

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 699 of 2009

DICKSON CHEGE KIMANI T/A PHASELINE SUPPLIES.....PLAINTIFF

VERSUS

PARAMOUNT UNIVERSAL BANK LTD.....DEFENDANT

RULING

The plaintiff filed suit against the defendant seeking the intervention of the court to enable him operate and gain access to funds held in a current account No.40861020 held at the defendant's Kimathi Street Branch in Nairobi. The subject of the dispute between the plaintiff and the defendant relates to a cheque of KShs.3,684,904/= which the plaintiff deposited in the said account. According to the plaintiff, the said cheque No.001539 was paid to him by a firm known as Stragag International for goods sold and delivered to the said firm. It was the plaintiff's case that the defendant had no justification whatsoever in freezing his said account and refusing to allow him to operate the same. The defendant filed pleadings to the plaintiff's claim denying that it had acted unlawfully in refusing to allow the plaintiff to withdraw funds in the said account. The defendant stated that it had taken the action on account of credible evidence that the funds deposited in the said account were as a result of criminal activities.

The plaintiff filed interlocutory application pursuant to the provisions of **Order XXXIX** of the **Civil Procedure Rules** seeking orders from the court to enable him operate the said account. Before the application could be heard, Strabag International GMBH entered appearance in the matter. Similarly, the Kenya Revenue Authority through its counsel Messrs Ontweka advocate entered appearance in the suit. Both Strabag International GMBH and Kenya Revenue Authority were claiming the said sum of KShs.3,684,906/= that is the subject of the suit between the plaintiff and the defendant. On 15th October 2009, the defendant filed interpleader proceedings pursuant to the provisions of **Order XXXIII Rules 2 and 3** of the **Civil Procedure Rules** seeking the determination of who between the plaintiff, the Kenya Revenue Authority, Strabag International GMBH, Commercial Bank of Africa and the Kenya Revenue Police Unit were entitled to the balance held in the plaintiff's account that is the subject of these proceedings less the costs incurred by the defendant.

In the said application, the defendant stated that it had no claim whatsoever the funds save for costs that has been incurred by the defendant in the present suit and the previous proceedings. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of Ayaz Merali, the managing director of the defendant. The application was opposed by the plaintiff. He filed a replying affidavit in opposition to the same. The position of Strabag International GMBH and that of Kenya Revenue Authority was the same: they both urged the court to direct that the funds in the account in question be paid to Kenya Revenue Authority as it was funds which had been remitted by Strabag International GMBH as its tax obligation to the Revenue Authority. Before the hearing of the application, Commercial Bank of Africa through its counsel intimated to the court that it would not be participating in the proceedings since the funds that are the subject of the proceedings herein either belonged to Strabag International GMBH or Kenya Revenue Authority.

Prior to the hearing of the application, counsel for the plaintiff and Strabag International GMBH filed written submissions in support of their respective positions. At the hearing of the application, this court heard oral submissions made by Mr. Mbegi for the plaintiff, Mr. Ontweka for Kenya Revenue Authority, Mr. Ngatia for the defendant and Mr. Milimo for Strabag International GMBH. I have carefully considered the said rival submissions. I have also read the pleadings filed by the parties in support of their respective opposing positions. I have had the benefit of the decided cases cited by respective counsel for the parties to this application. Interpleader proceedings are essentially brought in court by a party who has no interest in the subject matter of the dispute save for his costs. In order for the court to grant a prayer sought by an interpleader, the interpleader must satisfy the court that there has been no collusion between itself and any of the claimants and further that it would be willing to pay or transfer the subject matter

into court or dispose it as the court may direct.

In the present proceedings, certain facts are not in dispute. It is not disputed that the plaintiff operates a current account with the defendant's Kimathi Street Branch. In the said account was deposited Cheque No.001539 for the sum of KShs.3,684,904/=. The proceeds of the said cheque were credited to the said account. According to the plaintiff, the said sum was paid to him by a firm known as Stragag International Limited on account of goods its had sold to the said firm. On its part, Strabag International GMBH put forward a strong case which was to the effect that it had deposited the said cheque with the Kenya Revenue Authority in fulfillment of its tax obligations. According to Strabag, the said cheque was fraudulently and criminally converted and deposited in the plaintiff's account. Sylvester Ogello, an officer attached to the Kenya Revenue Authority's Investigation and Enforcement Department swore an affidavit which prima facie established that indeed the said cheque No.001539 of KShs.3,684,904/= was paid by Strabag International GMBH for the credit of Kenya Revenue Authority on account of its tax obligations but was intercepted and fraudulently diverted to the account of the plaintiff before the same was credited to the tax man's account.

Although the plaintiff argued that it had been paid the said cheque by a firm known as Stragag International, in my considered opinion, it was virtually impossible that the alleged firm known as Stragag International could have issued a cheque similar in number to that issued by Strabag International GMBH and further issued a cheque of similar amount to that issued by the latter firm. The plaintiff did not place any evidence in form of invoices, delivery notes and other documentary proof to establish its claim that it had indeed supplied goods to Stragag International which resulted in the said sum of KShs.3,684,906/= being paid to it.

The evidence placed before the court by the Kenya Revenue Authority and Strabag International GMBH is credible. It was clear that the said cheque which was paid by Strabag International GMBH to Kenya Revenue Authority was diverted before the same was credited to the tax account of Strabag International GMBH. The said cheque found its way into the accounts of the plaintiff. From affidavit evidence adduced, it was apparent that diversion of cheques meant for Kenya Revenue Authority into the account of the plaintiff was not a one off occurrence. Indeed, there is evidence that other cheques have been diverted in a similar fashion into the plaintiff's account after the same had been fraudulently intercepted before they were credited into the Kenya Revenue Authority tax account. In the premises therefore, I hold that the Kenya Revenue Authority and Strabag International GMBH have established ownership of the said cheque and with it, the amount deposited in the plaintiff's account.

I hold that the cheque which was diverted into the plaintiff's account in the sum of KShs.3,684,906/- being cheque No. 001539 was a cheque which had been issued by Strabag International Limited to settle its tax obligation with the Kenya Revenue Authority. I considered with incredulity the evidence placed before the court by the plaintiff in his bid to establish ownership of the proceeds of the said cheque. The Kenya Revenue Authority is entitled to the proceeds of the said cheque. I will therefore allow the interpleader application filed by the defendant. I direct that the defendant forthwith issues a cheque for the sum of KShs.3,340,263.90/- to the Kenya Revenue Authority, being the balance in the plaintiff's account at the defendant bank that was illegally diverted from the Kenya Revenue Authority. The above amount includes the current balance in the said account, being KShs.2,990,363.90/- and the sum of KShs.350,000/- which was paid by the defendant to its advocates Messrs Ngatia & Co. Advocates.

In defending the suits that were filed against it by the plaintiff, the defendant was protecting its interest and therefore, as in normal circumstances, it should pay its advocates from its own resources and not from an account whose contents are in dispute. I direct that the defendant pays to the Kenya Revenue Authority the said amount within seven (7) days of today's date. I further direct that the Kenya Revenue Authority credit the said amount to Strabag International GMBH tax account. The plaintiff shall pay the cost of the interpleader to the defendant. It is so ordered.

DATED AT NAIROBI THIS 20TH DAY OF JANUARY 2010.

**L. KIMARU
JUDGE**