**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: BOSIRE, VISRAM & NYAMU, JJ.A)**

**CIVIL APPEAL NO. 174 OF 2009**

**BETWEEN**

**JAMES NYAKUNDI NDEGE.....APPELLANT**

**AND**

**BARCLAYS BANK OF KENYA .....RESPONDENT**

***(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Milimani Commercial Courts) (Kimaru, J)***

***dated 25th June, 2009***

***in***

***H. C. C. C. No. 148 of 2009)***
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**JUDGMENT OF THE COURT**

By a plaint dated 4th March, 2009 and filed in the superior court on 5th March, 2009, the appellant (plaintiff in the superior court) claimed that he was the lawful holder of certain accounts that he had opened with the respondent bank and sought, among other things, a "permanent order of injunction" restraining the respondent from interfering with his operation of the said accounts, and a mandatory order compelling the respondent to release funds held in those accounts.

Contemporaneously with the filing of the plaint, the appellant filed an application by way of chamber summons seeking the following three orders:

***"(b) A temporary injunction do issue restraining the Defendant by itself, its servants, agents and/or assigns from interfering with the Plaintiff's operation and access to his Bank Accounts held at the Defendant Bank, to wit;***

***(a) A/c No. 3691204***
***(b) A/c No. 2601611***
***(c) A/c No. 0942506422***
***(d) A/c No. 0084100358***

***pending the inter partes hearing and determination of this application.***

***(c) A temporary injunction do issue restraining the Defendant by itself, its servants, agents and/or assigns from interfering with the Plaintiff's operation and access to his Bank Accounts held at the Defendant Bank, to wit;***

***(a) A/c No. 3691204***
***(b) A/c No. 2601611***
***(c) A/c No. 0942506422***
***(d) A/c No. 0084100358***

***pending the hearing and determination of this suit.***

***(d) THAT the defendant be compelled to release all monies belonging to the plaintiff held by it."***

The application was based on the following grounds:

***"1. The Plaintiff is and has been a customer of the Defendant bank since the year 1994 when he opened his first account with the Defendant bank.***

***2. The Defendant since 24th November, 2008 frozen*** *(sic)* ***and continues to freeze various accounts held by the Plaintiff at the Defendant Bank.***

***3. The defendant is unreasonably and unlawfully denying the plaintiff access to his accounts and funds by withholding the sum of Kshs.9,129,794.45/= belonging to the Plaintiff.***

***4. The Plaintiff is unable to sustain himself and his family.***

***5. The plaintiff is unable to conduct his day to day business as a result of his accounts being frozen by the Defendant.***

***6. The plaintiff's business operations have come to a stand still as a result of the defendant's action.***

***7. The plaintiff's business continues to suffer losses as a result of the defendant's action.***

***8. That the defendant has justified its breach of contract with the Plaintiff on the strength of Chief Magistrates Court Criminal Case Number 1925 of 2008 which is an extraneous and irrelevant matter in so far as the contractual banker customer relationship between the Plaintiff and the Defendant is concerned.***

***9. The plaintiff is suffering and will continue to suffer irreparable loss and damage if the said funds so held unreasonably and unlawfully are not released to the plaintiff forthwith."***

That application was heard by the superior court (Kimaru, J) on 18th May, 2009 and in a ruling given on 25th June, 2009 the superior court dismissed the application, and rendered itself, in part, as follows:

**"I am not persuaded at this stage of the proceedings that the plaintiff has established that he is the genuine James Nyakundi Ndege, the person who opened the accounts in question and therefore has the requisite mandate to operate them. The defendant did not exceed its mandate in the banker – customer contract in demanding the plaintiff, if indeed he is the person who opened the said accounts, first establishes his identity before he can be allowed to operate the said accounts. I am in agreement with counsel for the defendant that before the criminal case is determined, it may be impossible for this court at this stage to reach a definitive determination that the plaintiff is the**

**genuine holder of the said accounts.**

**In the premises therefore, I hold that the plaintiff has failed to establish a prima facie case to entitle this court grant him the orders of interlocutory and mandatory injunctions sought in this application."**

It is that ruling that is the subject of this interlocutory appeal. The main suit is still pending. The appellant has outlined 21 grounds of appeal as follows:

***"1. The learned Judge erred in law and fact by failing to address his mind at all to the specific issues, grounds and facts raised by the Appellant's application, Supporting Affidavit, Further Affidavit and Submissions both written and oral in support of the Chamber Summons application filed on 5th March, 2009.***

***2. The learned Judge erred in fact and law by failing to appreciate and hold that the Plaintiff is the one who opened all the accounts in question, being Accounts number 3691204, 2601611, 0942506422, and 0084100358.***

***3. The learned Judge erred in fact and law by failing to appreciate and take into consideration the fact that the defendant did not dispute the appellant's identity when he was opening the above mentioned accounts.***

***4. The learned Judge erred in fact and law by failing to appreciate and hold that by virtue of the consent recorded by the Plaintiff and Defendant before the Honourable Court on 11th March, 2009 granting the Plaintiff access to his Kisii Account, it was no longer in dispute that the Plaintiff was indeed the Account holder of the accounts in question.***

***5. The learned Judge erred in fact and law by failing to appreciate and hold that the Defendant acknowledged that it had not frozen the Plaintiff's account in Kisii and that the Plaintiff was at liberty to access the same, hence the reason for the aforesaid consent.***

***6. The learned Judge erred in fact and law by failing to appreciate and hold that the Defendant never questioned the authenticity of the Plaintiff's identification documents when he was opening the accounts in question and thereafter in his day to day operation of the accounts.***

***7. The learned Judge erred in fact and law by failing to appreciate and hold that the deponent of the defendant's replying affidavit, Jason Turanta, was not competent to depone to the matters that he deponed to.***

***8. The learned Judge erred in fact and law by failing to appreciate and hold that the Defendant's actions were not in good faith.***

***9. The learned Judge erred in fact and law by failing to appreciate and hold that the Defendant acted negligently.***

***10. The learned Judge erred in fact and law by failing to appreciate and hold that the Defendant's actions were not in the ordinary course of business.***

***11. The learned Judge erred in fact and law by failing to appreciate and hold that the Defendant is in breach of the banker – customer relationship existing between it and the Plaintiff.***

***12. The learned Judge erred in fact and law by failing to appreciate and hold that the Plaintiff had established a prima facie case entitling the court to grant him the interlocutory and mandatory orders sought in the application.***

***13. The learned Judge erred in fact and law by failing to appreciate and hold that the plaintiff will suffer irreparable damage as** (sic) **result of the defendant freezing his accounts and denying him***

***the ability to cater for his family's needs and conduct his businesses.***

***14. The learned Judge erred in law and fact in finding/holding that the Defendant was entitled to be suspicious of the Plaintiff's identity.***

***15. The learned Judge erred in law and fact in finding/holding that the Plaintiff has not established that he is the genuine James Nyakundi Ndege, the person who opened the accounts in question and therefore has the requisite mandate to operate them.***

***16. The learned Judge erred in law and fact in finding/holding that the Defendant did not exceed its mandate in the banker-customer contract, in it's conduct towards the Plaintiff.***

***17. The learned Judge erred in law and fact in finding/holding that he was in agreement with counsel for the Defendant that before the criminal case is determined, it may be impossible for the Honourable Court to reach a definitive determination that the Plaintiff is the genuine holder of the said accounts while the issue in the criminal matter was not in relation to his identity and in fact should have been the confirmation that the appellant is indeed who he says he is.***

***18. The learned Judge erred in law by failing to take into consideration that so far no evidence has been produced in the criminal case to prove that the plaintiff is guilty of the charges preferred against him.***

***19. The learned Judge erred in law by taking into account extraneous considerations and factors in exercising his judicial discretion in dismissing the appellant's Application.***

***20. In making the findings he did and reaching the decision appealed against, the learned Judge did not exercise his discretion judiciously but acted capriciously.***

***21. The learned Judge erred in both fact and law by failing to consider carefully the written and oral submissions and the principles enunciated in the Authorities presented to the Honourable Court by counsel for the Appellant and in holding that the Appellant had failed to establish a prima facie case to entitle the court to grant him the orders of interlocutory and mandatory injunctions sought in the application."***

In his submissions before this Court, Mr. W. Gitonga, learned counsel for the appellant, took us through all the account-opening forms completed by the appellant when opening the accounts with the respondent, including copies of the identification documents submitted at the time, and argued that the superior court erred in not holding that the appellant was indeed the lawful holder of those accounts; that in disallowing access to his accounts, the respondent had acted negligently, and in bad faith, resulting in considerable loss to the appellant; that the respondent had breached the banker-customer relationship with the appellant, and had acted outside its mandate and ordinary course of business when it denied the appellant access to his funds; that the respondent had no duty or right to question the "source" of the funds and finally that the respondent had acted in bad faith by denying the appellant access to his account at its Kisii branch despite a consent order to that effect.

Mr. A. Gichuki, learned counsel for the respondent, argued that the appellant sought "final" orders at an interlocutory stage; that the superior court was correct in refusing to grant mandatory orders when the identity of the person who wanted to access the disputed accounts was in doubt; and finally that there were many issues before the superior court that needed to be examined at the full trial, hence the decision by the superior court not to grant the orders sought was correct.

The decision of the superior court was made on an interlocutory application which called for the exercise of judicial discretion. It is trite law that this Court would not normally interfere with the exercise of such discretion except upon well defined parameters. They were stated by Sir Clement de Lestang V. P in ***Mbogo v. Shah [1968] EA 93***, at pg. 94, thus:
***"I think it is well settled that this court will not interfere with the exercise of its discretion by an***

***inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

The application before the superior court, though interlocutory, clearly sought final orders even before all the pleadings in the main suit were on record. There is, of course, no general rule of law that final orders cannot be granted in an interlocutory application. However, it would be rare to do so especially where there are serious disputes of fact which can only be resolved after hearing the parties. The chamber summons before the superior court sought both prohibitory and mandatory injunctions and on both accounts, the applicants invoked ***Order 39 rules 1*** and ***2*** of the Civil Procedure Act.

The superior court correctly applied the case of ***Giella vs Cassman Brown [1973] E. A. 358*** when it declined to grant the injunction sought. Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of a temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them and to third parties. In the ***Giella case (supra)*** the predecessor of this Court laid down the principle that for one to succeed in such an application, one must demonstrate a prima facie case with reasonable prospect of success; that he stands to suffer irreparable damage which cannot be adequately compensated for by an award of damages; and that the balance of convenience tilts in his favour.

In arriving at its decision, the superior court was guided by one important consideration – that there were far too many doubts left in the mind of the court that needed resolution at a full trial. Here is how the court expressed itself:

**"In October 2008, a person purporting to be the said James Nyakundi Ndege opened two accounts with the defendant's Queensway branch, Nairobi. There was substantial movements of funds from the Kisii branch of the defendant to the said Queensway branch. Substantial amounts were withdrawn. The defendant became suspicious when its staff closely examined the identity documents of the plaintiff. The officers from the Banking Fraud Investigation Division of the police were notified. The identity card of the plaintiff was confiscated by the police and sent to the National Registration Bureau Nairobi to establish its authenticity. The fingerprints of the plaintiff were also taken. In a report dated 20th January, 2009, an officer from the said bureau noted that the identity card found in possession of the plaintiff was not genuine. The photograph on the identity card appears to have been superimposed. On account of this report, and other evidence gathered by the police, the plaintiff was charged with various offences related to identity theft. The criminal case is still pending determination at the Chief Magistrate's court.**

**If I understood the plaintiff's case correctly, the plaintiff wishes to persuade this court that he is the genuine holder of the said bank accounts. I carefully perused the affidavits sworn by the plaintiff in support of his application. In the said affidavits, he deponed that he was a businessman carrying out various businesses, ranging from farming to real estate. The amount in cash that has been frozen in the said accounts is over Kshs.9 million. The plaintiff stated that in his life he has never left the country or been to United States of America. As stated earlier in this ruling, a substantial sum of the amount deposited in the said account was transferred in form of US Dollars. The plaintiff attempted to persuade this court that the amounts in the said accounts were proceeds from his various businesses. He did not give an explanation on how a substantial sum in US Dollars was deposited in the said accounts.**

**Having evaluated the facts of this application, I am satisfied that the defendant was entitled to be suspicious of the plaintiff's identity when he claimed that he was the holder and operator of the said accounts."**

The learned Judge then concluded by saying that he was not persuaded "at this stage of the proceedings" that the appellant had established that he was the lawful owner of the disputed accounts. Clearly he wanted to hear all the parties at a full trial.

We think we have said enough. As the main suit is still pending it would not be appropriate to make any comments that would pre-empt the final conclusion. Suffice it to say that in our view the superior court cannot be faulted in the manner it exercised its discretion.

Accordingly, and for reasons stated, we find no merit in this appeal and dismiss the same with costs to the respondent.

**Dated and delivered at Nairobi this 10TH day of December, 2010.**

**S. E. O. BOSIRE**

**……..……**
**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

**……..……..**
**JUDGE OF APPEAL**

**J. G. NYAMU**

**…….**
**JUDGE OF APPEAL**

*I certify that this is*
*a true copy of the original.*

***DEPUTY REGISTRAR***