



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANICOMMERCIAL COURTS)**

Civil Suit 421 of 2009

PARAMOUNT UNIVERSAL BANK.....APPLICANT

VERSUS

ALI AHMED ABOUND MAALIM.....1ST RESPONDENT

KENYA REVENUE AUTHORITY.....2ND RESPONDENT

FINA BANK LIMITED.....3RD RESPONDENT

BLOWPLAST LIMITED.....4TH RESPONDENT

J U D G M E N T

The applicant filed interpleader proceedings in an originating summons made pursuant to the provisions of **Section 58** of the **Civil Procedure Act** and **Order XXXIII Rule 1 & 2** of the **Civil Procedure Rules**. The applicant sought directions from the court in regard to whom, among the respondents, the applicant should release the credit balance held in the 1st respondent’s account No.001003611 less any costs and charges due to the applicant. The applicant further craved for an order of the court that upon the court issuing the directions sought in the first prayer regarding which respondent is entitled to the said credit balance, the applicant be discharged and or indemnified against all claims from the respondents or any other party. The summons is supported by the annexed affidavit of Ayaz Merali, the managing director of the applicant. Muhammad Mujtaba, the general manager of the applicant, swore a further affidavit in support of the application. The summons is opposed. Suriyakant Mohanlal Shah, the managing director of the 4th respondent swore a replying affidavit in opposition to the summons. Fidelis Muthoni Ngure, a manager with the 3rd respondent swore two replying affidavits in opposition to the summons. The 1st respondent also swore a replying affidavit in opposition to the summons. Sylvester Okello Ogello, an officer employed in the 2nd respondent’s investigation and enforcement department, swore a replying affidavit in opposition to the application.

Prior to the hearing of the application, the 2nd respondent withdrew from these proceedings. Counsel for the remaining parties to the proceedings agreed by consent to file written submissions prior to the oral hearing of the suit. The written submissions were filed. At the hearing of the suit (which was by way of submission), I heard oral submissions made by Mr. Macharia for the applicant, Mr. Mwangi for the 3rd respondent and Mr. Sehmi for the 4th respondent. I have carefully considered the submissions, both written and oral. I have read the pleadings filed by the parties herein in support of their respective opposing positions. I have benefited from the authorities cited by learned counsel. The facts of this suit are more or less not in dispute. The 1st respondent is a customer of the applicant. The 1st respondent maintains a current account No.001003611 with the applicant’s Parklands Branch in Nairobi. On 1st April, 2009, the 1st respondent deposited in his account cheque No.018317 of Kshs.7,785,008/- purportedly drawn in his favour by the 4th respondent. The applicant, in the normal course of business, presented the said cheque to the 3rd respondent (the paying bank) for payment. The said sum was credited to the 1st respondent’s account.

Meanwhile, the 4th respondent discovered that the cheque No.018317 of Kshs.7,785,008/-, which it had issued to the 2nd respondent to settle its tax liabilities, had not been credited to the account of the 2nd respondent. The 4th respondent had deposited the said cheque with its bankers so that the same could be paid to the 2nd respondent. The applicant and the 3rd respondent annexed copies of the two cheques in the affidavits sworn in support of their respective opposing positions. This court perusal of the said copies of the two cheques clearly points to the uncontroverted fact that one of the cheques is a forgery. It is the 4th respondent's case that at no time did it have dealings with the 1st respondent. On his part, the 1st respondent gave an explanation on how he came into possession of the said cheque from the 4th respondent. That explanation was not at all convincing. It was apparent to the court that the 1st respondent fraudulently benefited from the proceeds of the cheque which the 4th respondent had paid to the 2nd respondent to settle its tax liabilities. The 1st respondent has been charged with a criminal offence relating to the said conversion of the proceeds of the cheque that the 4th respondent had issued to the 2nd respondent. The criminal case is still pending hearing and determination.

This court's evaluation of the facts of this suit leads it to the conclusion that the cheque which the 4th respondent deposited in its account in favour of the 2nd respondent was diverted when the same was in the banking system. The genuine cheque was substituted with a fraudulent cheque during the clearing process. This court was not able to determine, who, between the applicant and 3rd respondent was culpable. The applicant blames the 3rd respondent for the said cheque substitution. On the other hand, the 3rd respondent blames the applicant. In my considered opinion, that issue can only be determined in a trial where the applicant and the 3rd respondent will have the opportunity to ventilate their respective positions. This court is not being called upon to determine who is to bear the blame between the applicant and the 3rd respondent. The issue for determination by this court is whether the applicant indeed established that it was an interpleader in these proceedings and should be granted the order sought in the suit.

As correctly observed by the respective counsel for the applicant and for the 3rd respondent, for the applicant to succeed in the prayers sought in this suit, it must fulfill the requirements of **Order XXXIII Rule 2** of the **Civil Procedure Rules**. The applicant is required to satisfy the court that it has no claim or interest in the subject matter of the dispute other than any charges and costs. The applicant must convince the court that there has been no collusion between itself and any of the claimants. Finally, the applicant must be willing to pay or transfer the subject matter of the suit into court or to dispose it as the court may direct. In the present suit, it was evident that the manner in which the applicant dealt with the proceeds of the fraudulent cheque resulted in a dispute with the 3rd respondent. It was the 3rd respondent's case that the dispute had been referred to The Clearing House Sub-Committee of the Kenya Bankers Association for arbitration. At the time this court heard the present suit, the dispute had not been resolved. The 3rd and 4th respondents were not ruling out the option that they would file suit against the applicant in respect of the said conversion of the cheque.

From the evidence adduced in this case by way of affidavits, it was clear that the applicant cannot be completely absolved from the events that resulted in the 4th respondent's cheque being fraudulently diverted to the 1st respondent's account. I therefore hold that the applicant's conduct subsequent to the discovery of the fraud, precludes it from asserting that it had no claim or interest in the subject matter of the suit. The applicant did not act with due diligence when it became aware that there was a possibility that the 1st respondent could be committing fraud through his account that is the subject matter of this suit. The applicant refused to take action even when it was faced with the reality that the sum deposited in the 1st respondent's account was out of the ordinary. It was apparent to this court that the applicant filed the present suit in a bid to obtain a decision from the court that would absolve it from blame. As stated earlier in this ruling, the issue as to who is to blame for the fraudulent conversion of the proceeds of the 4th respondent's cheque in question shall be determined in another forum.

In the premises therefore, the order that commends itself to this court in these proceedings is an order that will mitigate the loss suffered by the 4th respondent before a decision is finally rendered in regard to how the 4th respondent can be adequately compensated. There is no doubt that the said amount belongs to the 4th respondent. The 2nd respondent had no claim over the subject matter of this suit. This court established that the 1st respondent fraudulently converted the proceeds of the cheque which the 4th respondent had issued in favour of the 2nd respondent to settle its tax liabilities. The 1st respondent cannot therefore have claim over the subject matter of the suit. I hereby direct the applicant to pay to the 4th respondent the sum of Kshs.1,903,923/- within fourteen (14) days of today's date. This amount includes the sum of Kshs.250,000/- which the applicant unlawfully debited the account in question to settle its advocate's fees. The applicant had no authority to debit the disputed account with its advocate's fees. It is only the court which has jurisdiction to direct that the costs of any successful party be debited from the disputed funds.

Order XXXIII Rule 6 of the **Civil Procedure Rules** grants this court discretion to award costs. In the present suit, I will award costs of the suit to the 3rd and 4th respondents.

DATED AT NAIROBI THIS 9TH DAY OF JUNE, 2010

L. KIMARU

JUDGE