



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL SUIT NO 135 OF 2013

INSTITUTE FOR SECURITY STUDIES.....PLAINTIFF

VERSUS

**1. STEVE CLEMENT MURITHI MUGO
2. VICTOR KARIUKI MUGO**

(t/a COMPUTER HARD & SOFT CONCEPTS).....DEFENDANTS

RULING

1. The Plaintiff's claim against the 1st Defendant is in conversion. Its case is that in the course of his employment with the Plaintiff as an assistant accountant, the 1st Defendant converted to his own use by way of **“irregular, fraudulent and dishonoured payments to himself and the 2nd Defendant and other various sums of money in various currencies, all accounting to KShs 18,380,458/30 as at 30th October 2012”**. Particulars of fraud, illegality and breach of duty are pleaded in paragraph 7 of the **plaint dated 23rd April 2013**. The Plaintiff claims from the 1st Defendant the said sum of KShs 18,380,458/30 with interest.
2. The Plaintiff has further pleaded that the 1st Defendant admitted to illegally taking US Dollars 15,000 from the Plaintiff and undertook to reimburse the same, but has since failed to do so despite demand.
3. The Plaintiff's case as against the 2nd Defendant is not clearly pleaded. But it appears to be that he illegally received from the 1st Defendant various funds amounting to KShs 6,899,788/30 that the 1st Defendant had irregularly and fraudulently diverted from the Plaintiff's coffers. It is not clear if this KShs 6,899,788/30 is part of the KShs 18,380,458/30 claimed from the 1st Defendant. But any lack of clarity in pleadings can be cured by amendment. At any rate, the Plaintiff claims from the 2nd Defendant this sum of KShs 6,899,788/30.
4. It is the Plaintiff's further case that the money converted or stolen from it by the 1st Defendant was used to purchase some two named motor vehicles and the rest of it held in various bank accounts. The Plaintiff seeks orders to preserve the two motor vehicles and the funds in some six (6) named bank accounts – presumably pending hearing and disposal of the suit.

5. The Defendant entered appearance and filed a joint **statement of defence dated 15th June 2013**. They denied the Plaintiffs claims against them, including the particulars of fraud, illegality and breach of duty pleaded.

6. In addition the 1st Defendant pleaded, *inter alia*, that “he was not the only one who received monies on behalf of the Plaintiff and therefore it is not possible to apportion blame on the 1st Defendant; and that the Plaintiff did not suffer any loss and damage amounting to KShs 18,380,458/30 or at all.

7. The Defendant also admitted “taking” the Plaintiff’s US Dollars 15,000/00 but denied that he had failed or refused to reimburse the same. He further denied that the Plaintiff had made any demand for the same.

8. The Defendants did not deny in terms that any money illegally converted from the Plaintiff was used to purchase the two motor vehicles and also banked in the six bank accounts. They merely pleaded that they are strangers to the averments contained in paragraph 12 of the plaint. They also pleaded that the Plaintiff is not entitled to the injunctions sought in respect to the two motor vehicles and the bank accounts.

9. In a **reply to defence dated 24th July 2013** the Plaintiff joined issue with the Defendants upon their statement of defence.

10. Together with the plaint the Plaintiff filed **notice of motion dated 23rd April 2013** under **Order 40, Rules 1, 4 and 10** of the **Civil Procedure Rules, 2010** (the **Rules**). The inherent jurisdiction of the court is also invoked. That application is the subject of this ruling.

11. The main relief sought in the application is temporary injunction, pending disposal of the suit, to preserve the two motor vehicles and all the six bank accounts. The grounds for the application given on the face thereof include –

(i) That the Plaintiff “strongly believes that all the monies taken/misappropriated and/or stolen from it by the Defendants could be held” in the said bank accounts and “could also have been used to purchase” the motor vehicles.

(ii) That there is need to preserve “all the monies in the bank accounts ... (and also) the motor vehicles...to ensure that the Plaintiff is able to recover all its monies”.

(iii) That unless the orders sought are granted the Defendants “may divert or transfer the monies held in the bank accounts or the motor vehicles ... (and) place them out of ...reach of the Plaintiff”.

12. There is a supporting affidavit sworn by one **Hameline Chimuka**, the Plaintiff’s “Finance Manager based in South Africa”. The affidavit basically restates the Plaintiff’s case as pleaded in the plaint. There are various documents annexed thereto.

13. The Defendants have opposed the application by **replying affidavit filed on 7th May 2013**. It is sworn by the 1st Defendant. It also basically restates the Defendant’s case as pleaded in their defence. The 1st Defendant also admits taking the Plaintiff’s US Dollars 15,000/00 “for emergency purposes which amount was to be refunded...,” but that the Plaintiff summarily dismissed the 1st Defendant on account of that money without making a demand for its refund.

14. The following grounds of opposition emerge from the replying affidavit –

(i) That the Plaintiff has not fulfilled the legal requirements for granting the orders sought.

(ii) That the application is “speculative and anticipatory and as such the same is vexatious, frivolous and an abuse of the court process”.

15. There is a supplementary affidavit filed in response to the replying affidavit.

16. I have considered the submissions of the learned counsels appearing, including the authorities cited.

17. The 1st Defendant has expressly admitted the theft of US Dollars 15,000/00 from the Plaintiff which he has not paid back. His employment with the Plaintiff at the time the theft occurred is not in dispute.

18. The Plaintiff has demonstrated at pages 22 and 23 of the application bundle that the 1st Defendant took 2,000 Euros. At pages 24, 25, 26, 27 and 28 of the bundle there is evidence of further monies of the Plaintiff received by the 1st Defendant and not banked in the Plaintiff’s account.

19. At pages 29, 35, 36, 37, 38, 39, 40, 41 and 42 of the application bundle there is evidence of various sums of money requisitioned by the 1st Defendant ostensibly for the Plaintiff’s legitimate purposes, but the very exact amounts of money ending up in the 2nd Defendant’s bank accounts.

20. At page 55 of the application bundle there is evidence of the 2nd Defendant subsequently banking some money into the 1st Defendant’s bank accounts.

21. There is at common law a right of tracing stolen property. The Plaintiff has not only established, *prima facie*, that the 1st Defendant stole various sums of money from it, but also, again *prima facie*, that at least some of these monies ended up in the bank accounts in issue, and further that some of the money may have been used to purchase the two motor vehicles.

22. I am alive to the fact that what is before the court is not an application for attachment before judgment. I am also alive to the fact that the Plaintiff’s claim against the Defendants is for money, and that therefore it cannot be said that the Plaintiff stands to suffer irreparable loss unless the temporary injunctions sought are granted.

23. It must be remembered though that the Plaintiff’s cause of action is founded on conversion. Its case is that the Defendants stole its money and that they banked at least some of it in named bank account and bought with some of it the two named motor vehicles. The 1st Defendant has admitted stealing some of the Plaintiff’s money. It has also provided good evidence, *prima facie*, that at least some of the stolen money was banked in the stated bank accounts and may also have been utilized to purchase the two motor vehicles.

24. In the circumstances I will allow the application as prayed in prayer 3. The temporary injunction will remain in place pending disposal of the suit or the further order of the court, and it is subject to the Plaintiffs giving an appropriate undertaking as to damages within fourteen (14) days of delivery of this ruling. Costs of the application will be in the cause. Those will be the orders of the court.

DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF OCTOBER 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 8TH DAY OF OCTOBER 2013