



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**MISCELLANEOUS CIVIL APPLICATION 37 OF 2009**

**SAMUEL KINGORI WAITHANJI.....PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED. .... APPELLANT**

**R U L I N G**

By a plaint dated 4.05.2009 and filed on 5.05.2009, the Plaintiff sought the following prayers:-

- (i) A declaration that the Defendant's acts of freezing the Plaintiff's Bank Account No. 4658762 and unilaterally making negative entries therein on 09.04.2009 are illegal and in breach of contract of operating the said account,**
- (ii) An order of mandatory injunction directing the defendant to lift the orders of freezing the Plaintiff's Bank Account No. 4658762 and reverse all the unilateral entries made 09.04.2009 by the Defendant in respect of the said account.**
- (iii) An order of permanent injunctions restraining the Defendant from unlawfully freezing the Plaintiff's Bank Account No. 4648762 or interfering with the Plaintiff's operations thereof.**
- (iv) General damages for breach of contract.**
- (v) Costs of the suit**
- (vi) Any other relief.**

By a Chamber Summons of even date with the Plaint and filed the same day, and expressed to be brought under Order XXXIX Rule 2 of the Civil Procedure Rules the Plaintiff sought the following orders.

- (a) an order of mandatory injunction directing the Defendant to lift orders freezing the plaintiff's**

**bank account No. 4658762 and reversing all entries in respect of thereof unilaterally made by the Defendant on 09.04.2009.**

**(b) an order for temporary injunction restraining the Defendant from unlawfully freezing the Plaintiff's bank account No. 4658762 or interfering with the Plaintiff's operations thereof pending the termination of the suit.**

**(c) costs be provided for.**

The Summons in Chambers was supported by the Plaintiff's Affidavit sworn on 4<sup>th</sup> May 2009 and the grounds on the face of the Summons.

To the Summons, and the suit itself there was filed a Notice of Preliminary Objection dated 20<sup>th</sup> May 2009 by the Defendant and which raised the following issues-

- 1) that the Plaintiff's suit and the said application (Chamber Summons) is incompetent, misplaced and bare of any reasonable cause grounds or proof to warrant the grant of the orders sought;**
- 2) that the Plaintiff's suit and said application is fatally incompetent and is riddled with falsehoods deceit and is overwhelming display of an attempt to mislead the court into granting the relief sought;**
- 3) that in any event the Plaintiff/Applicant does not merit the grant of the equitable reliefs sought as it is apparent from his Affidavit that he has approached the court with unclean hands.**
- 4) that consequently the said application and the entire suit are scandalous and vexatious and are otherwise an abuse of the court process and that both should be struck out with costs to the Defendant.**

The Defendant also filed a Defence along with the said Preliminary Objection and alleges in paragraphs 9 & 10 thereof that as a result of fraudulent/illegal transactions on the part of the Plaintiff, a Police investigation was launched with warrants to investigate various bank accounts including that of the plaintiff issued by the Chief Magistrates Court at **NAIROBI IN MISC. CRIMINAL APPLICATION NO.L 295 OF 2009** on 7<sup>th</sup> May 2009.

In addition to the Preliminary Objection and Statements of Defence, the Defendant also filed a Replying Affidavit sworn by one Peter Nganga its Security and Investigating Manager on 26<sup>th</sup> May 2009.

Following the receipt of both the Preliminary Objection the Defendant's Statement of Defence, the Plaintiff's counsel filed an Amended Plaintiff on 28<sup>th</sup> May 2009, but dated 27<sup>th</sup> May 2009. The Amended Plaintiff does however maintain the same prayers as the original Plaintiff of 4<sup>th</sup> May 2009.

When the Plaintiff's Chamber summons was urged before me on 2/06/2009, the sole issue was whether the plaintiff's application was fatally defective and therefore incompetent. Mr. Gatari Ringera who urged the application for the Plaintiff maintained that the application was in order, as there was no binding procedure for approaching the court for orders of mandatory and permanent injunction, and in the interests of justice the funds be released to enable the Plaintiff to carry on his business, and that all the authorities cited by the Defendant and to which I shall presently refer supported the Plaintiff's case for release of funds or lifting the freeze on the plaintiff's account.

Miss Kaimunya learned counsel for the Defendant did not share Mr. Gatari's reading of the application. In her submission, the Chamber Summons was fatally defective and therefore incompetent. She relied on less than seven (7) authorities.

Counsel relied on the case of **OWNERS OF THE VESSEL LILIAN “S” Vs CALTEX OIL (K) LTD [1989] K.L.R.1** to support the proposition that it is axiomatic that in ex-parte proceedings there should be full and frank disclosure to the court of facts known to the applicant.

In this case, it is the Defendant’s contention that the Plaintiff’s suit is riddled with falsehoods and deceits and for that reason, the Plaintiff is not entitled to the equitable reliefs sought as he has come to the court of equity with unclean hands.

Counsel also relied on the case of **RAGUL VS BARCLAYS BANK OF KENYA LTD [2002] K.L.R. 648**, on the same proposition that;-

**“If an interlocutory application has been obtained by means of misrepresentation or concealment of material facts, the same will on application of the party aggrieved, be discharged”.**

Miss Kaimunya relied on **CHOWADA vs KENYA COMMERCIAL BANK LTD [2003] K.L.R. 453** on it for the proportions that-

**“the customer has no right to put upon the banker and the bank is not bound to accept any risk or inability not contemplated in or essentially arising out of ordinary routine business”**

Similar reliance was placed on the case of **ONJALLAH VS KENYA COMMERCIAL BANK LTD. [2004] K.L.R 702**, that **“money paid under a mistake of fact is repayable. The position of a banker does not differ from any other recipient of money acting as an agent and accordingly money paid to a banker under a mistake of fact can be successfully re-demanded from the banker who so paid it.....”**

In the matter at hand, none of the propositions in the above captioned cases come into play because, they relate to final orders, where the court has had occasion to hear the parties on all the issues at stake or in dispute in the suit. Those authorities do not therefore go to the root for the determination of the plaintiff’s Chamber Summons. The authorities which go to the root of the application herein are-

1. **Standard chartered Kenya Ltd Vs. intercom services Kenya Ltd & 4 others [2004]2 K.L.R. 183.**

And

2. **Morris & Co. Ltd Vs. Kenya Commercial Bank Ltd and Others [2003] EA 605 (Morris case).**

Discussing the provisions of Order XXXIX of the Civil Procedure Rules in the **Morris** case and on the incompetence of the application the Ringera (as he then was) said at p. 610.

**“And while on the incompetence of the application, I cannot help observing that the application also seeks certain interlocutory mandatory injunctions. Although counsel for the defendant did not take this point, I think a court should not shut its eyes to manifest procedural interactions in matters before it. In that regard, it is trite law that interlocutory mandatory injunctions are not contemplated by order XXXIX of the Civil Procedure Rules. That order only contemplates interlocutory prohibitive injunctions. An application for a mandatory injunction can only be made pursuant to the provisions of section 3A of the Civil Procedure Act, and the procedural mode in that case is a motion on notice pursuant to Order L rule 1 of the Civil Procedure Rules.....”**

**And in Standard Chartered Kenya Ltd vs Intercom Services & Others** the court of Appeal held inter alia

**“The law requires to determine a case on the issues that flow from the pleadings and to pronounce judgment on the issues arising from the pleadings or from issues framed for the courts determination by the parties. Also parties are generally confined to their pleadings unless the pleadings are amended during the hearing of the case.**

The immediate foregoing holding reiterates the provisions of Order VI rule (1) of the Civil Procedure Rules, that no party may in any pleading make an allegation of fact or raise any new ground of claim inconsistent with a previous pleading of his in the same suit unless he first amends [(rule 6(2))]

The Chamber Summons herein seeks in prayer 3 thereof an order of temporary injunction. There is no such prayer in either the original Plaint of 4.05.2009 or the Amended Plaint (of 27.05.2009) the application is therefore inconsistent with the previous main pleading and is to that extent incompetent that prayer is therefore struck out.

Would the prayers for mandatory and permanent injunction fair any better fate? I do not, with respect to counsel for the plaintiff/applicant, think so. A definition of those orders would explain why apart from the procedural irregularity to which I shall revert in the final part of this ruling), such orders are not available to the Applicant.

A mandatory injunction is an order of court which orders or specifies an affirmative act or mandates a specific course of conduct. That is why it is sometimes referred to as an affirmative injunction.

On the other hand a permanent injunction is an injunction granted after a final hearing on the merits even if it does not last forever despite its name.

In this matter both the Plaintiffs and the Defendant have raised counter issues of deceit and fraud, misrepresentation and mistake. These are issues, as I have stated in the earlier passages of this ruling, which require full disclosure and discovery on either side, and do not therefore lend themselves to determination by way of interlocutory application at this stage.

As for procedural irregularity an application for orders of mandatory or permanent injunction are not contemplated by Order XXXIX rules 1 & 2 of the Civil Procedure Rules and an application by way of a Chamber Summons under that Order. An application for those orders may only be entertained under the court's interest power under section 3A of the Civil Procedure Act (Cap 21 Laws of Kenya).

So in the application herein where Plaintiff sought both mandatory and permanent injunctions, it was incumbent upon him to do so in a motion on notice, for **under our procedural law it is established that where a matter partly falls within the scope of a Summons in Chambers and partly within a motion on notice, the large procedure namely, the motion is to be invoked.** That is the effect of Order L Rule (1) & (2) which says:-

**“All applications to the court save where otherwise expressly provided for under these rules, shall be made by motion (on notice) and shall be heard in open court.”**

Having failed to invoke the proper procedure, the plaintiff's application is also incompetent for this additional reason.

For all those reasons, I would not however strike out the Plaintiff's suit. I would however dismiss the Plaintiff's Chamber Summons. The Plaintiff's Chamber Summons dated 4.05.2009 and filed on 5.05.2009 is for reasons stated at length, dismissed with costs to the Defendant herein.

There shall be orders accordingly

Dated, Delivered and Signed at Meru this 17th day of July.2009

**ANYARA EMUKULE**

JUDGE

