



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: E. GITHINJI, H. OKWENGU & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 12 OF 2010

BETWEEN

CFC FINANCIAL SERVICES.....APPELLANT

AND

JUJA ROAD FANCY STORE LIMITED.....RESPONDENT

(An appeal from the Order and Ruling of the High Court of Kenya at Nairobi (Khaminwa, J.) given on 6th February, 2009)

in

H.C.C.C No. 331 of 2008)

JUDGMENT OF THE COURT

[1] This is an appeal arising from a ruling delivered by the High Court (Khaminwa J) in which an order of mandatory injunction was issued against the appellant **CFC FINANCIAL SERVICES LIMITED** the defendant in the suit, in the following terms:

“That a mandatory injunction do issue enjoining the defendant either by itself or its agents, servants or whomsoever to reverse and cancel the entry reflecting the purchase of the 10,000 shares of ICDC Investment Company Limited by Defendant on or about November 2006 over CDS Account Number 381543 held by the Plaintiff pending the hearing and determination of this suit”

[2] We take cognizance of the fact that in issuing the order of interlocutory injunction the learned judge was exercising a discretionary power, and that this Court ought not to interfere with the exercise of such discretion unless it is satisfied that the learned judge misdirected herself and therefore arrived at the wrong finding, or that it is manifest that the exercise of discretion was clearly wrong and has resulted in injustice (see **Jaj Super Power Cash and Carry Ltd vs. Nairobi City Council and two others Civil Appeal No. 11 of 2002**).

[3] Juja Road Fancy Store Limited (the respondent herein) initiated the suit in the High Court through a plaint filed on 19th June 2008. According to the plaint the respondent and the appellant had a contractual agreement pursuant to which the respondent entrusted the appellant (a stock broker) to deal with the

respondent's Central Deposit System Account (CDS Account) professionally in a manner beneficial to the respondent and subject to the respondent's authority; that in June 2007, in breach of the contract and its fiduciary duty, the appellant without any authority from the respondent purchased 10,000 shares of ICDC Investment Company Limited worth Kshs. 4,379,124.00; that the transaction was also conducted in breach of the Capital Markets Authority Licensing Requirements and General Regulations; that as a result of the unauthorized dealings, and breaches, the respondent suffered substantial loss and damage as its investments were appropriated to cover losses arising from the appellant's dealing with the CDS account; and that the respondent was apprehensive that the appellant would illegally and without authority continue to deal with the CDS account.

[4] In addition to the mandatory injunction already adverted to, the respondent prayed for a declaration that the purchase of the 10,000 shares of ICDC Investment Company Limited by the appellant was unlawful, null and void, as it was done without the contractual or regulatory authority; a permanent injunction restraining the appellant from dealing with the respondent's CDS account; the taking of accounts in regard to the CDS account; and judgment in favour of the respondent for the sum found to have accrued in the respondent's favour in the CDS account.

[5] On 11th July 2008 the respondent filed the Notice of Motion dated 10th July 2008 seeking orders of interlocutory injunction including the order of mandatory injunction already adverted to. The motion was supported by an affidavit sworn by a director of the respondent Mr. Nipul Shah. The director averred to the facts reiterating what was pleaded in the plaint; In addition the director stated that upon discovery of the unauthorized purchase of 10,000 ICDC Investment Company Limited shares, the respondent had made attempts to have the transaction revoked, but the appellant had refused maintaining that the instruction to purchase the shares was verbal, and has threatened to appropriate the entire investment of the respondent to cover the transaction.

[6] The appellant filed a defence on 16th September 2008 in which: it maintained that it purchased 10,000 ICDC shares on the unequivocal instruction and or order of the respondent; denied being in breach of contract or fiduciary duty to the respondent; and denied dealing with the respondent's CDS account in breach of or non-conformity of the subject regulations.

[7] In response to the motion, the appellant filed grounds of opposition, asserting that there were no debilitating or exceptional circumstances demonstrated to warrant the grant of mandatory injunction; that the alleged substantial loss could be compensated by monetary damages if the claim was to be vindicated; that it would be premature and inequitable to grant the order of mandatory injunction before determination of the triable issue as to whether the respondent gave the disputed instructions to the appellant; and that an order of mandatory interlocutory injunction before the hearing of the respondent's suit would amount to the respondent stealing a march on the appellant before the appellant has had a chance to present its case.

[8] In allowing the motion the learned Judge of the High Court relied on **HCCC No 2225 of 1992 Belle Maison Ltd v Yaya Towers Ltd** in which Bosire J (as he then was) held that where the interest of justice demand, the court will invoke its inherent powers to grant orders. The learned judge came to the conclusion that the respondent deserved protection as the appellants were insisting on using its fiduciary duty against the respondent's account; contrary to express or implied agreement; contrary to the statutory regulations; and to the detriment of the respondent.

[9] In its memorandum of appeal, the appellant has raised 8 grounds that include the learned judge having erred in law and fact: in allowing the respondent's application for a mandatory injunction without proper grounds to justify the grant of the onerous order; in making the order of reversal or cancellation of a shares transaction in the Nairobi Stock Exchange Market where the order for cancellation cannot be effected without contravening the Capital Markets Authority Act and the Rules thereunder; failing to consider that once the shares were purchased in the name of the respondent the appellant was no longer privy to the shareholding of the respondent in ICDC; making the order whose effect was cancellation of an entry in the shares register of a company without the court being properly moved under the Companies Act; making an order which makes reference to entries in a CDS account in the absence of evidence of

such entry contrary to Section 34 of the Central Depository Act; and failing to consider and give due regard to the appellant's grounds and submissions in opposition to the respondent's motion.

[10] The parties duly exchanged and filed written submissions that were highlighted during the hearing of the appeal. Mr. M. Mwaniki appeared for the appellant while Mr. E. Saluny appeared for the respondent.

[11] For the appellant it was submitted inter alia that the High Court failed to adhere to the principles and test for granting mandatory injunction. The test for granting an order of mandatory injunction was identified as establishment of special circumstances in which the applicant's case is clear and one that the court thinks ought to be determined at once; or the act complained of is a simple and summary one that can easily be remedied, the respondent has attempted to steal a match on the applicant.

[12] Further it was submitted that the learned Judge did not analyze the application, the supporting affidavit or the law to lay the basis for her finding; that the respondent's claim that the appellant breached contractual and fiduciary duties and purchased shares without mandate was not proved or established; that the issue whether the respondent issued instructions for the purchase of the alleged shares was neither proven nor interrogated; that the loss allegedly suffered by the respondent was not particularized; and that the order sought was onerous and could not be effected without legal difficulties in view of section 31 of the Capital Markets Act and section 25 of the Capital Markets (Licensing Requirements) (General) Regulations 2002;

[13] In addition it was argued that the application made by the respondent in the High Court for the order of rectification of the share register was incompetent and improper as it contravened the procedure provided for under Rule 7 of the Companies (High Court) Rules which stipulates that such an application should be brought through an originating motion; that the reliefs sought in the Plaint are intertwined with the order of mandatory injunction, hence it was not proper for the court to grant the order of interlocutory mandatory injunction. Finally the Court was urged that it was not established that the issues raised were "*clear and one which the court ought to decide at once*" nor could they be described as a "*simple and summary one which can easily be remedied*" as to justify the granting of the mandatory interlocutory injunction.

[14] The authorities relied upon by the appellant in support of its submissions were ***Kenya Breweries Limited & Another vs. Washington O. Okeyo [2002] eKLR; Alex Wainaina t/a John Commercial Agencies vs. Janson Mwangi Wanjihia [2015] eKLR.***

[15] The respondent submitted that the High Court correctly applied the test for granting orders of interlocutory injunction as there were special circumstances necessitating the grant of the order of a mandatory injunction at interlocutory stage, including the fact that the respondent's case was a clear one justifying the court dealing with the matter at once;

[16] Further, it was argued that the respondent established prima facie that the appellant was operating the respondent's CDS account without mandate and contrary to statutory regulations; that in accordance with Section 23 of the Capital Markets (Licensing Requirements) (General) Regulations, 2002), the appellant was obligated to act only on written orders from the respondent and the appellant failed to produce any such order or written instructions in regard to the impugned transaction; that contrary to the requirements of Section 19(1)(e) & (f) of the Capital Markets (Licensing Requirements) (General) Regulations, 2002) that required the appellant to maintain and preserve client's accounts and a memorandum of each client's order received for a period of seven years, the appellant did not produce any document touching on the respondent's CDS account; and that the omission was a calculated move aimed at obscuring the delivery of justice;

[17] It was posited that the respondent established prima facie, that the appellant had dealt with the respondent's CDS account without authority, consequently, the High Court was justified in granting the mandatory injunction at interlocutory stage as it had the duty of ensuring that justice was done without further delay, by protecting the respondent from the appellant's unlawful act calculated at stealing a match against the respondent by making profit out of an unsanctioned transaction; that regardless of the

provisions concerning how to move the court to cancel the entry in the share register, the respondent moved the High Court appropriately for protection against the illegal actions of the appellant, and that the order made by the court was capable of enforcement without much difficulty.

[18] The authorities relied upon by the respondent in support of its submissions included *Locabail International Finance Ltd vs. Agro - Export & Another [1986] 1 All ER 901* cited in *Shariff Abdi Hassan vs. Nadhif Jama Adan [2006] eKLR*; *Kamau Mucuha vs. The Ripples Ltd [1993] eKLR*; and *National Bank of Kenya Ltd vs. Wilson Ndolo Ayah [2009] eKLR*;

[19] The primary purpose of granting interim relief is the preservation of property; mitigation of losses; or preservation of peace and public order during the pendency of the suit. A mandatory injunction may be granted on an interlocutory application to preserve or restore *status-quo* or the contested status which preceded the controversy, pending the hearing and determination of the dispute, when the court can give final appropriate relief. The starting point in considering such an application is determination whether there is a right that has been infringed that is likely to result in dissipation of property, or loss or threaten public order. The respondent has demonstrated through the affidavit evidence that its CDS account has been established by the applicant

As already mentioned the trial court exercises discretionary power in granting or refusing to grant injunctive orders. Therefore one of the issues that we need to determine in this appeal is whether the learned Judge properly exercised her discretion.

[20] We are in agreement as submitted by both parties that the law on granting a mandatory injunction at interlocutory stage is as set out in *Kenya Breweries Limited & Another vs. Washington O. Okeyo (supra)* and *Shariff Abdi Hassan vs. Nadhif Jama Adan (supra)*. The threshold is that the applicant must satisfy the court, firstly, that there are special circumstances justifying the grant of the mandatory order of injunction, secondly either that the case is a clear case that the court thinks should be decided at once, or that the injunction is directed at a simple act that can be easily remedied, or that the person against whom the injunction is directed has attempted to steal a match on the applicant; and thirdly the court must be satisfied that the chances of the injunction being affirmed at the trial are high. To meet this threshold the applicant must establish a *prima facie* case that clearly demonstrates the above parameters.

[21] We have considered the pleadings that were before the learned judge, the motion that resulted in the mandatory injunction that is being impugned, and the affidavits in support and in opposition to the motion. It is not disputed that the appellant was a stockbroker and that the respondent contracted the appellant to manage its CDS Account No. 381543 (herein CDS Account). It is clear that the dispute concerned the purchase on the CDS account of 10,000 shares of ICDC Investment Company Limited then worth Kshs 4,379,124/=.

[22] While the respondent maintained that the shares were bought without its knowledge or authority, and in breach of the Capital Markets Act, and the statutory Regulations, the appellant maintained that it purchased the share on the respondent's unequivocal instruction or order. The respondent's motion was supported by an affidavit sworn by one of its directors Mr Nipul Shah who swore that the shares were purchased without their knowledge or authority; that the respondent had not derived any benefit from the transaction; and that there was a risk that unless the appellant is restrained it would continue to deal with the respondent's account to its further detriment. The appellant did not rely on any affidavit but relied on grounds of opposition in which the appellant basically contended that the respondent had not established exceptional circumstances, or substantial loss; and that it was premature to grant the prayer of mandatory injunction.

[23] The ruling of the learned judge was quite brief, but what appears to be her finding resulting in the decision to allow the application is contained in the following paragraph:

“In this case where the defendant insists on using its fiduciary duty against the applicant's account contrary to express or implied agreements and all to the detriment of the applicant and contrary to the statutory regulations, it is my view that the appellants are entitled to protection.”

[24] In light of the affidavit evidence that was before the learned judge and given that the affidavit evidence was not controverted by an affidavit in reply, there was prima facie evidence upon which the learned judge could make the finding she made. It is true that going by the pleadings the issue whether the respondent issued instructions for purchase of the 10,000 shares was in dispute. This was an issue for determination during the main trial. However, it was clear that the appellant purchased the shares on the respondent's CDS account and claimed to have had the respondent's "unequivocal instruction and or order." This placed a burden on the respondent to demonstrate such authority, but nothing was placed before the learned judge.

[25] Given the unpredictable nature of stocks and shares, and the fact that the respondent had demonstrated through the annexures to the affidavit of the director, that it had lost funds and continued to suffer at the behest of the appellant who had used one of its subsidiary companies to liquidate one of its directors fixed deposit account on account of the debt that was created through the shares purchased by the appellant, there were special circumstances that justified the conclusion that the respondent was deserving of the court's protection.

[26] Nevertheless, what is of concern is the terms of the mandatory injunctive orders as sought and issued. The order required the appellant:

"either by itself or its agents, servants or whomsoever to reverse and cancel the entry reflecting the purchase of the 10,000 shares of ICDC Investment Company Limited by Defendant on or about November 2006 over CDS Account Number 381543 held by the Plaintiff (emphasis added).

[27] The fact is that the respondent contended that the appellant had already purchased the shares (albeit without the respondent's authority). The purchase of the shares by the appellant could only have been through the stock market and therefore involving other third parties, such as the Nairobi Stock Exchange and ICDC Investment Company from whom the shares were bought. How then could the appellant reverse and cancel the entry reflecting the purchase? If the intention of the mandatory injunction as sought was to restore the respondent's CDS Account to the position it was in before the alleged breach by the appellant, this was not possible as the appellant could neither cancel nor reverse the entry reflecting the purchase that was regulated by a specific law. At best the appellant could only mitigate the situation by selling the 10,000 shares at that interlocutory stage to avert any further losses to the respondent. But that was neither what the respondent sought nor what the court directed. The order issued was therefore meaningless and incapable of performance.

[28] We find that our intervention is necessary as the learned judge failed to take into account circumstances involving the purchase and transfer of shares generally; the fact that there were other parties involved in the shares transfer; and that there were specific statutory regulations that were applicable. Therefore, the learned judge did not exercise her discretion judicially in issuing the order of interlocutory mandatory injunction as sought.

[29] Accordingly we allow this appeal and set aside the orders made by the learned judge on 6th February 2009, and substitute therefor an order dismissing the respondent's motion filed on 11th July 2008. Given the circumstances of this appeal, the order that commends itself to us on costs is that each party shall bear their own costs.

[30] Those shall be the orders of the Court.

Dated and delivered at Nairobi this 17th day of November, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

J. MOHAMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR