



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 585 OF 2015

UBA KENYA BANK LIMITED..... CLAIMANT

VERSUS

SYLVIA MUTUTI MAGOTSI.....RESPONDENT

Mr. Makasila for Claimant / Applicant

Mr. Waigwa for the Respondent

RULING

1. The Notice of Motion dated 29th April, 2015 seeks *inter alia* for orders that;

The Honourable Court be pleased to give an Order compelling the Respondent to furnish full and complete inventory of all monies held in all and any bank within and outside the jurisdiction of this Honourable Court, and assets and/or properties owned by the Respondent individually, with another person (s) or through a third party within there (3) days of service of this application, failure to which the Respondent be arrested and committed to civil jail until this order is complied with.

2. A temporary injunction be issued restraining the Respondent from disposing, dissipating, removing from the jurisdiction of this honourable court, advertising for sale, charging, encumbering, assigning, selling or otherwise interfering in any way with her interest in any monies/assets/properties owned by her individually and/or jointly with another person(s), including the following monies/assets/properties.

(i) Monies deposited in her accounts and held in all and any bank operating within and outside the jurisdiction of this Honourable Court (including those held/operated with the Claimant)

(ii) shares she owns in any listed company in the Nairobi securities Exchange and the Central Depository and Settlement Corporation.

(iii) Shares, in any company whatever located, whether held by herself or through any third party.

(iv) Properties she owns jointly and severally and registered in any land registries within the jurisdiction.

Or otherwise dealing with the said monies/assets/properties in any way pending the full hearing and determination of this suit.

3. In the alternative this Honourable Court be pleased to give an order, freezing any monies deposited in the Respondent's accounts and held in all and any bank operating in Kenya (including those held/operated with the Claimant) and all of the accounts in the names of Respondent.
4. The Respondent does furnish security for costs of the Claimant for the sum of Kshs 3,000,000/= within 3 days of the order of the court.
5. The claimant's application is supported by a Supporting affidavit and further affidavit of Fred Chumo who is the Claimant's company Secretary.
6. The application is premised on grounds that the Claimant/Applicant has lodged a claim in the Honourable Court for breach of contract, breach of confidentiality and professional ethics and negligence on the part of the Respondent that has consequently caused the Claimant substantial loss of over USD 1,641,737.217.
7. The application is further based on the ground that it has come to the Claimant's attention that the Respondent is in the process of disposing, dissipating and/or removing from the local limits of the jurisdiction of the court her property or any part thereof, with the intention and/or purpose to defeat possible outcome of the case.
8. It is the Claimant/Applicant's contention that it has a *prima facie* case against the Respondent and that it stands to suffer irreparable harm should the orders sought not be granted.

Response

9. The Respondent relies on her replying affidavit sworn on 12.5.2012 and filed on 13.5.2015.
10. The Respondent deposes that it is most apparent that the Supporting Affidavit to the Claimant's Notice of Motion is made on information and the Honourable Court ought not to act unless the source of the information is specified. It is not sufficient for the claimant to merely depone that matters have come to his knowledge without disclosing from whom and what sources.

"Fear alone unsupported by such evidence, of imminent departure ought not to suffice to move the court to exercise its discretion".
11. That *Mareva* injunction sought by the Claimant against the Respondent is indeed an abuse of the judicial process as there is no real danger of the Respondent dissipating her assets to make herself judgment proof.
12. That Respondent implores the Honourable Court to rule that justice of this case and no doubt the convenience of all parties is that this case be heard as soon as possible so that the Respondent may ventilate her case, have her defence vindicated at trial instead of the Claimant seeking piecemeal orders, the basis of which have not been shown to be justified either in law or fact at this interlocutory stage.

Patrick Otembo Vs Afrispace Kenya limited & 3 Others [2006] eKLR at page 6, 7 and 12.
13. The Respondent further contends that it is presumptuous for the claimant to allege that the Respondent is indebted to it when the cause herein has not been heard on merit. Furthermore, the Claimant's prayer for security for costs in the sum of Kshs 3,000,000/= is ludicrous and premature.
14. Consequently, the Respondent submits that the Claimant has failed to discharge its burden of showing that it has met the criteria set out in **Geilla vs Cessman Brown**.
15. The Respondent submits further that the grounds in the Notice of Motion and the deponements in the supporting affidavit are a figment of the Claimant's imagination.
16. That casual comparison between the prayers sought by the claimant in the Notice of Motion dated

29.4.2015 and the prayers in the Memorandum of Claim dated 14.4.2015 reveals that the prayers in the Notice of Motion have not been pleaded in the Memorandum of Claim.

17. It is trite law that “*a party cannot seek at an interlocutory stage a relief that is not in the claim*” (**DCF Engineering Limited Vs. Johari Limited & Another 2013 eKLR** at page 6).

18. As a result, the Claimant has not presented an arguable case to warrant the grant of the compelling, restraining, freezing and furnishing of security for costs orders.

19. Indeed the freezing orders that the Claimant is seeking is only intent on:

- a. Putting pressure on the Respondent
- b. Stripping (forfeiting) the Respondent of her hard-earned assets; and
- c. Conferring the Claimant of some proprietary rights of the assets of the Respondent which is, in itself, unconstitutional.

20. The Respondent urges the Court to find that the Claimant has not provided actual evidence from which the appropriate inference may be drawn by the Court. That “*The Courts must always be vigilant to ensure that parties’ assets are not frozen and their lives impeded lightly and that a Mareva relief is not to be used to give Claimant’s security for the satisfaction of their judgments*” (**International Air Transport Association & Another Vs Akarim Agencies Limited & 2 Others [2014] eKLR** at pages 11 and 13).

21. To accede to the Claimant’s prayers “*would be tantamount to aiding the Claimant in its attempt to steal a march on the Respondent*” and the Respondent prays that the Notice of Motion dated 29.4.2015 be dismissed with costs. (**Viable Deco Solutions Limited Vs Co-Op Bank of Kenya Limited [2014]eKLR at pages 6, 7 and 9**).

Determination

22. The grant of injunctive relief is discretionary and must be exercised judiciously. The principles for granting the reliefs sought by the Applicant were well established in the case of **Giella Vs. Cassman Brown & Co. Limited [1971] E.A. 358** as follows:

- a. Applicant must show a *prima facie* case with a probability of success at trial.
- b. Injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury where damages will not be adequate compensation.
- c. If the Court is in doubt it should decide the Application on a balance of convenience.

23. However, a *Mareva*, injunction is a freezing order and is an order in *pesonan* restraining or enjoining a person from dissipating an asset directly or indirectly. *Goode on Commercial Law, 4th Edition at page 1287* states thus;

- i. the grant of a freezing injunction is governed by principles quite distinct from those laid down for ordinary interim injunctions. Before granting a freezing injunction, the Court will usually require to be satisfied that;
 - a. The Claimant has ‘a good arguable case’ based on a pre-existing cause of action.
 - b. The Claim is one over which the Court has jurisdiction.
 - c. The defendant appears to have assets within the jurisdiction.
 - d. There is a real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted.
 - e. The balance of convenience is in favor of granting the injunction.
 - f. The Court can also order disclosure of documents or the administration of requests for further information to assist the Claimant in ascertaining the location of the defendant’s assets.

Facts of present case

24. The memorandum of claim dated 14th April 2015 by the Claimant seeks *inter alia*;
25. A permanent injunction restraining the Respondent by herself or her agents, servants or otherwise howsoever from using and exploiting the banks confidential information.
26. General damages due to breach of contract, negligence and confidentiality and aggravated and punitive damages in respect of the above.
27. The Claimant avers that the Respondent failed and / or ignored to advise the Claimant that the standby letters of credit that the Claimant received as security from First Credit Bank Corp for the facilities advanced to PES South Africa (PTY) and MITS Electrical (both customers of the Claimant) were fatally defective. That despite representing to the Claimant that she had practiced as an Advocate for over twelve years, she failed to note that the clauses requiring the Claimant to first seek consent from the Guarantor before issuing a demand on the guarantor would make the stand by letters of Credit fatally defective.
28. That the Respondent also failed to advise the Claimant that the customers had not provided standby letter of credit from first clan Banks as required by the Claimant and as agreed between the Claimant and the said customers.
29. That as a result of the Respondent's said negligence the Claimant has incurred substantial losses in respect of the customer accounts held by MITS Electricals Limited and in respect of customer accounts held by PES South Africa (PTY) Ltd. i.e. in the sum of USD 1,641,737.217.
30. Furthermore, the Respondent in breach of Bank confidentiality shared customers statements with 3rd persons without the express consent or authority of the Board of Directors of the Bank and as a result the Claimant's reputation in the eyes of their customers and the public at large has suffered and continues to suffer.
31. That the aforesaid actions constituted a breach of the Respondent's duties and obligations as set out in her employment contract and this Court has jurisdiction over the matter.
32. The suit is supported by verifying affidavit of Fred Chumo an Advocate of the High Court of Kenya, in the employ of the Claimant Bank as the Company Secretary / Head of Legal and is well versed with the facts of the case.
33. The Respondent has not yet responded to the Memorandum of claim but has filed replying affidavit to the notice of motion as earlier stated in which she denies all the particulars of claim by the Claimant bank as follows;

The loss of over USD 1,641,754.217, for which the Claimant purports to lay blame on the Respondent exemplifies a leadership groping in the dark, as ordinarily the Claimant would be pursuing the defaulting customers.
34. That it is ingenious for the Claimant / Applicant to imply that the Respondent single handedly sourced the customers, processed the credit application, approved the loan and distributed the monies, which is not the case.
35. That the Claimant has maliciously discriminated against the Respondent in this respect and the Respondent has filed a suit for wrongful and unfair dismissal from employment in Cause No. 735 of 2015 in this Court.
36. That email communications between various officers of the Claimant regarding the said losses do exonerate the Respondent from the alleged allegations by the Claimant.

37. It is clear that the issues in dispute are hotly contested by the parties. However, the Claimant has an arguable case against the Respondent which the Court cannot delve into at the interlocutory stage of the matter.

38. The Claimant has therefore satisfied the first requirement of granting a *Mareva* injunction.

39. On the issue whether the Claimant stands to suffer irreparable harm incapable of being remedied by damages in that the Respondent is in the process of moving her assets from the jurisdiction of the Court and / or dissipating such assets to avoid reach by the Claimant in the event the main suit is successful, the Court cites **HCCC 847 of 1995, Comec Garage Transport Ltd. – vs.- Taoxago Xango Shontang** referred to in **HCCC . ELC Civil case 317 of 2003 Patrick Otembo –vs- Atrisspace Kenya Limited and 3 others** where it was held;

“Fear alone unsupported by such evidence of imminent departure will not suffice to move the Court to exercise its discretion.”

40. The fact that the Respondent has sued the Claimant in this Court in Cause number 734 of 2015 in which she claims 6,220,500 unpaid balances and general damages for unlawful and unfair dismissal indicates quite to the contrary that the Respondent intends to remain within the jurisdiction of the Court.

41. Secondly, no tangible evidence has been brought by the Claimant / Applicant in the grounds set out on the notice of motion or in the supporting Affidavit of Fred Chumo that shows that the Respondent is in the process of disposing, dissipating and / or removing her assets from the jurisdiction of this Court.

42. Furthermore, it has not been established that the Claimant will suffer irreparable harm, incapable of satisfaction by way of damages if the relief sought is not granted.

43. It would be unjust, and a gross inconvenience to the Respondent to encumber her assets, especially after the loss of her employment pending the hearing and determination of this suit. The balance of convenience is clearly in favour of not granting the orders sought.

44. As was stated in Patrick Otembo case (*supra*);

“The justice of this case and no doubt the convenience for all parties is that this case be heard as soon as possible so that the Plaintiff may ventilate his case, and have his claim vindicated at trial instead of seeking piecemeal orders the proper basis of which cannot as shown above be justified either in law or fact at the interlocutory stage.”

45. This applies to all the prayers in the present notice of motion including one seeking to gag the Respondent whose basis has not been clearly established at this stage.

46. Application dismissed. Main suit to take its normal course.

Dated and Delivered at Nairobi this 30th day of October 2015

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE