



**SWIFT GLOBAL (K) LTD..... PLAINTIFF**

**VERSUS**

**DENNIS SILAS MBICHI**

**(T/A MBICHI MBOROKI**

**& COMPANY ADVOCATES) .....DEFENDANT**

**RULING**

1. In this **originating summons dated 11<sup>th</sup> September 2009** the Applicant is the erstwhile client of the Respondent (an advocate of this court). The originating summons is brought **under Order 52, rule 4(1) & (2)** of the **Civil Procedure Rules** (the **Rules**). It seeks three main orders -

(i) That the Respondent do deposit as security (in court?) KShs 2,425,263/75 “being monies in regard to rent payments for the Applicant’s leased premises L.R. No. 9721 along Mombasa Road (paid) to the Respondent ... by the Applicant (on diverse) dates between 8<sup>th</sup> January 2004 and 9<sup>th</sup> June 2006 for onward transmission to Machakos Ranching Company Limited”.

(ii) That the Respondent do pay back to the Applicant the said sum of KShs 2,425,263/75.

(iii) That (in the alternative?) the Respondent do deliver to the Applicant a cash account “in regard to rent payments of the Applicant’s leased premises L.R. No. 9721 along Mombasa Road made by the Respondent to the landlord, Machakos Ranching Company Limited from the aforesaid sum of KShs 2,425,263/75”.

2. The originating summons was supported by the annexed affidavit sworn by one **Philip K Wafula**, the Senior Accountant of the Applicant. In this affidavit it is demonstrated when and how the total sum of KShs 2,425,263/75 was paid by the Applicant to the Respondent.

3. In a replying affidavit sworn and filed on 11<sup>th</sup> November 2009 the Respondent acknowledges receipt of the said sum of KShs 2,425,263/75 from the Applicant, but that the same was received by virtue of orders of the Business Premises Tribunal in BPRT Case No. 284 of 2003 “for the benefit of a third party ... who is not a party to this suit”. The Respondent also makes a claim for his advocate’s costs in the sum of KShs 460,000/00.

4. When the originating summons came up for hearing on 6<sup>th</sup> July 2011 the following consents were recorded –

**Consent 1**

**“ORDER: By consent the following facts are not in dispute –**

(i) **The amount paid by the Applicant to the Respondent is KShs 2,425,263/75.**

(ii) **The said amount was paid on account of rent due to a third party, Machakos Ranching**

**Co. Ltd., which was the Applicant's landlord in certain premises.**

**(iii) The said amount has not been remitted to Machakos Ranching Co. Ltd and is being held by the Respondent.**

**(iv) The Respondent's professional fees agreed at KShs 460,000/00 have not yet been paid by the Applicant."**

**Consent 2:**

**"The following are the issues to be determined –**

**(i) Whether the Applicant has any claim upon the said sum of KShs 2,425,263/75.**

**(ii) Whether Machakos Co. Ltd would have a legitimate claim against the Respondent on account of the (said) money that would be superior to the Applicant's claim over the same money.**

**(iii) Whether or not there are any outstanding issues of rent as between the Applicant and Machakos Ranching Co. Ltd that have a bearing on the said sum of KShs 2,425,263/75.**

**(iv) Whether there are still pending cases between the Applicant and Machakos Ranching Co. Ltd in the Business Premises Rent Tribunal that have a bearing on the (said) sum of KShs 2,425,263/75."**

**Consent 3:**

**"(i) The four issues for determination shall be canvassed by way of submissions upon the affidavit evidence already on record. To this extent the directions given on 29/6/2010 are hereby varied.**

**(ii) The parties shall file and exchange written submissions within 30 days of today.**

**(iii) Mention for further directions on 28/9/2011.**

**(iv) Costs in the cause."**

5. Indeed the parties filed and exchanged written submissions. Those of the Applicant were filed on 2<sup>nd</sup> August 2011 and those of the Respondent on 13<sup>th</sup> September 2011. I have considered those submissions, including the cases cited.

6. With the agreed facts as recorded in the first consent, this matter is a fairly simple one and determining the agreed issues poses no problem at all.

**Issue 1: Whether the Applicant has any claim to the said sum of KShs 2,425,263/75.**

7. This sum was paid by the Applicant to the Respondent (the Applicant's then advocate) for the specific purpose of onward transmission of the same to the Applicant's then landlord in payment of rents. The Respondent did not transmit the money as instructed. He kept it. It would appear that the Applicant has since settled the issue of rents directly with the landlord, Machakos Ranching Company Limited. So, the money belongs to the Applicant, less of course the Respondent's agreed advocates' costs of KShs 460,000/00.

8. As far as the Respondent should be concerned, the money belongs, not to Machakos Ranching Co. Ltd, but to the Applicant. It was the Applicant who paid it to the Respondent for onward transmission to Machakos Ranching Co. Ltd. He did not do so, and has not advanced any reason why he did not do so.

9. There was no advocate/client relationship between the Respondent and Machakos Ranching Co.

Ltd. So, why or how can the latter have any claim against the Respondent on account of the money? He has not claimed that he gave any professional undertaking to Machakos Ranching Co. Ltd. on account of the money, and he has not demonstrated any such professional undertaking. So, how can he claim that Machakos Ranching Co. Ltd “has not discharged him to enable him to pay that ... money to the Applicant”?

10. The only legitimate claim to the sum of KShs 2,425,263/75 that the Respondent has is that portion of the same that would cover his agreed costs of KShs 460,000/00. The rest of it belongs to the Applicant. I so hold.

**Issue No. 2 Whether Machakos Ranching Co. Ltd would have a legitimate claim against the Respondent on account of the money that would be superior to the Applicant’s claim over the same money?**

11. There was no contractual or professional relationship between the Respondent and Machakos Ranching Co. Ltd. The Respondent gave no professional undertaking to the latter regarding the sum of KShs 2,425,263/75. Machakos Ranching Co. Ltd cannot now have a claim directly to the Respondent over that money, particularly when the Applicant says it settled all unpaid rents directly with Machakos Ranching Co. Ltd when the Respondent failed to remit the money.

12. Any claims Machakos Ranching Co. Ltd might have in respect to rent must be directly to the Applicant (not to the Respondent) and would be outside the ambit of the present proceedings to which it is not a party. As already held, the money (KShs 2,425, 263/75 less agreed advocate’s costs of KShs 460,000/00) now held by the Respondent belongs to the Applicant.

**Issue No 3: Whether or not there are any outstanding issues of rent as between the Applicant and Machakos Ranching Co. Ltd that have a bearing on the said sum of KShs 2,425,263/75.**

13. None have been demonstrated.

**Issue No. 4 Whether there are still pending cases between the Applicant and Machakos Ranching Co Ltd in the Business Premises Rent Tribunal that have a bearing on the sum of KShs 2.425,263/75.**

14. None have been demonstrated.

15. I must state that I am rather surprised by the stand taken by the Respondent in this matter. He appears intent to be involved in the rent disputes between the Applicant and its landlord, Machakos Ranching Co. Ltd, if indeed there are still such disputes outstanding. I cannot understand why he would want to be involved. He was paid money by the Applicant to onward transmission (on behalf of Applicant) to Machakos Ranching Co. Ltd. He did not do so, and has been keeping it for over six (6) years now! He has not stated why he did not transmit the money as instructed. He has not stated that he will forthwith transmit the money! So, why does he want to continue keeping it?

16. The technical objection to the suit raised by the Respondent is not worth consideration.

17. I direct that the Respondent pays to the Applicant the sum of **KShs 1,965,263/75** (which is KShs 2,425,263/75 less the Respondent’s agreed advocate’s costs of KShs 460,000/00) within fourteen (14) days of delivery of this ruling. In default judgment shall be deemed to have been entered for the Applicant against the Respondent for that sum of KShs 1,965,263/75, and the Applicant shall be at liberty to execute for the same. The Applicant shall also have costs of these proceedings. Those shall be the orders of the court.

18. Delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now fully recovered my health.

**DATED AT NAIROBI THIS 11<sup>th</sup> DAY OF OCTOBER 2012**

**H.P.G. WAWERU**  
**JUDGE**

**DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF OCTOBER 2012**