Shakab Imports Exports Company Limited v Absa Bank Kenya Plc & another (Commercial Suit E068 of 2024) [2025] KEHC 12104 (KLR) (30 June 2025) (Ruling)

Neutral citation: [2025] KEHC 12104 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

COMMERCIAL SUIT E068 OF 2024

F WANGARI, J

JUNE 30, 2025

BETWEEN

SHAKAB IMPORTS EXPORTS COMPANY LIMITED ..... PLAINTIFF

AND

ABSA BANK KENYA PLC ..... 1ST DEFENDANT

NCBA BANK KENYA PLC ..... 2ND DEFENDANT

RULING

1. For ruling are two applications dated 29th November, 2024 and another one dated 29th May, 2025. For ease of reference, the application dated 29th November, 2024 shall be referred as the first application while the one dated 29th May, 2025 shall be referred to us the second application.

2. The first application which is brought under the provisions of section 1A and 1B of the *Civil Procedure Act* and Orders 40 and 51 of the *Civil Procedure Rules* seek the following orders: -

    a. Spent;

    b. Spent;

    c. This Honourable court be pleased to stay execution of the demand notice dated 19th November, 2024 pending the hearing and determination of this suit;

    d. This Honourable court be pleased to grant an injunction barring the Respondents either in themselves, or their agents from executing the demand notice until the suit is heard and determined; and

    e. Costs of this application be provided for.

3. The grounds in support briefly are that the Plaintiff carries on business of exporting and selling tea through shipments made via Kenya Ports Authority. The Defendants are described as banks that trade

as such in Kenya that offer various banking facilities for various purposes including loans for purposes of conducting business like how they did it (Plaintiff).

4. It is averred that the parties herein shared a customer client relationship where they issued various banking facilities to it is US dollars to aid in its operation costs in its tea exporting business. It is stated that the 2nd Defendant provided these services to the Plaintiff before the 1st Defendant made a takeover purchase of the said loan facility. The total facility issued was for a sum of Usd 6,500,000 at a margin of 5%. It enumerates what the facility encompassed including Bonds, Guarantees and Indemnity (BGI) among others.

5. The Plaintiff states that the multi option facility offer letter was dated 5th April, 2023 and the funds issued therein were used to fund the takeover from the 2nd Defendant. It is contended that unfortunately due to the 1st Defendant fraudulent negligence during the takeover process, the 1st Defendant caused to posted to post shipment refinanced invoices totaling to Usd 1,655,483.59 which had already cleared and paid exports as at 25th May, 2023 before the takeover was completed. A list of the various invoices together with the amounts are listed.

6. The Plaintiff states that the 1st Defendant was aware that the said process without any post shipment documentation as is required making it a loan that attracted discount charges and interests making the 1st Defendant to accrue gains and benefits illegally. According to it, the same did not qualify as post shipment as there were no export documentations or reference numbers to be addressed as receivables given that the stock in the warehouse had not yet been processed for export.

7. Accordingly, it is stated that due to this fraudulent negligence of the 1st Defendant, instead of posting the amounts under pre-shipment, the same were posted as post-shipment leading to unwarranted discounting charges and interests which the 1st Defendant was not entitled to through generating revenue while inversely affecting the Plaintiff's gains for the business. It is averred that being that the genuine and legitimate invoices from the takeover from the 2nd Defendant should have amounted to Usd 3,504,849.05 instead of the claimed Usd 5,160.332.64.

8. It avers that the disputed 1,655,483.59 were pre-shipment purchases and drawdowns paid by the 2nd Defendant to EATTA and which stock was already physically present in its warehouses at the time of takeover. Its position is that it has been forced to pay twice for the sums. A further complaint is that the post-shipment accounts with the relevant documents or export receivables was a total of Usd 2,295,390.18 with the 2nd Defendant during the takeover. However, it is contended that this amount has not been referenced but rather masked under the overdraft amount of Usd 1,500,000.

9. It is said that further payments were received by the 2nd Defendant amounting to Usd 909,201.44 and immediately transferred to the 1st Defendant on June, 2023. Further, its position is that it has exported over 550 containers earning the 1st Defendant a business turnover of over Usd 25,000,000 duly remitted via receivables. Accordingly, costs, overheads, other expenditures round off to approximately Usd 6,000,000 which the Plaintiff states should have already paid off the takeover amount from the 2nd Defendant which was Usd 5,160,332.64 but same is said is fraudulently not reflecting at all in accounts and it wonders where the money had gone.

10. It contends that despite raising this issue before and recently through a letter dated 23rd November, 2024 addressed to the Relationship Manager of the 1st Defendant, the same have not been addressed. It is instead averred that the 1st Defendant proceeded to issue a demand notice dated 19th November, 2024 but served on 23rd November, 2024 through. It concludes that unless the orders sought are granted, it stands to suffer prejudice and danger thus rendering the application moot.

11. The application is supported by the affidavit sworn by one Kiran Fatima Abbas of even date. Other than the annexures, the said affidavit restates more or less the grounds in the certificate of urgency and the grounds in support of the application. I do not see any usefulness to rehash.

12. Once again, the Plaintiff moved the court through the second application hinged on the same provisions as the first application seeking the following orders: -

    a. Spent;

    b. Pending the hearing and determination of the application interpartes, the Honourable Court be pleased to issue an interim relief in the nature of an injunction restraining the 1st Respondent, its officials, servants, agents, employees and/or any assigns from in any manner withholding authorization of RTGS transfer made from the escrow account by the Plaintiff/ Applicant from payments to East Africa Tea Traders Association (EATTA) for purchase of tea;

    c. A mandatory order be issued directing the 1st Defendant to immediately release the authorized RTGS transfer fro payments to EATTA for purchase of tea issued on 16th and 29th May, 2025;

    d. Pending the hearing and determination of the suit interpartes, the Applicant be allowed to continue have access to monies within its account in line with the Multi Option Facility Contract terms entered between the Applicant and the 1st Respondent dated 5th May, 2023;

    e. This honourable court be pleased to grant an injunction barring the Respondents either by themselves or their agents from in any manner transferring funds from the escrow account to any account except for payments through authorization of RTGS transfers made from the escrow account by the Plaintiff/Applicant for payments to EATTA for purchase of tea until the application is fully heard and determined;

    f. Pending the hearing and determination of the suit interpartes, the Honourable Court be pleased to issue interim protection relief in the nature of injunction restraining the 1st Respondent, its officials, servants, agents, employees and/or assigns from in any manner withholding authorization of RTGS transfer made from the escrow account by the Plaintiff/ Applicant for payments to EATTA for purchase of tea;

    g. This Honourable Court be pleased to grant an injunction barring from the Respondent from in any manner transferring funds from the escrow account into any other account except for payments through authorization of RTGS transfers made from the escrow account by the Plaintiff/Applicant for payments to EATTA for purchase of tea until the suit is fully heard and determined; and

    h. Costs of the application be provided for.

13. The grounds in support are almost similar to the first application save for a few additions. It is averred that the billing had the effect of depleting the marked overdraft limit of Usd 1,000,000 availed to the Applicant for its daily operation costs and purchase of tea. It is said that the erroneous posting made the current account not to have consistent credit balances thus making the overdraft limit of Usd 1 million unavailable for use forcing a default on its current account and the genesis to their predicament.

14. It is said that an audit of accounts was done to show the position the account could have been had the mis-postings not taken place as at 6th February, 2025. It is averred that the said report will be produced. It is contended that these were concerns were shared with the 1st Defendant who is said to have acknowledged its fault on 5th December, 2024 through a letter dated 5th November, 2024. It is also contended that the report was proceeded by a physical meeting where certain concessions were made.

15. It concludes that the failure to honour the RTGS payments has the undesired effect of harming the Applicant's reputation which it has built for over 30 years. They thus seek the court to grant the orders sought. Just as the first application, the second application is supported by the Applicant's director. It mirrors the grounds and thus I see no need to restate the same.

16. The 1st Defendant has filed a single affidavit in respect to both applications sworn on 5th June, 2025 by one Edna Omangi, its Senior Business Support and Recoveries Manager. She begins by stating what happened on 24th January, 2024. It is averred that the Plaintiff submitted to it a request to take over loan facilities from the 2nd Defendant. She states that by a facility offer letter dated 5th April, 2023, it agreed to grant a certain tabulated multi option facilities to the Plaintiff. The facility had certain express terms and conditions.

17. It is averred that following the approval of the facilities, by a letter of undertaking dated 2nd June, 2023, the 2nd Defendant wrote to it communicating the redemption amount of Usd 5,150,332.64 and Kshs. 500,000/=. An email dated 6th June, 2023 was written by the 1st Defendant to the Plaintiff for purposes of cross-checking. It is said that the Plaintiff responded the same day attaching a revised schedule of the accounts to be taken over by the 1st Defendant.

18. It is said that whereas the total amount remained the same, the accounts had been revised by the Plaintiff to include the six (6) invoices currently claimed. Based on the revised information, provided by the Plaintiff, it is said that the 1st Defendant proceeded to take over and a total of Usd 5,160,332.64 was remitted to the 2nd Defendant to settle outstanding balances and booked as post shipment based on the confirmation of the Plaintiff.

19. The affiant goes to tabulate the collections post takeover. However, she deposes that a sum of Usd 2,757,997.83 was not paid to the 1st Defendant and it remained unaccounted. Further, it is stated that on 13th May, 2024, the 1st Defendant refinanced part of the unpaid invoices from the takeover and advanced the Plaintiff a sum of Usd 600,000 to allow it pay for the deficit. It goes ahead to tabulate another table showing documents collected but not yet received by the 1st Defendant.

20. It is said that on 1st November, 2024, certain contracts amounting to Usd 1,163,377 matured causing the current account to overdraw. It is averred that in October, 2024, the Plaintiff had utilized Usd 200,000 as part of the overdraft limit for pre-shipment explaining further the overdrawn position. She avers no further drawdown was allowed as the current account was in excess. A table to that effect is indicated.

21. The 1st Defendant states that it noted in April, 2024 that the RTGS total of Usd 1,035,885.62 was sent to EATTA using payments received in the current account without settlement of the post-shipping finance. On the multi optional facility, totaling to Usd 8,000,000, it is said that the Plaintiff accessed the short term loan of Usd 500,000 and a further Usd 6.5 million. Thus given the status of the facilities, it issued a demand letter dated 19th November, 2024 clearly stating the steps the Plaintiff needed to do to regularize the accounts.

22. She states that on 21st November, 2024, the 1st Defendant acknowledged receipt of a request for an extension for 180 days and the bank pointed out the issues which the Plaintiff needed to resolve. She avers that as at 3rd June, 2025, the total outstanding amount of Usd 6,233,151.17. It is said that the exposure pointed out is against securities of Usd 3,953,814.32. Despite the foregoing, it is said that the Plaintiff proceeded to request Usd 216,601.43 on 23rd May, 2024. Various other requests were indicated.

23. In totality, the 1st Defendant sought for the dismissal of both applications. Due to the urgency of the matter, the court directed that the applications be argued orally and parties proceeded to argue their respective rival positions. During the hearing, the 2nd Defendant was discharged from the proceedings and thus the matter proceeded between the Plaintiff and the 1st Defendant.

Analysis and Determination

24. I have considered the two applications, the response, parties' oral arguments, authorities cited and the law and the issues falling for the court's determination are: -

    a. Whether the two applications have any merit;

    b. If the answer to (a) is positive, what orders ought to issue;

    c. If the answer is in the negative, what orders ought to flow; and

    d. Who bears the costs?

25. At the onset, it is not in dispute that the Plaintiff and the 1st Defendant enjoy bank – client relationship through various facilities executed between them. It is also not in contest that initially, the Plaintiff had a bank – client relationship but sometime in 2024, the 1st Defendant took over the Plaintiff's loan from the 2nd Defendant and this explains the discharge of the 2nd Defendant from these proceedings.

26. Having said as above, the nature of the prayers sought are in the nature of injunction. However, I need to point out that the prayers in the nature of interim reliefs as sought cannot be granted. These are only granted where parties have expressly agreed to settle their dispute through arbitration. This is not the case herein. Similarly, under rule 2 of the *Arbitration Rules*, the prayer for interim relief can only be commenced by way of Summons in Chamber. (See the case of *Safaricom Ltd v Ocean View Beach Hotel Ltd & 2 Others* [2010] eKLR).

27. Having said as above, the prayers for interim reliefs fall by the way side. This court will thus proceed to interrogate whether the various prayers of injunction can be granted. The principles of injunctions were enunciated in the case of *Giella v Cassman Brown* (1973) EA 358 and the same were reiterated in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No. 77 of 2012 [2014] eKLR where the Court of Appeal held thus: -

> "...in an interlocutory injunction application the applicant has to satisfy the triple requirements to
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> a) establishes his case only at a prima facie level,
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> b) demonstrate irreparable injury if a temporary injunction is not granted and
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> c) ally any doubts as to b) by showing that the balance of convenience is in his favour.
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> These are the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially..."

28. The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd* (2003) eKLR gave a determination on a *prima facie case*. It held thus: -

> "...In civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter..."

29. Having noted as above, has the Plaintiff established a *prima facie case*? In the lengthy affidavits filed by both sides, it is not in doubt that they are well conversant with their type of case they are facing. On its part, the Plaintiff has raised various issues especially on the issues of pre-shipping finance and post-shipping finance. This cannot be dealt with through contested affidavit evidence but requires a full trial to discern the parties' respective positions. To this end, I have no hesitation to return a finding that the Plaintiff has established a prima facie case.

30. On the issue of irreparable damage, the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* (*supra)* defined the term as follows: -

> "...The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy..."

31. It was not disputed that the Plaintiff was in the tea industry and that it had built its reputation for over thirty (30) years. This is not a small period of time and as such, if the 1st Defendant is allowed to proceed with its demand, there is a likelihood that this reputational image which was not controverted will be destroyed significantly. I do not think such a long reputational image can be adequately compensated by an award of damages. To this end, I find that the Plaintiff has satisfied the second limb.

32. On the third limb, having established the first two, it still behooves the Plaintiff to demonstrate that the balance of convenience tilts in its favour. In *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR, the court addressing this issue observed as follows: -

> "...The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer. In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting it..."

33. Earlier in *Paul Gitonga Wanjau v Gathuthis Tea Factor Company Ltd & 2 others* (2016) eKLR, the court expressed itself as follows: -

> "...Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should

be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies..."

34. In the present case, parties have taken diametrically extreme positions. On the one hand, the Plaintiff insists that it had paid the amounts due to the 2nd Defendant. However, the 1st Defendant posits otherwise. Balancing the two positions, if the 1st Defendant is allowed to proceed with its demand and the Plaintiff later succeeds, it would be difficult to reinstate the Plaintiff to its earlier position.

35. However, for the 1st Defendant, if it proves that indeed the Plaintiff is owing, it retains the right to pursue its claim. Based on the foregoing, I find that the balance of convenience lies in granting the injunction sought.

36. Before addressing the prayer for mandatory injunction, I need to caution myself that at this stage, I should not delve deeper than I am required to when dealing with interlocutory injunctions. If I do so, I may end precluding the Judge who will hear the main suit.

37. It is settled that in interim applications, such as in this case, the Court should avoid making final determinations on matters of fact on the basis of the conflicting affidavit evidence. This was reiterated by the Court of Appeal in *Mbuthia v Jimba Credit Finance Corporation & Another* [1988] KLR 1 where it guided thus: -

> "...the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions..."

38. Having cautioned myself as above, it is trite law that mandatory orders of injunction can only issue at an interlocutory stage where there are special circumstances are demonstrated. This was addressed by the Court of Appeal in *Nation Media Group & 2 Others v John Harun Mwau* [2014] eKLR as follows: -

> "...It is trite law that for an interlocutory mandatory injunction to issue an applicant must demonstrate existence of special circumstance. A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted..."

39. In the present case, if the 1st Defendant is allowed to move funds in the escrow account to any other account, the orders already found merited would be rendered superfluous. This would clog the Plaintiff's right to redeem whatever it owes if any. I thus find this being a special case where grant of mandatory injunction in merited.

40. I note that the relationship between the parties has not deteriorated beyond redemption. I such, I encourage parties to pursue an out of court settlement beginning with the issue of reconciling the accounts to avoid the obvious back and forth as can be gleaned from the rival affidavits.

41. Having found as above, I need not consider the third issue. Lastly, on costs, the same follows the event. However, courts retain discretion whether to award the same or not. This being an interlocutory application, I direct that the costs shall be in the cause.

42. In respect to the costs the former 2nd Defendant, NCBA Bank Kenya PLC, who has since been discharged from the proceedings, their being sued by the Plaintiff was not malicious as the Plaintiff was just securing her interests. The bank to bear its own costs.

43. Following the foregone discourse, the upshot is that the following orders do hereby issue: -

    a. The Notice of Motion dated 29th November, 2024 is allowed in terms of prayer (d);

    b. The Notice of Motion dated 29th May, 2025 is allowed in terms of prayers (c), (d) and (e); and

    c. Costs to be in the cause.

    Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 30TH DAY OF JUNE, 2025.

.....

F. WANGARI

JUDGE

In the presence of;

Mr. Makori Advocate for the Plaintiff/ Applicant.

N/A by the Defendant

Ms. Getrude, Court Assistant