LAWS OF ENGLAND FOURTH EDITION VOL 16(2) para 861**. That remedy was designed by and has its origin in equity aimed at preventing abuse of the fiduciary authority by trustee. But, properly understood, are remedies within the law of property.

[26] A small necessary detour: Following and Tracing of assets is expressed better within the enterprise of Trust which encompasses very wide instances of fiduciary relationships including constructive trusts. And nations have realized the remedy is “the big idea” which could deliver the promise of asset recovery in causes of action based on criminal activity- recovery of proceeds of crime under constructive trust. Thus, legislative innovations have used following and tracing of assets to fight crime through recovery proceeds of crime especially those generated from or used in or connected with crimes of trans-boundary nature such as corruption, drug trafficking, money laundering etc. Kenya has also passed laws such as Anti-corruption and Economic Crimes Act,

Ethics and Anti-corruption Commission Act, Proceeds of Crime and Anti-money Laundering only to mention a few, which have provided for methods of recovery namely civil recovery as well as criminal confiscation. That aspect of the law is, however, not the gist of this ruling albeit it is necessary knowledge for those who may be engaged in asset-tracing and recovery. The foregone rendition is driven by the awareness created by Article 259 of the Constitution that courts should develop the law; leapfrog development of the law beyond where it currently seems to end.

[27] Following and Tracing of assets are different and are utilized at different stages such that the former comes before the latter. Nonetheless, both are kind of “investigative tools” and are always engaged in the same venture; locating assets. They may, also draw from the same factors. Following of assets refers to the initial steps where the movement of the assets from one person to the other or from one location to another is literally monitored or followed. “Tracing” graduates “Following” of assets and refers to the process of identifying the actual assets or other asset into which the original assets may have been converted. The conversion arises when the trust property is used to purchase or in exchange with another form of or substitute property; that is what is known in law as “Related Property”, and is in principle recoverable once traced. The traced property may also be in a pool of other property owned by the respondent alone or jointly with other persons or held by the respondent in trust for others. The conglomerate property in that status is referred to as co-mingled or mixed property. In co-mingled property there could be property which is innocently or legitimately owned by the respondent or other parties but which in some way, legally or physically, is connected to recoverable property say deposit of money in a joint or trust account. In that case, the property which is not the trust property or related property is called in law “Associated Property”, and it may not be recoverable especially if it belongs to innocent third parties. But if it belongs to the respondent, it will be subject to recovery for as long as the trust property remains unsatisfied.

[28] In tracing of assets identification and or disentangling of the recoverable property are necessary and the onus of doing that lies on the applicant. But where the defendant intentionally mixes trust property with other properties, the law has created a burden on the defendant to identify the recoverable property lest the entire traced assets are deemed to be and shall become recoverable. Courts have taken this position as a way of damning any efforts by unscrupulous trustees to engage complicated designs to conceal misappropriated or stolen trust property. A further safeguard; where it is practically impossible to separate or identify the recoverable property from other property, court have taken the view that the entire property ‘represents’ recoverable property. Therefore, depending on the type of order being sought, two things must be present for an order for preservation or freezing of assets to issue, namely; 1) that the traced property has been identified or located to the defendant; and 2) prima facie evidence has been laid before the court showing that the property will be dissipated unless the order is issued. These two issues will also feature prominently in the decision I will make on the freezing order.

[29] The Applicants have established there was a trust between the 1st plaintiff and the 1st defendant. They have also shown that the 2nd plaintiff insured the 1st defendant against any loss that may arise out of the default in payments as the agent for the 1st plaintiff. Although the 1st defendant submitted that this is the first time it has seen an insurer suing alongside the plaintiff instead of paying the claim, the 1st defendant has not shown the court that it has made a claim for payment of net ascertained financial loss to them as the policy holder. Indeed the 1st defendant has denied owing any money to the 1st plaintiff. The 2nd plaintiff which is the insurer, has, on the other hand claimed fraud in the obtainance of the insurance policy of insurance by the 1st defendant and they have set out the particulars of fraud. That cause of action is not irreconcilable or incompatible with that by the 1st plaintiff. Other than that the 2nd plaintiff is apprehensive that with the default notices having been issued against the 1st defendant, it may be faced with a possibility of a claim on the policy it claims was obtained through fraud and misrepresentation by the 1st defendant. And this case is indeed the basis for a claim by the 1st defendant should it succeed. In totality, a prima facie identification of the trust property which should be followed and traced has been made by the plaintiffs; it the money arising from sales of tickets amounting to a

sum of Kshs. 115, 633,360.60 and USD \$ 1,446,906.06 which given the mode of transactions herein passed through the 1st defendant's bank accounts. Despite the objection by the 1st defendant that the list on the sum claimed herein is undated, it does not say anything about the demand letters and notices which were issued by the 1st plaintiff which declared the default and the amount due on the default at the time. The notices issued and the demand made was in accordance with the default clause in the agreement. The 1st defendant remained mum just as it did when those notices and demand were made. Of significance, the 1st defendant has not denied the trust which has been there since 1994. It has also stated in the affidavit filed on its behalf that financing the ticket sales was a very expensive affair and they obtained an overdraft to take care of the ticket sales. The latest audited accounts reveal a huge Bank loan/Overdraft. As far as the material before the court is concerned, the 1st defendant did not make any serious rebuttals of the foundations of the application. It merely stated that it did not owe anything and that the 1st plaintiff is also claiming money for airliners which are not IATA members and he has annexed a list of IAATA members which is Current Airline Members but it does not state as at what date it relates. That list suffers a great deficiency which has not been mitigated by any other corroborative evidence. It may not be useful at the moment save for the hearing where further proof may be offered. The big question is: Should the court order following and tracing of assets in this case? The answer to the question depends on whether a freezing order is tenable in this case. At this point I turn to the nature of the freezing order.

Nature of freezing order

[30] Freezing order is not an interim injunction and the threshold to be attained for it to be issued is also distinct from those attending a temporary injunction set out in **GIELLA v CASSMAN BROWN**. Freezing order is an order of the court which is usually issued *in personam* restraining or enjoining a person from dissipating an asset directly or indirectly. It is ordinarily issued *ex parte* for it is intended to serve a useful purpose of preservation of assets. See the opinion of Lord Denning in the case of **MAREVA COMPANIA NAVIERA SA V INTERNATIONAL BULKCARRIERS SA**. The basis for freezing order is the inherent jurisdiction of the court although some jurisdictions have enacted freezing-order statutes and others have codified it under their civil procedure laws. Freezing order may be issued alone or with other injunctive orders or orders calling for security for satisfaction of an existing or a judgment which may be issued by the court in the case. However, and I stated this earlier, freezing order ***is not to be used to: 1) to pressure a defendant; or 2) as a type of asset stripping (forfeiture); or 3) as a conferment of some proprietary rights on the plaintiff upon the assets of the Defendant. The purposes of any order that should be issued under Order 39 Rules 5 and 6 of the CPR is to prevent the Defendants or would be judgment-debtor from dissipating his assets as to have the effect of obstructing or delaying the execution of any decree that may be passed against him***". They are simply aimed at preventing the Respondent from dissipating its property in order to defeat the judgment that may be issued against the Respondent. Dissipation, therefore, in the context of the law refers to any action that the Respondent takes with regard to his asset or assets which is aimed at defeating satisfaction of an existing or future judgment, including: a) selling, removing, alienating, transferring, assigning, encumbering, or similarly dealing with the asset; a) instructing, requesting, counselling, demanding, or encouraging any other person to take an action described in subparagraph (a); and c) facilitating, assisting in, aiding, abetting, or participating in an action described in subparagraph (a) or (b). The circumstances of this case are perfect for consideration of a freezing. I now turn to the threshold and standard of proof for a freezing order.

The threshold

[31] The threshold for the grant of freezing order are enunciated in **GOODE ON COMMERCIAL LAW, 4th Edition at Page 1287** to be as follows;-

“The grant of a freezing injunction is governed by principles quite distinct from those laid down for ordinary interim injunctions....Before granting a freezing injunction the

court will usually require to be satisfied that;

(a)The claimant has ‘a good arguable case’ based on a pre-existing cause of action;

(b)The claim is one over which the court has jurisdiction;

(c)The defendant appears to have assets within the jurisdiction;

(d)There is a real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted; and

(e)There is a balance of convenience in favour of granting the injunction;

(f)The Court can also order disclosure of documents or the administration of requests for further information to assist the claimant in ascertaining the location of the defendant’s assets”

[32] “Arguable case” has been assigned a meaning within the context of freezing order and has been adopted with approval by many courts in Kenya. See the case of **AFRICAN BANKING CORPORATION LIMITED –VS- NETSATAR LIMITED & 6 OTHERS NAIROBI MILIMANI HCC NO. 299 OF 2009 (UR)** where the court observed that:-

“A “good arguable case” was defined by Mustill J in The Niedersachsen [1983] 2 Lloyd's Rep 600 at page 605 to be:-

“One which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success.”

This in my view, is a sound principle to rely on in establishing whether a Plaintiff has a good arguable case.”

[33] The Applicant has established that there existed a fiduciary relationship between the 1st Plaintiff and the 1st Defendant through a Passenger Sales Agency Agreement which was made on 30th March, 1994 between 1st Plaintiff and 1st Defendant. In that agreement, the 1st defendant was appointed by the 1st plaintiff to be the travel agent to sell tickets for air passenger transportation on the services of the Carrier in Kenya. *The sale of air passenger transportation means all activities necessary to provide a passenger with a valid contract of carriage including but not limited to the issuance of a Valid Traffic Document and collection of monies thereof. The agent is also authorized to sell all such ancillary and other services as the Carrier may authorize.* All monies collected by the Agent for transportation and ancillary services were held in trust and were to be remitted to the 1st plaintiff. All these things have not been disputed. The defendants only generally denied the claim and alleged that the system used to sell the tickets was blocked by the 1st Plaintiff. They did not deny the agency or tell the court whether there were any sales or what became of the sales they made before the system had been blocked. The defendants also did not respond to the demand letters which were issued by the principal-IATA. It is also not disputed that all ticket sales and proceeds thereof were held in trust for 1st plaintiff. And the 1st defendant was under an obligation in accordance with the agreement to keep records and accounts together with supporting documents on the sale of tickets and proceeds thereof and avail them to the 1st plaintiff. Although the defendants stated that the system is paperless, it was a term of the contract that the 1st defendant will keep record and subject them to inspection by the 1st Plaintiff as well as remit all proceeds of ticket sales to the 1st Plaintiff.

[34] At this stage, I need only state that the evidence on record establishes an arguable case based on allegations of breach of the trust by the 1st defendant. And the claim by the 1st Plaintiff for the

sum of Kshs. 115, 633,360.60 and USD \$ 1,446,906.06 is not frivolous or baseless at all. The claim for indemnity from the 2nd and 3rd defendants who executed indemnities on default of payment of all sales to the 1st plaintiff by the 1st defendant is also not baseless or premature as it is claimed. The plaintiffs have set out particulars of breach of contract and fraud. But I will look at this aspect in great detail under the next cover on dissipation of assets.

Risk of dissipation of assets

[35] Risk of dissipation is the cornerstone of a freezing order and also the basis for following and tracing of assets. The trust property, for the sake of this ruling is the sum of Kshs. 115, 633,360.60 and USD \$ 1,446,906.06. The 1st defendant is a company and by law operates through formal banking accounts. It also accounts for its operations, financial as well as assets in the audited accounts. It had been contracted as an agent to sell tickets and remit the proceeds thereof. The contract was huge and involved colossal sums of money. And see what the Plaintiffs deposed to under oath; that the 1st defendant sold the tickets without the intention of remitting the proceeds of sale; and in contravention of the agreement herein, the 1st defendant neither gave the Applicant any account for the said sales nor details of all the transactions relating to the said sales of tickets as agreed. Further, they deposed, the fraud by the defendants is deduced from the following facts: In order to induce the plaintiffs of its credit worth, the 1st defendant through its directors, the 2nd and 3rd defendants (and in particular the 2nd defendant), furnished the plaintiffs with its Annual Audited Financial Statements as at 30th June, 2013 vide a letter dated 6th August, 2013. The said accounts were intended to show the sound credit worth of the 1st defendant. Later, by a letter dated 13th August, 2013, the 1st defendant's auditors Kihunyu Mungai & Co Associates informed all concerned that it had rectified its earlier Audited Report of 30th June, 2013 in respect of the 1st defendant. The first set of audited accounts induced the 2nd plaintiff to renew the 1st defendant's Agency Default Program (IPP Insurance Policy). Those were fraudulent representations by the 1st defendant through the audited reports which were later altered. The accounts as changed affected and altered the status of the financial position of the 1st defendant. Thus, the earlier audited accounts did not reflect the true financial position of the 1st defendant.

[36] From the evidence on record, so far shows that this is a case falling within the precincts of freezing order. But a further hurdle has to be surmounted; that is, whether there is any risk of dissipation of assets? I wish to borrow from the writing of **SMITH, I et al (editors) Asset Recovery: Criminal Confiscation and Civil Recovery 2003 (Lexis Nexis Butterworths: United Kingdom)** that:

“Risk of dissipation can be shown in a number of ways. In most cases, the risk will be inferred from evidence of the Defendant’s dishonest and unlawful conduct which has led to the investigation or charge”.

This approach is applied where allegations for breach of trust or misappropriation of trust property have been made. It also applies in the cases of bankruptcy proceedings or in cases of recovery of proceeds of crime under the regime of anti-money-laundering and anti-corruption laws. The present case is one where breach of trust and misappropriation of trust property have been alleged. The injunction under Order 40 rule 2 of the CPR is also apt in this case for the Order applies in cases where it is proved that any property in a suit is in danger of being dissipated. It provides as follows:

1. ***Where in any suit it is proved by affidavit or otherwise—***
 - a. ***that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or***
 - b. ***that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the***

execution of any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

[37] The prove of dissipation normally in freezing orders is on balance of probabilities and is inferred from the evidence offered. On this consider the words of Hamilton J in ***ELECTRIC MOBILITY COMPANY PTY LTD V WHIZ ENTERPRISES PTY LTD*** [2006] NSWSC 580 that:

“...must be proved on the balance of probabilities in the way and to the extent that is usual in interlocutory applications for restraint generally. There is no need for the case to be made out in some special way. The reference by Mustill J [Ninemias] to “solid evidence” is meant in my view only to emphasise that there must be actual evidence from which the appropriate inference may be drawn by the Court. On the other hand, the appellate courts have reminded primary judges that they must always be vigilant to ensure that parties’ assets are not frozen and their business lives impeded lightly and that Mareva relief is not to be used to give plaintiffs security for the satisfaction of their judgments...”

[38] There is prima facie evidence; 1) that there is a trust which is a fiduciary relationship between the 1st Applicant and the 1st defendant; 2) that there is trust property in issue; 3) that the 1st defendant is a limited liability company whose financial status is established through audited accounts. Against that backdrop, the current financial statements was issued after an earlier one which reflected a different financial position of the company; the true financial standing of the 1st defendant is an issue here; and that fact was not rebutted; 4) that the trust property is cash received which is easy to dissipate; and 5) that whereas it appears that the defendants have assets within the jurisdiction of the court, the Applicants do not know of the particular assets of the defendants. All these things portend danger that the trust property may be lost or dissipated and that obscures the prospects of realization of the fruits of any decree herein. I am persuaded that evidence of the 1st defendant company’s obscured financial statements in a fiduciary relationship such as this is a matter that attacks the financial probity of the 1st defendant which in turn raises evidential burden on its part as the trustee. The 1st defendant did not discharge the evidential burden thereof and nothing on record offers an assurance that the trust property will be satisfied should the application herein succeed. I am aware that the 2nd and 3rd defendants undertook not to dissipate their property. But I also reckon that the 1st plaintiff is not aware of any assets of the defendants which make this case a perfect one for following and tracing of assets as an appropriate measure to aid freezing of the assets of the company and the guarantors. Except, in law, the freezing order should be limited to property equal to an amount that is equal or sufficient to cover the decretal sum of any judgment that may be issued against the defendants. It is a tethering of the freezing order which ensures that no more property is frozen than is necessary; and that the operations or livelihoods of the defendants are not inhibited unreasonably. Looking at the circumstances of this case, the balance of convenience is in favour of granting the freezing order. One more thing; the Court can also order disclosure of documents or the administration of requests for further information as part of ascertaining the location of the defendant’s assets. It is not; therefore, tenable argument as it has been advanced by the defendants that the court cannot issue orders of disclosure.

ORDERS

[39] The upshot of the foregoing rendition is that the court hereby issues the following orders:

- a) An order of following and tracing of the assets of the defendants;

b) An order of disclosure by the defendants to the court of the information and location within 14 days of their assets to the value of Kshs. 350,000,000;

c) A freezing order restraining the defendants from selling, disposing of, exchanging, mortgaging, transferring or in any other way dealing with their properties including any shares held in any company in accordance with the records of the CDSC, cash held in bank accounts in any bank within Kenya and land owned by the defendants jointly or severally within the republic of Kenya to the amount of Kshs. 350,000,000 which will be sufficient to satisfy any judgment that may be obtained against the defendants. The freezing order will subsist until determination of the suit but subject to Order 40 rule 7 of the CPR.

d) An order for costs of the application which I award to the Applicants.

e) The prayer for accounts and production of records of all transactions for sale of tickets will abide the trial. It has not been granted at this stage.

f) The Applicants shall give an undertaking that they will pay damages to the Respondents should it be shown in the future that the freezing order should not have been issued, a practice developed within the regime of freezing orders as a safeguard to give remedy to a successful defendant.

Dated, signed and delivered in open court at Nairobi this 11th day of March, 2014

F. GIKONYO

JUDGE