

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

Civil Suit 7 of 2008

FRANCIS OKENY OLAKAPLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.DEFENDANT

R U L I N G

The plaintiff filed an application pursuant to the provision of **Sections 1A, 1B, 3, 3A** of the **Civil Procedure Act** and **Orders 48 & 49** of the **Civil Procedure Rules** seeking orders from this court to fix the time and date upon which accounts between the parties herein may be taken in accordance with the direction of this court. The application is supported by the annexed affidavit of the plaintiff. The application is opposed. Upendo Wambua, the Manager of the defendant's Village market branch Nairobi, swore a replying affidavit in opposition to the application.

At the hearing of the application, this court heard rival submission made by Mr. Ashioya for the plaintiff and Mr. Mukisu for the respondent. From their submission, it was clear that there are certain issues that are not in dispute in this application. It was not disputed that the parties herein did enter into a consent in court that they would meet at the defendant's Village market branch with a view to reconciling all the relevant accounts held by the plaintiff at the bank. It is further not disputed that the defendant was required to supply the plaintiff with bank statements of the accounts that were the subject of reconciliation. It is not disputed that the defendant in fact did supply the said bank statements to the plaintiffs. According to the plaintiff, after scrutinizing the said bank statements, he noted that there was an entry which was made on 28th February 2006 in his account of US dollars 27,000 which was inexplicably reversed. It was the plaintiff's contention that he had made this deposit of US dollars 27,000 in cash but the same had been reflected as a cheque deposit in his account. It was the plaintiff's submission that, in light of a fraud that had been committed in his account (a fraud which had been admitted by the defendant), he was of the view that unless the plaintiff produced the actual cheque reflecting the deposit of the said US dollars 27,000 in his account, then the court should uphold his assertion that the deposit was in actual fact made in cash.

On its part, the defendant argued that the plaintiff was in fact making a case out of nothing. It submitted that the entry of US dollars 27,000 cheque was made by mistake. The only way to remedy the mistake was by having the erroneous entry reversed. The defendant denied the contention by the plaintiff that he had deposited a sum of US dollars 27,000 in cash. The defendant demanded the plaintiff produce a copy of the cash deposit receipt of US dollars 27,000 if in fact he made such deposit. The plaintiff is of the view that the only way the difference of opinion between the plaintiff and the defendant in relation to how the said account was maintained can only be resolved is by the parties presenting their respective accounts for determination by the Deputy Registrar of this court. The defendant contends that it is not necessary for this court to prolong these proceedings any further because, in its opinion, it had complied with the order of this court by rendering the accounts and reconciling its accounts with the plaintiff.

Having evaluated the facts of this application, it was apparent to this court that the issue in dispute is whether the plaintiff made a cash deposit of US dollars 27,000 on the 28th February 2006 or whether the entry in his statement of US dollars 27,000 was an erroneous cheque entry as alleged by the defendant. This entry was later reversed. This court is of the opinion that to resolve this dispute is simple;

he who asserts the existence of a fact must prove it. If the plaintiff is alleging that he deposited US dollars 27,000 in cash, the burden is on him to produce a cash voucher proving that he made such a deposit. If the plaintiff can produce such cash deposit voucher, then the burden would shift to the defendant to show cause why it should not refund the said sum to the plaintiff. There is no need for this court, or the Deputy Registrar of this court for that matter, to undertake any further hearing in this case.

In the premises therefore, the plaintiff is given thirty (30) days to produce before court the cash deposit voucher for US dollars 27,000 which he claims he had deposited in his account with the defendant or in default this court will hold that the defendant has fully complied with the order that was issued by this court on 16th October 2010. That order required the defendant to co-operate with the plaintiff in the taking and in the reconciliation of the relevant accounts held by the plaintiff, at the material time, at the defendant bank. There shall be no orders as to costs.

DATED AT BUSIA THIS 25TH DAY OF JULY, 2012.

L. KIMARU
J U D G E