



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL CASE NO. 16 OF 2013

PAVIWA LIMITEDAPPELLANT

VERSUS

CO-OPERATIVE BANK OF KENYADEFENDANT

RULING

1. By a notice of motion dated 22nd May 2013 under order 40 Rules 1 & 2 of the CPR and sections 1, 1A IB and 3 of CPA the plaintiff applicant moved this court for orders:
 1. ***THAT this application be certified as urgent service be dispensed with and heard ex-parte in the 1st instance.***
 2. ***THAT this honourable court be pleased to issue an order of temporary injunction restraining the Defendant, his/her agents, servants and/or employees from restricting access, continued freezing and/or preventing the plaintiff from dealing with account NO. 01148365792300 held at Nanyuki Branch pending the inter-parties hearing of this application.***
 3. ***THAT this honourable court be pleased to issue an order to Co-operative Bank of Kenya to open and/or defreeze Account No. 01148365792300 Nanyuki Branch for Paviwa Limited to enable Paviwa Limited unlimitedly access the said account in order to withdraw, deposit, pay, transfer money and/or in any other way deal with the said account in the manner as the said Paviwa Limited may deem fit.***
 4. ***THAT this hounourable court be pleased to issue an order of permanent injunction restraining the Defendant, her agents, servants and/or employees from freezing and/or dealing with the Plaintiff's account No. 01148365792300 pending the hearing and determination of this suit.***
 5. ***THAT costs be in the cause.***
1. The application was grounded on the grounds summarized as follows:

THAT the defendant has illegally frozen the plaintiff's account No. 01148365792300 held at its Nanyuki Branch with no order authorizing such freezer and without giving any notice contrary to Bank-customer relationship.

THAT the Defendant actions have resulted in the plaintiff suffering damages.

2. The application was supported by the affidavit of one PATRICK MAINA who deponed that on 10th May 2013 one of the plaintiff's client Reliable Earthmovers informed them that cheque No.

- 000083 issued to them had been returned with reason 80 - confirmation awaited.
3. That when they called on their branch at Nanyuki to inquire why the said cheque was returned they were informed that the account had been frozen in Naivasha but were not given any satisfactory answer neither were they provided with any court order authorizing or allowing the defendant to freeze the account.
 4. This application was filed under certificate of urgency in Nakuru High Court but was transferred to this court for determination and when Mr. Ojieda appeared before me on 31st May 2013 I certified the application as urgent and ordered the same to be served for interpartes hearing on 6th June 2013.
 5. When parties appeared before me on 6th June 2013 Mr. Kioni appeared for the defendant and informed the court that the account was being investigated by the police but needed time to file an affidavit in reply where upon I ordered the defendant to allow the plaintiff to withdraw the sum of money which was not under investigation.
 6. In reply to the said application the defendant filed a replying affidavit on 14th June 2013 sworn by one DUNCAN MACHARIA the Defendants investigation officer wherein he deponed that the respondent discovered a fraud at its University Way Branch which involved transfer of funds to various accounts by the Bank officer one Peter Ngumo Muya allegedly under instructions from a director of the applicant PATRICK MAINA.
 7. That the transactions were carried out on about 16th April to 20th April 2013 whereupon discovery some perpetrators were arrested and investigation commenced as a result whereof some of the beneficiaries of the said fraud recorded statements with the police implicating the said director of the applicant.
 8. That according to the terms and conditions of the defendant Bank signed between her and her customer clause 22 (variation and termination of relationship) gives the respondent a right to freeze the customers account.
 9. In a further affidavit sworn by the said DUNCAN MACHARIA the same deponed that the said PATRICK MAINA the director of the applicant company was subsequently arrested and charged with different counts: Stealing contrary to section 268(1) as read with section 275 of the Penal code and Attempted stealing contrary to section 268(1) as read with section 389 of the Penal Code and attached the charge sheet and witness statements implicating the said PATRICK MAINA
 10. In reply to the affidavit by Mr. Duncan Macharia Mr. Patrick Maina on 11th May 2013 swore a further affidavit in which he deponed that based on the principle of SOLOMON V SOLOMON (1897)A.C. 22 he is just a director of the plaintiff company and that the plaintiff had no any business relationship with the said Peter Ngumo Muya and that there was no evidence that the monies he paid out to Civicon Ltd were monies obtained fraudulently.
 11. That there is a clear breach of the contractual duty by the defendant upon realizing their mistake they have now embarked on fishing expedition on the person of the plaintiff director to justify their act.

SUBMISSIONS

12. Mr. Ojienda on behalf of the applicant submitted on behalf of the plaintiff that the said account should be opened because there is a breach of contract; Bank-customer relationship by the defendant and that the bank cannot freeze a clients account unless such instructions are specifically drawn from the client themselves even if the money is stolen the customers account can not be stopped.
13. He further submitted that on the principle of Solomon v Solomon there is a distinction between the applicant and its director who has been charged on his individual capacity and that the period in question is known and therefore any money deposited into the plaintiff's account outside the period is known and that there is no evidence to show that the director of the plaintiff acted on its behalf.
14. On behalf of the defendant Mr. Kioni submitted that the Bank discovered a fraud which was being done by a clerk of the Bank and Mr. Maina the Plaintiffs director and that the plaintiff is run by the said Patrick Maina and the moneys in the plaintiffs account belongs to the said Patrick Maina.
15. He submitted that contracts entered into between Patrick Maina and other entities are paid into the plaintiff's account and therefore the bank was entitled to freeze the account.

ISSUES

16. From the pleadings herein and the submissions by counsels for the parties there is only one issue for determination and that is whether the applicant has made up a case for the grant of an interlocutory mandatory injunction against the defendant herein.
17. The principles upon which an interlocutory mandatory injunctions can be granted are similar to those of interlocutory injunctions that is to say that the applicant must meet the three conditions set out in the case of GIELLA vs CASSMAN BROWN & CO. LTD [1973] EA 358 as follows:

1. ***An applicant must show a prima facie case with a probability of success.***
2. ***An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.***
3. ***Where the court is in doubt it will decide the application on the balance of convenience.***

1. For an interlocutory mandatory injunction in addition to the above principles there must be special circumstance for it to be granted as stated by the Court of Appeal in KENYA BREWERIES LTD & ANOTHER V W. OKEYO NAIROBI CIVIL APPEAL NO. 332 of 2000 reported in (2002) eKLR where the Court of Appeal cited Halsbury Laws of England with approval as follows

“The test whether to grant a mandatory injunction or not is correctly stated in vol. 24 Halsbury Laws of England 4th Edition para 948 which reads

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

2. This holding was adopted by Onyango Otieno J as he then was in NDERU V KENYA NATIONAL CHAMBER OF COMMERCE & INDUSTRIES & ANOTHER [2003] KLR161 as follows:
 - a) ***a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstance and only in clear cases where the court thinks that the matter ought to be decided at once or where the injunction is directed at simple and summary act which can easily be remedied.***
 - b) ***a mandatory injunction at interlocutory stage is merely granted, only where the plaintiff's case is clear and incontrovertible.***
3. Does the plaintiff's case fall within the stated principle? In support of its claim the applicant has relied upon the case of HON. NICHOLAS R.O. OMBIJA V KCB HIGH COURT CIVIL CASE NO. 547/2008 MILIMANI reported in [2009] eKLR to my mind this case is distinguishable since it related to defamation. He has further relied upon the case of LAZARUS MASAYI V KENYA COMMERCIAL BANK LTD CIVIL APPEAL No. 259 OF 2007 KISUMU reported in [2004] eKLR which was in respect of whether the bank could lawfully debit its customers saving account without reference to the customer and pay out all or any of the money credited into that account to a third party.
4. Finally he relied upon ERUSTUS KIBITI STEPHEN V EURO BANK LTD & ANOTHER NAIROBI MISC. CRIMINAL APPLICATION NO. 9 OF 2003 which is a case in respect of warrant issued to the police to inspect the account and when it was held that the bank is not bound to disclose the state of a customers account except on reasonable and proper grounds such as where the due closure is under compulsion by law or there is a duty to the public to disclose

- where the interest of the bank requires the disclosure or where the disclosure is made by the express or implied consent of the customer.
5. In the case before the court, the plaintiff is a customer of the defendant bank and there is evidence that the said account had been used by a bank employee who has been charged to commit fraud against the bank and further that a director of the plaintiff has been charged together with the said employee.
 6. The order sought by the applicant is an equitable remedy and he who comes to equity must do equity. I have noted that Mr. Patrick Maina has used the applicant's account for payment of monies which are due to him in person and the applicant has offered no explanation for the said transaction. It is therefore clear to my mind that the plaintiff's case is not clear and incontrovertible to enable this court grant the orders sought at this stage.
 7. Further I am of the considered opinion that the balance of convenience between the banks claim and the plaintiff's claim is against the grant of the orders sought since any damage that the plaintiff is likely to prove will be adequately compensated for by way of damages whereas if the bank were to lose the money being held in the plaintiff's account and it turns out that the bank is entitled to the said money it might not be possible to recover.
 8. On the principles of *Solomon v Solomon* of corporate identity I take the view that this is a case where the veil of corporate identity can be lifted.
 9. It is also clear from the affidavit evidence that the director of the plaintiff as stated never has been charged and therefore applying the principles set out herein it can not be said that the plaintiff has established the existence of special circumstances that would enable the court to grant the mandatory injunction at this stage and therefore decline to grant the orders sought by the plaintiff at this stage and dismiss the application dated 22nd May 2013 with cost being in the cause.

Dated at Nyeri this 3rd day of October 2013.

J. WAKIAGA

JUDGE

Mr. Kioni for the Defendant.

Mr. Thuku for Ojenda for the plaintiff/Applicant

Court: The ruling is read in open court in the presence of the Advocates for the parties.

J. WAKIAGA

JUDGE