



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Miscellaneous Criminal Application 388 of 2011**

**ANN WANJIKU KURIA.....APPLICANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**R U L I N G**

The Petitioner, **ANN WANJIKU KURIA** was on trial before the Chief Magistrate's Court, Nairobi, in Criminal Case No. 2202 of 2009. The charge against her was for the offence of Issuing a bad cheque contrary to **section 316 (A) (1) (c ) of the Penal Code.**

The particulars of the offence were that the Petitioner issued a cheque No. 500106, for Kshs.1,300,000/- in favour of CitiBank Limited, knowing that the account No. [particulars withheld], held at Eco Kenya Limited, Westminster Branch had no sufficient funds.

On 17<sup>th</sup> May 2011, the Petitioner informed the trial court that she intended to raise a constitutional issue. The issue was in relation to the question as to whether or not the Petitioner's right to be protected from self-incrimination would be violated, if the trial proceeded.

As I understand it, the Petitioner's bank account was erroneously credited with US Dollars 68,384, (which is equivalent to about Kshs.5,378,400/-.) That credit was erroneous because the applicant should only have been credited with Kshs.68,384/-.

The Petitioner says that on 22<sup>nd</sup> June 2009, she undertook to refund the money to Citibank, by way of monthly instalments.

According to the Petitioner, she had already repaid a total of KShs.3,000,000/-, leaving a balance of KShs.2,078,401/60.

The Petitioner says that she issued 2 cheques for KShs.1,300,000/-each. The said 2 cheques were dated 16<sup>th</sup> October 2009 and 13<sup>th</sup> November 2009 respectively.

Subsequent to the issuance of those 2 cheques, the Petitioner stopped payment. The said stoppage prompted CitiBank to lodge a criminal complaint to the police, culminating in the arrest and prosecution of the Petitioner.

The Petitioner asserts that because CitiBank had accepted her offer to repay the money, they are estopped, by their conduct, from lodging the criminal complaint against her.

The acceptance of the offer is said to have compromised the defence which could have otherwise been available to the Petitioner.

It is for that reason that the Petitioner moved to this court seeking a declaration that the institution, prosecution and maintenance of the criminal case against her is a contravention of her constitutional rights to a fair trial.

The continuation of the criminal case is said to constitute an abuse of the criminal process of the court, and a flagrant affront to the universally acknowledged presumption of innocence.

The Petitioner will be asking the Court to permanently stay the said criminal proceedings against her, and to award her General Damages for breaching her constitutional rights.

The Petition seeking those reliefs was filed in court on 18<sup>th</sup> November 2011, under a certificate of urgency.

Simultaneously with the said Petition, the Petitioner filed an application for conservatory orders, to stay the criminal proceedings against her. This ruling relates to that application.

At this stage, I am not called upon to determine the substantive issues raised in the Petition. I am only required to determine whether or not the criminal trial should be put on hold until the Petition is heard and determined.

If the trial proceeds before this court establishes whether or not the said trial would constitute a violation of the Petitioner's rights, the Petitioner may stand prejudiced. I say so because the trial court may end up convicting the Petitioner before this court made a finding on the constitutionality of the proceedings leading to such conviction.

In the event, justice demands that the proceedings before the learned trial magistrate be placed on hold until the Petition herein has been determined.

But I am also conscious of the fact that the cheques in issue are more than 2 years old.

Furthermore, the money which the Petitioner admits to have erroneously received, was credited to her account in February 2009.

If the money was erroneously credited to the Petitioner's account, justice demands that the person entitled to the money should have been paid soonest possible.

I cannot understand how a person who readily concedes that she received and used money which she knew that she was not entitled to, can seek the protection of the court when the state takes steps to prosecute her, when she had not yet repaid all the money due from her.

Surely, justice cannot be blind when a bank may be deprived of money which it paid out erroneously to the Petitioner.

Be that as it may, I now grant an order staying the further trial of the Petitioner until her Petition is heard and determined.

I further order that the Petition be listed for hearing before any Judge within the next 30 DAYS.

If, for any reason, the hearing and determination of the Petition is not concluded within the next 60 DAYS, the stay order shall stand vacated.

Costs of the application shall be in the cause in the substantive Petition.

**Dated, signed and Delivered at Nairobi this 7<sup>th</sup> day of November, 2012.**

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**FRED A. OCHIENG**  
**JUDGE**