



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
HCC NO. 393 OF 2015 (OS)

KENYA COMMERCIAL BANK LIMITED.....PLAINTIFF

VERSUS

JEREMIAH MAINAH.....1ST DEFENDANT

VIOLET WAFULA.....2ND DEFENDANT

JULIUS MUEMA.....3RD DEFENDANT

AND

WINNIE N. SHENA.....4TH DEFENDANT

ALFRED O. OBENGO.....5TH DEFENDANT

JACINTA MOKI.....6TH DEFENDANT

NATIONAL NURSES ASSOCIATION OF KENYA.....7TH DEFENDANT

NURSES INVESTMENT LIMITED.....8TH DEFENDANT

JUDGMENT

1. The Plaintiff (hereinafter ‘the ‘Bank’) commenced this suit by filing an Originating Summons dated 11th August 2015, brought under Section 58 of the Civil Procedure Act, (Cap 21) of the Laws of Kenya, and Order 34 Rule 1 of the Civil Procedure Rules, 2010.

2. It is seeking for orders that:

- *The Honourable Court be pleased to order that the operation of the Bank Account No. 1108083404 of Nurses Investments (K) Limited and others, held with Kenya Commercial Bank Limited, be suspended, pending hearing and determination of this suit.*
- *In view of the conflicting interest of the 1st to 6th Respondents, claiming over the mandate to operate the Bank Account No. 1108083404 of Nurses Investments (K) Limited and others, held with the Kenya Commercial Bank Limited and withdraw funds thereof, the said 1st to 6th Respondents do interplead among themselves as to who should have the*

mandate to operate the bank accounts and receive monies withdrawn thereof from the said bank account No.1108083404 of Nurses investments (K) Limited held with the Applicants.

- ***The cost of the Summons be provided for.***

The Plaintiff gave the brief background facts to the case, to the effect that the Nurses Investments (K) Limited operates a Bank Account number 1108083404 with the Bank. On 12th May 2015, the Bank received a letter from the officials of National Nurses Association of Kenya (hereinafter 'NNAK') signed by one Alfred O. Obengo advising the Bank of the change of signatories to the Bank Account No. 1109124805 held with Bank. The instructions were accompanied by a copy of letter from Registrar of Societies dated 11th May, 2015. That position regarding change of signatories was confirmed with the Registrar of Societies and its authenticity established. The letter was seeking to change of signatories to the account to read:

- *Winnie N. Shena* - *National Chairman*
- *Alfred O. Obengo* - *National Secretary*
- *Jacinta Moki* - *National Treasury*

3. However on 13th May, 2015, the Bank received a letter from the National Nurses Association of Kenya (NNAK) signed by one Violet Wafula accompanied by a copy of the Court Order issued on 5th May 2015, emanating from a case, Nairobi High Court, Judicial Review: Miscellaneous Application No. 144 of 2015. The letter was advising the Bank that, there was no change to the Bank's signatories to the Bank Account and by the content thereof, Jeremiah Mainah, Violet Wafula and Julius Muema were the recognized signatories. This letter by the National Nurses Association of Kenya contradicted the earlier letter dated 12th May, 2015 by National Nurses Association of Kenya written by Alfred O. Obengo.

4. On the 4th June 2015 the Bank received a letter from M/s Rachier & E. Amolo Advocates, acting on behalf of the National Nurses Association of Kenya (NNAK), stating that the National Executive Council is supposed to appoint and nominate the signatories to the Bank Account held by the Association and the proper signatories should be Bernard Okeah, Phoebe Omondi and Bernard Rono.

5. On the 22nd June 2015, the Bank received further letter dated 22nd June 2015 from Phoebe Omondi forwarding a Court order issued on 15th June 2015, in HCC No. 22 of 2014, at Kisumu restraining the persons named therein from undertaking the operations of the National Nurses Association of Kenya.

6. On the 26th June 2015, the Bank received a letter dated 25th June 2015 from M/s Kagwimi Kangethe & Co Advocates, representing the Nurses Investments (K) Limited, a limited company (associated with National Nurses Association of Kenya), calling for release of funds, held in their Bank Account.

7. As a result of the above stated wrangles, the Bank froze the operation of the Bank Account until the issue of representation and mandate has been sorted. It filed an Application dated 6th July 2015 vide Nairobi High Court Judicial Review Miscellaneous Application No. 144 of 2015, seeking to interplead, the warring parties.

8. The Application was heard inter parties on 14th July, 2014 and an order sought issued accordingly. The other accounts held by National Nurses Association of Kenya were frozen till further orders of the Court. However, the Honorable Court did not issue any orders touching on the Nurses Investment Ltd account on the ground that the same was an independent entity and did not form part of those proceedings.

9. The Bank averred that the credit balance held by Bank on the Nurses Investments (K) Limited's account, belongs to the said Nurses Investments (K) Limited only. Therefore, only legitimate officers thereof can access the accounts and the funds thereon, and yet the 1st to 3rd Respondents claims legitimacy to the operating mandate and access to the funds in the Account No. 1108083404, while the

4th to 6th Respondents also claims recognition to operate the same account and draw funds from that Bank account. That, the Leadership wrangles currently existing in the National Nurses Association of Kenya and its investments arm Nurses Investments (K) Limited is putting the Bank in an awkward position, as to which particular camp it should recognize for the purposes of operating the mandate of the Bank accounts of the aforesaid Nurses Investments (K) Limited. The Bank cannot confirm with certainty, the persons to recognize as legitimate officials of the Nurses Investments (K) Limited due to the said leadership wrangles existing.

10. The Bank argued that though it is a neutral party, it is being brought into the mix of conflicting opinion and is under imminent threat of being sued for failing to honour the instructions by either camp. Yet, it is under obligation to safeguard the financial interest of the Nurses Investments (K) Limited. Therefore, it is only fair that the 1st to 6th Respondents be called to interplead among themselves as who has the mandate to operate and draw funds from the bank account No. 1108083404 of the Nurses Investments (K) Limited and others held with the Plaintiff.

11. The Bank averred that it does not have any interest in the money held in the Bank Account of Nurses Investments (K) Limited other than charges thereof and it is ready and willing to allow the Nurses Investments (K) Limited to operate its Bank Accounts upon determination by the Court as who among the 1st and 6th Respondents or any other should execute the operation mandate and draw funds from the Account. There is no collusion between the bank and any of the other parties involved in this suit.

12. Therefore, for the sake of good order and protection of the interests of all the concerned, it is only fair that the two camps be called to interplead among themselves and ultimately the Court give an order as to who should have the mandate to operate the Nurses Investments (K) Limited said Bank Accounts. If the Originating Summons is allowed, it will avoid multiplicity of suits.

13. The Originating Summons was opposed vide a Replying Affidavit sworn by Jeremiah Mainah, on his own behalf and on behalf of the 2nd and 3rd Defendant dated 12th April 2016 and filed on 13th April 2016. He deposed that, the Bank is seeking to freeze the account of Nurses Investment (K) Ltd, which is a separate entity from National Nurses Association of Kenya. That the 1st, 2nd and 3rd Defendants are the legitimate Directors of the Nurses Investment (K) Ltd, and the Bank has been issued with minutes of the Board meeting confirming the same. Further verification has been given to the Bank vide a letter from the Registrar of Companies, yet the Bank has denied the 1st, 2nd and 3rd Defendants access to the Bank accounts. As the 1st, 2nd and 3rd Defendants have met the Bank's requirements for opening and operation of the account, they should be allowed to operate the account accordingly. He disputed the averments that, the Directors hold shares as trustees of the Investment Company and argued that the shares are held by the Directors individually.

14. The parties agreed to dispose of the Originating Summons by filing written submission. The Plaintiff's submissions dated 8th July 2016 were filed on 11th July 2016. The Bank submitted that, it acted with due diligence when it became aware of the aforesaid leadership wrangles and that there is a strong indication that the National Nurses Association of Kenya is closely related to the Nurses Investment (K) Ltd. The freezing of the account was not done out of ill-will or malice, as acknowledged in the Replying Affidavit sworn by the 1st Defendant, where he admits that the shares in Nurses Investment (K) Ltd were held by them in trust for National Nurses Association of Kenya. It is also confirmed by the Associates Advocates Letter addressed to the Chairman of the Association (marked JM3). Similarly the Replying Affidavit sworn by Winnie Shena at paragraph 6 to 11, contains a declaration of their interest in Nurses Investment (K) Ltd. As two camps namely, that of the 1st to 3rd Defendants and of the 4th to 6th Defendants, exist in conflict, the Bank acted in the interest of the Account's operations. Hence, the need for the Court to finds that interpleading is necessary in these proceedings and orders sought be granted. The Bank further submitted that pursuant to the Procedural provisions of Order 34, Rule 2 of the Civil Procedure Rules, 2010. It has established that:-

- ***It has no claim or interest in the subject matter of the dispute other than the usual bank charges and costs***

- ***It has not colluded with any of the claimants***
- ***The bank is willing to pay or transfer the funds on the account once the Court directs it to.***

15. The 1st to 3rd Defendants filed submissions dated 24th June 2016 arguing that the correct Bank Account number for the Nurses Investments Limited is Account number **114585338** and not the Account Number **11080834404**. That the Bank has failed to prove the allegations that the 4th to 6th Defendants have laid a claim to the Account in the names of Nurses Investment Limited. That, under clause 30, the terms and conditions of operating the Bank Account, the Bank is entitled to freeze the Account in case of a dispute but are not bound to institute interpleader proceedings. Equally the Consumer Guide to Banking in Kenya, requires the Bank to give the Account holders 14 days' notice prior to freeze of the account. That was not done herein.

16. The 1st, 2nd 3rd and 8th Defendants, further submitted that there is no leadership wrangles in the Nurses Investment (K) Ltd, but there is collusion between the Bank and the 4th to 6th Dependents. The Defendants cited the case of **Gatobu M'ibuutu Keratho VS Christopher Muriithi Kubai (2014) Civil Appeal No.78 of 2006**, to the effect that, the Court cannot re-write a contract for the parties. Reliance was also laid on the case of **Viable Deco Solutions Limited VS Co-operative Bank of Kenya Ltd 2014 Civil Appeal 175 of 2014**, to submit that notice to the customer on important matters touching the Account held in a bank, is almost an indispensable necessity. The case of **Satina Properties Ltd & Another VS Barclays Bank of Kenya ltd & Another 2015 eKLR** was also relied on as it lays down the characteristics of an interpleader. The defendants prayed for the dismissal of the Originating Summons dated 11th August, 2015 for lack of merit and the Application dated 25th May 2016 be allowed as prayed.

17. The 4th to 7th Defendants submitted that the Nurses Investment Ltd was registered and is financed by the members of the National Nurses Association of Kenya. The officials of the NNAK are the ones who are mandated to be the officials of the Nurses Investment Ltd. The 1st to 3rd defendants who ceased to be officials of the NNAK also ceased to be officials of the Nurses Investment Ltd. The current officials of the 7th defendants are the 4th, to 6th defendants. Any shares held in the names of the 1st to 3rd defendants, should also be transferred to and be registered in the names of the 7th defendant. To allow the 1st to 3rd defendants run the affairs of 7th defendant shall prejudice the pecuniary interest of the 7th respondent and expose it to the risk of financial loss. It shall also amount to perpetuation of an illegally and/or unlawful activities and/or omissions. The 4th to 6th Defendants distinguished six authorities cited by the 1st defendant as being irrelevant to the case before the Honourable Court; as they relate to Bank/Customer relationship, with no Third Party with district legal and proprietary interest. The prayers sought for should be allowed as prayed.

18. The 8th Defendant's submissions dated 4th July 2016 were filed on 5th July 2017. The 8th Defendant submitted that, the issue in dispute rests on whether the 8th Defendant shares are held in trust and whether the 8th Defendant is an investment arm of the 7th Defendant herein. The position is that, the 1st to 3rd Defendants are the rightful Parties to operate the 8th Defendant's Accounts as the 8th defendant is a separate legal entity, separate from the National Nurses Association of Kenya. This is confirmed vide the copies of minutes dated 24th September 2013, and a letter dated 14th August 2015 from the Registrar of Companies. The failure to recognize the 1st to 3rd defendants as lawful persons to operate the account of the 8th defendant is frustrating the operations including the servicing of the loans by the 8th Defendant.

19. I have considered the arguments advanced in support and opposition to the Originating Summons and the submissions tendered by the respective parties. I find that the key issue to consider herein is whether the Plaintiff/Bank has met the threshold of interpleader proceedings.

20. The Parties herein; the Bank and the 8th Defendant have a Banks Customer Contractual Relationship under Clause 30 of the General Terms and Conditions the Bank is authorized to freeze any account if and so long as there is a dispute or the bank has doubt for any reasons as to the person or persons entitled to operate the account. In answer to the question as to whether the bank was then entitled in this case to

freeze the Nurses Investment (K) Ltd, I find the Bank has annexed to the Supporting Affidavit:

- *A letter dated 12th May 2015, notifying it of change of signatories to the Account No. 1109124805 (See Annexure "BO2A"). That Account belongs to National Nurses Association of Kenya (NNAK).*
- *The minutes attached thereto also relate to the same organization.*
- *The other letter dated 13th May 2015, also relates to the operations of NNAK Bank Accounts (See Annexure "BOA2").*
- *The proceedings of HCCC (JR) Misc Application No. 144 of 2015, relates to the NNAK.*
- *The annexure marked BOA 4 is on the letterhead of NNAK*
- *Again a Court order dated 15th June 2015, makes reference to the National Nurses Association of Kenya.*
- *The letter from the law firm of Racher & Amollo Advocates (See Annexure "BO5), dated 4th June 2015, makes reference to the Account held by the Kenya National Nurses Association.*
- *The reference account is Account Number 1109124805, held by the said Kenya National Nurses Association.*
- *The letter dated 21st June 2015, makes reference to Court order relating to the operations of NNAK Bank Accounts.*
- *The order issued in HCCC No. 22 of 2015, at Kisumu, makes reference to the National Nurses Association of Kenya.*

21. Apparently, the 1st document which makes reference to the Nurses Investment (K) Limited is a letter dated 25th June 2015 from Kagwimi Kang'ethe & Co-Advocates, written to the plaintiff's/ Bank's Manager, complaining about the freezing of the Nurses Investment (K) Limited Bank Accounts. Unfortunately the said letter does not identify with the subject account. The letter from the 1st Defendant to the Chief Executive Officer of the plaintiff Bank, makes reference to the Account Number **1145385338** in the name and identity of Nurses Investment (K) Ltd and the last annexure deals with compliance with orders issued in JR 144/15 (Supra).

22. It's therefore clear to me that, the plaintiff/ Bank indeed received correspondence relating to wrangles in leadership of NNAK. I have not seen any correspondence stating that, there was leadership wrangles in the Nurses Investment (K) Ltd. The Originating Summons under prayer 1 seeks for order that the operations of the Bank Account Number **1108083404** of the said Nurses Investment (K) Ltd, and others, held by the KCB Ltd, be suspended. Apparently this particular Account does not feature anywhere in the correspondence of the parties. The first defendant has submitted that, the Account number for the Nurses Investment (K) Ltd is Account number **114585338** and not Account number **11080834404** as stated herein. This issue can only be resolved if the Court gets the benefit of the Account opening documents relating to the two disputed accounts, to enable it resolve the Account which is sought to be suspended: whether Account number **114585338** or **1108034404**.

23. The next question to answer is whether, the 1st to 6th Defendants/Respondents have a dispute over who should operate that Account number 1108083404. If so, should, the Court order that they interplead among themselves to decide on who should have the mandate to operate that Account. I find that, in the normal banking practice, the Bank will seek for and obtain a Mandate on how a Bank account is to be operated. The Bank did not give the Court the benefit thereof. I believe if that information is availed. It will assist the Court to give just and fair decision herein. In that regard I shall stay the final finding herein pending the availability of the Account opening documents held by the plaintiff/Bank and the mandate relating to the two Accounts referred to herein. The same to be availed within **five (5)** days of this order, and further orders be made thereafter.

G. L. NZIOKA

JUDGE

23/03/17

**DATED, SIGNED AND DELIVERED IN AN OPEN COURT ON THIS 23RD DAY OF
FEBRUARY 2017 AT NAIROBI**

G.L. NZIOKA

JUDGE

IN THE PRESENCE OF

Mr Mahinda for the Plaintiff

Mr Maina for the 1ST to 3RD Defendants

Mr Modi for the 4th to 6th Defendants

No Appearance for the 7th and 8th Defendants

Teresia Court Assistant