

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL CASE NO. E127 OF 2022

**VICTORIA COMMERCIAL BANK
PLC.....PLAINTIFF**

VERSUS

**JAYESH UMEDLAL SHANGHAVI.....1ST
DEFENDANT**

**NINA JAYESH SHANGHAVI.....2ND
DEFENDANT**

RULING

1. The Court is called upon to determine two applications. The first is the Defendants’ Notice of Motion dated 1st February 2023. The second is the Plaintiff’s Notice of Motion dated 14th February 2023, filed in response to the earlier application.

Defendants’ application dated 1st February 2023

2. The Defendants seek, inter alia, an injunction restraining the Plaintiff from making further deductions from their accounts; an account of payments made to third parties; and restitution of Kshs. 82,168,058.10 allegedly deducted; and a determination on the reasonableness of charges at the hearing of the main suit.

3. The application is premised on the grounds of the face thereof and supported by affidavits sworn by Jayesh Umedlal Shanghavi and Nina Jayesh Shanghavi, who deponed that

they are directors of Good Earth Group Limited. They assert that the Plaintiff has embarked on the enforcement of disputed personal guarantees and has unlawfully deducted Kshs. 76,649,408.75 from what they describe as their personal accounts, allegedly for legal fees, payments to advocates, auctioneers, valuers and other third parties.

4. They further claim that the Plaintiff unlawfully disposed of 265,940 shares of I&M Bank held in their names, realizing Kshs. 5,518,649.35, and that these actions constitute fraud, bad faith, and abuse of the banker-customer relationship.
5. The Defendants argue that the conduct complained of is oppressive and intended to deplete their assets before the Court determines liability under the guarantees. They therefore seek injunctive relief and restitution.

Plaintiff's application date 14th February 2023

6. The Plaintiff seeks orders staying, reviewing, discharging and setting aside the *ex parte* restraining orders granted on 2nd February 2023, under Section 1A, 1B, and 3A of the Civil Procedure Act, and Order 40 Rule 7 of the Civil Procedure Rules.
7. The application is supported by an affidavit sworn by Clement Gitau, a Senior Legal Officer of the Plaintiff. He avers that the *ex parte* injunction was obtained through material non-disclosure. He states that the deductions complained of were not made from the Defendants' personal

accounts but from Account No. 100***9019, a bank account belonging to the Company, Good Earth (Group) Limited, which is currently under administration and is overdrawn by over Kshs. 202,886,259.55.

8. Gitau asserts that the entries complained of are debit entries contractually permitted under the Company's loan agreements and the General Terms and Conditions for account operation, citing clauses authorizing the bank to recover legal fees, charges, and other expenses related to enforcement and recovery. He further states that the shares said to have been unlawfully sold were pledged securities, lawfully realized upon the Company's default.
9. The Plaintiff therefore contends that the Defendants misrepresented facts by suggesting deductions were made from their personal accounts, and by concealing that the shares were pledged securities, thus misleading the Court and obtaining injunctive orders irregularly.
10. The Defendants filed a Replying Affidavit sworn on 20th February 2023, maintaining that the Plaintiff was indeed deducting money and making payments to advisers, consultants, auctioneers, and valuers during the pendency of the proceedings, which they assert is improper and prejudicial.

Plaintiff's submissions

11. The Plaintiff emphasizes the long-established principle that a party seeking ex parte relief must make full and frank

disclosure, citing authorities such as **R v Kensington Income Tax Commissioners [1917]**, **Brink's MAT v Elcombe [1988]**, **Bank Mellat v Nikpour [1985]**, and the Kenyan Court of Appeal decision in **Uhuru Highway Development Ltd v CBK**. The Plaintiff argues that the Defendants failed to disclose that the deductions were from the Company's account, that the account was overdrawn by more than Kshs. 202 million, that the debits were contractually permitted under clauses 15.3, 24 and 25 of the General Terms and Conditions, and that the shares sold were subject to a pledge under a deed dated 7th February 2018.

12. The Plaintiff further submits that guarantees become enforceable upon default, as affirmed in **Fidelity Commercial Bank v Kenya Grange Vehicle Industries Ltd**, and that the Defendants mischaracterized legitimate debit and credit entries, including dividends.

Defendants' submissions

13. The Defendants counter that the Plaintiff has been applying dividends and other credits to a disputed debt and wasting assets that should be preserved until the Court determines the dispute. They rely on Halsbury's Laws of England and the decision in **Paul Gitonga Wanjau v Gathuthi Tea Factory** to argue that an injunction is justified to prevent irreparable or continuous harm. They also allege contempt, asserting that despite a clear order restraining further deductions issued on 2nd February 2023, the Plaintiff debited Kshs. 7,630,000.00 and paid it to its advocates. They argue that this conduct amounts to willful

disobedience of a court order in terms of the principles set out in **Shimmers Plaza Ltd v National Bank of Kenya**.

Analysis and determination

14. Having considered the two applications, affidavits, and submissions, the issues for determination are:

- i. Whether the Defendants have met the threshold for grant of interlocutory injunction*
- ii. Whether the ex-parte orders ought to be discharged.*

15. The principles governing grant of interlocutory injunctions are set out in **Giella v Cassman Brown & Co. Ltd [1973] EA 358**, reaffirmed in **Nguruman Ltd v Jan Bonde Nielsen & Another [2014] eKLR**:

a. The applicant must establish a prima facie case with a probability of success.

b. The applicant must demonstrate irreparable harm not compensable by damages.

c. If in doubt, the Court determines the matter on a balance of convenience.

16. A prima facie case is defined in **Mrao Ltd v First American Bank of Kenya Ltd [2003] eKLR** as “a case which, on the material presented, shows a right which has apparently been infringed.”

17. The Defendants claim the deductions were from their personal accounts; however, the Plaintiff disputes this and

has presented evidence suggesting the deductions were debit entries from the Company's account, not from personal accounts. Whether the guarantees are enforceable is an issue for trial. At this stage, the burden of proving wrongful deductions lies with the Defendants.

18. The dispute is ultimately contractual and monetary in nature. It is trite that where damages are an adequate remedy, injunctions do not issue. (See **Kenya Commercial Finance Co. Ltd v Afraha Education Society [2001] 1 EA 86**).
19. The Defendants have not demonstrated irreparable harm. Their complaint concerns monetary debits, fully compensable.
20. The balance of convenience turns on whether the Court should restrain a bank from exercising what it alleges are contractual rights. In **National Bank of Kenya v Pipeplastic Samkolit [2001] eKLR**, the Court held that clear contractual rights cannot be restrained absent evidence of illegality.
21. Without sufficient evidence of wrongful conduct, the balance of convenience favours allowing the bank to continue lawful debt recovery.
22. I thus find the Defendant has not met the threshold for granting an injunction. The result is that the Notice of motion dated 1st February 2023 is bereft of merit and the same is dismissed.
23. The second issue concerns whether the *ex parte* orders were obtained through material non-disclosure.

24. The Defendants presented the deductions as being made from their personal accounts. The evidence shows the deductions were made from the Company's account, which is overdrawn and governed by separate contractual instruments not disclosed to the Court at the *ex parte* stage.
25. The Defendants also failed to disclose that the I&M Bank shares were pledged securities under a Deed of Pledge dated 7th February 2018 and thus lawfully realizable on default.
26. Non-disclosure of the true nature of an account, the securities, and the governing contractual terms constitutes material non-disclosure, going to the heart of the injunction granted. On this basis alone, the *ex parte* orders cannot stand.
27. On the issue of contempt, although the Defendants allege breach of the injunction through the debit of Kshs. 7,630,000.00, the legal foundation of contempt cannot stand where the order said to have been disobeyed is itself set aside for material non-disclosure. Since the injunction is vacated, the contempt claim collapses.
28. In conclusion, the Defendants' application dated 1st February 2023 is dismissed. The Plaintiff's application dated 14th February 2023 is allowed, and the *ex parte* orders issued on 2nd February 2023 are discharged and set aside. Costs shall be in the cause.

RULING delivered virtually, dated and signed at **NAIROBI**

This **11th** day of **December** 2025.

P.M. MULWA
JUDGE

In the presence of:

Ms. Kamau for Plaintiff

Ms. Oseko h/b for Mr. Awele for Defendant

Court Assistant: *Carlos*