



REPUBLIC OF KENYA

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

**Civil Case 661 of 2007**

**NASSER AHMED T/A AIR TIME BUSINESS SOLUTIONS.....  
.....PLAINTIFF**

**VERSUS**

**CELTEL KENYA LTD.....DEFENDANT**

**AND**

**FIDELITY COMMERCIAL BANK.....INTERPLEADER**

**RULING**

Before me is a notice of motion by the defendant made under the provisions of **Section 3A** of the **Civil Procedure Act** and **Order XXXIII rules 5 & 6** of the **Civil Procedure Rules** seeking to vary this court's orders of 27<sup>th</sup> May, 2008 by which the court directed that the subject matter of interpleader, being Kshs.10,000,000/=, remain deposited with the interpleader pending the hearing and determination of the suit. The defendant desires the court to vary its said order so that the said amount may be deposited in an interest earning account in the joint names of the advocate for the plaintiff and the advocate for the defendant. The grounds in support of the application are on the face of the application. The interpleader, through its legal officer, Philip Muoka, filed a replying affidavit in opposition to the application. The plaintiff did not file any papers either in support or in opposition to the application.

At the hearing of the application, I heard rival submissions made by Mr. Ojiambo on the one hand and Mr. Mutubwa and Mr. Kanjama on the other. I have carefully considered the said arguments. I have also read the pleadings filed by the two parties herein in support of their respective opposing positions. The issue for determination by this court is whether the defendant made a suitable case for this court to vary its said orders. Under **Order XXXIII rule 5** of the **Civil Procedure Rules**, this court may, with consent of the parties, and having regard to the subject matter of the suit dispose off the merits of their claim and decide the same in a summary manner and on such terms as may be just. In the present application, both the interpleader and the plaintiff as evidenced by their letters dated 13<sup>th</sup> June, 2008 and 17<sup>th</sup> June, 2008, were not in principle opposed to the deposit of the said sum in an interest earning account. From the word go, the interpleader indicated that it had no interest in the sum in question other than to secure the payment of its costs in these proceedings. The costs of the interpleader have already been assessed. The plaintiff and the defendant have agreed to share the costs of the interpleader.

It appeared to the court that the interpleader opposed the application for the deposit of the amount in an interest earning account on the ground essentially that it had not been paid its taxed costs. This court is of the view that since the court has already settled the issue of where the money will be kept pending the hearing and determination of the suit, the interpleader is no longer a necessary party to these proceedings. The interpleader is thus ordered removed from these proceedings, save for its costs. I therefore order the plaintiff and the defendant to pay the interpleader its taxed costs, as agreed, within thirty (30) days of today's date or in default thereof, the interpleader shall be at liberty to execute for the same in the normal manner. The issue of the interpleader's costs should not in the premises be tied with the fundamental

question of securing the interests of the plaintiff and the defendant in the disputed sum pending the hearing and determination of the suit.

As the plaintiff did not oppose the defendant's application, I will allow the same. I think it is in the interest of justice that the sum in dispute be deposited in an interest earning account in a bank other than the interpleader pending the hearing and determination of the suit. Such deposit in an interest earning account will secure the interest of both the plaintiff and the defendant from said sum eroding in value by inflation while the dispute awaits determination by the court. I therefore order that the sum of Kshs.10,000,000/= currently deposited with the interpleader, together with any interest that may have accrued, be deposited in an interest earning account in the names of the counsel for the plaintiff and counsel for the defendant in a reputable bank to be agreed between the said advocates. The said amount shall be so deposited within fourteen (14) days of today's date. Costs shall be in the cause.

**DATED** at **NAIROBI** this 22<sup>ND</sup> DAY OF JULY, 2009.

**L. KIMARU**

**JUDGE**