



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 313 OF 2011

INTERACTIVE GAMING & LOTTERS LIMITED PLAINTIFF

VERSUS

FLINT EAST AFRICA LIMITED 1ST DEFENDANT

DIAMOND TRUST BANK LIMITED 2ND DEFENDANT

R U L I N G

1. This matter comes before the Court on a Notice of Motion under Sections 1A, 1B and 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules 2010 issued on 16th October 2014 and seeking the following Orders:

“i) THAT the amount of Kshs. 14,000,000 held by the 2nd defendant be and is hereby ordered to be released to the plaintiff.

ii) THAT the 1st defendant to bear the cost of this application and of the suit”.

The Application is supported by the Affidavit of Mr. Adil Bashir also dated 16th October 2014 but according to its heading it was in fact made in the associated suit HCCC No. 281/2011.

2. Like HCCC No. 281 of 2011, this suit was stayed pending the outcome of Suit No. 115 of 2011. The present suit was not consolidated with that suit.
3. The matter came before me at the same time and date as HCCC No. 281 of 2011 although the two cases were not consolidated. The stay applied between 20th February 2012 and 30th April 2014 and applied equally to this case as to HCCC No. 281 of 2011.
4. The Grounds for the Application at ground 4 explains:

“That the determination of the Plaintiff’s ownership of the funds held by the 2nd defendant was also made by Court on 2nd September 2011 in Judicial Review Case No. 370 of 2010 and that decision has not been appealed against”.

5. In addition Ground 6 explains that in **HCCC No. 115 of 2011** the Court ordered the Parties to take appropriate steps in light of that decision.
6. It should be mentioned that there is a second Supporting Affidavit within the bound version of the

Application which has the same Heading (281 of 2011) the same date but a different content. In other circumstances that would be questionable.

7. As the two matters are so closely related and also at the invitation of the Parties Advocates, I adopt herewith the reasons for my decision as set out in **HCCC No. 281 of 2011**. I take that as the lead because it was the first in time.
8. For those reasons, I adopt the Order of the Hon. Mr. Justice Odunga in HCCC No. 115 of 2011 made on 30th April 2014 in so far as it relates to ownership of the funds held by the Second Defendant.
9. I therefore Order:

1. **The Plaintiff is entitled to the Kshs. 14,000,000 held by the Second Defendant less the costs and charges due to Airtel Network Ltd.**
2. **Those costs and charges shall be paid to Diamond Trust Bank and the net balance to the Plaintiff.**
3. **The interest accrued on the deposit shall also be apportioned and paid on a pro rata basis.**
4. **The Parties to appear before the Registrar of the Commercial Division for a determination of the figures due to each party. The matter be listed before the Deputy Registrar, Madam Nyambu for a mention on 30 January 2015**
5. **Liberty to apply on implementation and enforcement granted.**

COSTS:

10. In relation to the question of costs, I apply the wide discretion of the Court. The starting point is that costs should follow the event. However, I note that there has been a duplication of proceedings and applications which was not strictly necessary. This is starkly illustrated by the Affidavits in Support carrying a different Suit No. from the Suit in which it is filed. I also note that there was no effort to consolidate the three matters even as late as 20th February 2012 when the issues were known. I note that in all the hearings before me there was consensus.
11. In relation to litigation conduct including duplication and the Defendant lengthening the proceedings by its conduct, there are arguments for both sides. However, the Application is seeking an Order that the First Defendant pays the costs of the Application of the Suit. No explanation is given as to why the Order should be different to 281/2011.

ORDER:

12. I therefore Order:

1. Each Party shall pay its own costs of the Application dated 15th October 2014.
2. The Plaintiff shall pay the costs of the Second Defendant/Intervenor for the Suit.
3. The Defendant shall pay 50% of the Plaintiff's Costs of the Suit.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY, 2015.

FARAH S. M. AMIN

JUDGE

In the presence of:

Mr. Collins – Court Clerk.

..... for the Plaintiff.

..... for the First Defendant.

..... For the Second Defendant.