



**Advancly Embed Technologies Ltd & another v Bei Nafuu
Ration Duka Ltd & 2 others (Commercial Case E018 of 2024)
[2024] KEHC 2839 (KLR) (Commercial and Tax) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2839 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E018 OF 2024**

**AA VISRAM, J
MARCH 20, 2024**

BETWEEN

ADVANCLY EMBED TECHNOLOGIES LTD 1ST PLAINTIFF

ADVANCLY TECHNOLOGIES NIGERIA LTD 2ND PLAINTIFF

AND

BEI NAFUU RATION DUKA LTD 1ST DEFENDANT

JAWAID ALI 2ND DEFENDANT

FAMILY BANK LIMITED 3RD DEFENDANT

RULING

1. I have considered the grounds on the face of the Notice of Motion application dated January 17, 2024; the further grounds set out in the supporting affidavit sworn on even date; the Applicant's further affidavit sworn on 13th March, 2024; and the supplementary affidavit sworn on 19th March, 2024; together with replying affidavit sworn on 27th February, 2024; the grounds of opposition of even date; the submissions of the parties; and the applicable law.
2. The Applicant submitted that its application is for freezing orders pending the hearing and determination of the suit. Counsel contended that Mareva orders are capable of being granted by the court subject to the various grounds being met. Counsel submitted that one of the said grounds is that there ought to exist a debt. Counsel contended that the grounds have been met because there is a debt due and payable by the Respondents to the Applicants. The same has not been repaid to date.
3. Counsel reiterated the facts of the case and explained that money had been transferred outside of the terms of the agreement between the parties, and there is a risk of alienation of the funds. Further, she



contended that the Respondent is a foreigner with no assets within the jurisdiction, and that the same were accordingly at risk of being dissipated.

4. On the balance of convenience, counsel stated that the money supplied to the Respondent was for the importation of rice only, and not working capital. She argued that there was no basis upon which the Respondents will be prejudiced if the injunctive relief is not granted.
5. Finally, counsel contended that the documents in relation to the facility do not relate to digital service credit provision. The Applicant has not contravened any provisions of law in relation to the present facility, and subject matter of injunctive relief.
6. In opposition to the application, counsel for the Respondent submitted that under the provision of order 39 rule 5, one has to demonstrate bad faith. This has not been pleaded or proved. The Applicants have not shown that the Respondents will prevent execution of a decree against them in the event that the injunctive relief is not granted.
7. Counsel submitted that pursuant to order 2 rule 1 parties may not depart from their pleadings. The Applicant may not, at an interlocutor stage, seek orders that are final in the manner presented by the Applicant.
8. Counsel argued that there has been material non-disclosure in the present matter in relation to the opening of, and maintaining various bank accounts. Arguments in relation to the same have been detailed in the Respondents' written submissions and form part of the record. The same need not be repeated in full. Essentially, the point being made by counsel, was that the Applicant has not come to the court with clean hands.
9. Having considered the above, I note from the outset, that the application seeks five prayers only, all of which relate to prayers expressed as pending the hearing and determination of the application only, and not pending the hearing and determination of the suit. Orders pending the hearing and determination of the application were in fact granted by this court and accordingly, at this point, the same have been spent.
10. Moreover, I have looked at the Plaintiff and the same does not contain any prayers for mandatory injunction, or similar injunctive relief in respect of which the present application arises. No injunctive relief whatsoever is pleaded in the Plaintiff. The import of this oversight is that the Applicant is seeking final orders that it has not prayed for either in its application, or in the suit. The oversight falls afoul of order 2 rule 6 of the Civil Procedure Rules. The same reads as follows:-

Departure [Order 2, rule 6.]

- (1) 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.
 - (2) Subrule (1) shall not prejudice the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative.
11. To my knowledge, no such amendment has been made, nor is any application pending before this court to cure the oversight in accordance with the rule as stated above, at the time of hearing the present application.



12. In *Cecil Miller v Jackson Njeru & another* [2017] eKLR, the court stated the following:-

“As to whether a prayer for mandatory injunction can issue where a similar prayer is not made in the plaint, I wish to rely on the case of *Morris and Company Limited v Kenya Commercial Bank Ltd & others* (2003) 2 EA 605 where it was held inter alia that even though the Plaintiff’s application for injunction was expressed to be grounded under Rules 1 (a) and (b) and 2 it falls under Rule 2 only. That there being no prayer for a permanent injunction appearing in the plaint, the Plaintiff’s application for interlocutory injunction was incompetent and was struck out.

Similarly, in the case of *Sunrise Properties Limited v Just Investments Ltd & another* (2007) the court held that the interim relief could not be granted as it was not anchored in the plaint and that failure to anchor it in the claim disentitles the Applicant of the same. This court is of the same view as there is no reason for it to depart from the same as they state the current position in law.”

13. Guided by the law above, and because the Applicant has not prayed for injunctive relief beyond the hearing and determination of this application, or sought any injunctive relief in the Plaint, I am of the view that this court may not grant the same.
14. It is trite law that a court cannot grant a relief or remedy that has not been specifically pleaded and prayed for in the Plaint and while I empathize with the Applicant, I do not intend to depart from this principle.
15. Having already issued orders of status quo in the pendency of this application, the application by its own nature is spent, and there is nothing further for this court to determine. However, those orders may not remain in perpetuity, and in the absence of a prayer seeking to extend the same to a logical point and for the purpose of preservation, the same are hereby discharged.
16. Finally, I have not set out the reasons as to why the threshold for grant of injunctive relief was not met based on the same reason set out above, which I do not think bears further repetition.
17. Based on the reasons set out above and the reasons put forward by counsel, I find that the application is without merit. The same is dismissed with costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 20TH DAY OF MARCH 2024

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

..... For the 1st Plaintiff

..... For the 2nd Plaintiff

..... For the 1st Defendant

..... For the 2nd Defendant

..... For the 3rd Defendant

