



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)

Misc. Crim. Appli. 685 of 2007

IN THE MATTER OF –

FAMILY IN NEED ORGANIZATION..... APPLICANT

-VERSUS-

1. COMMISSIONER OF POLICE

2. ATTORNEY-GENERAL .....RESPONDENTS

-AND-

KENYA POST OFFICE SAVINGS BANK.....INTERESTED PARTY

RULING

Counsel for the respondents, **Mrs. Kagiri** indicated to the Court at the beginning that the State was not interested in this matter which related only to *costs*; and, that left in contention only the applicant, and the Interested Party. Counsel involved, **Mr. Moibi** (who held brief for **Mr. Ojienda**), for the applicant, and **Mr. Njoroge** who held brief for **Mr. Nderitu**, on behalf of the Interested Party, represented to the Court that there would be no need to canvass their respective cases orally, as they had filed written submissions.

The reference-point was a Chamber Summons by the applicant, dated 24<sup>th</sup> September, 2007. It was in quest of revision orders made by virtue of s.362 of the Criminal Procedure Code (Cap.75, Laws of Kenya).

The application was the subject of a ruling by **Mr. Justice Dulu** on 24<sup>th</sup> October, 2007. From that ruling, the following passage may be set out:

***“The order or decision complained about is from the Subordinate Court in Nakuru, and there is a High Court in Nakuru manned by three High Court Judges. The Subordinate Court in Nakuru is under the administrative jurisdiction of the Nakuru High Court. I will, therefore, order that the application be transferred to Nakuru High Court for hearing and determination.”***

This, apparently, is the matter that has led to the question of *costs*; and counsel have made their written submissions in that regard.

The Interested Party set this matter off by seeking costs. Learned counsel for the Interested Party, Kenya Post Office Savings Bank, in his submissions, stated that the applicant's application carried certain errors, which unnecessarily but the Interested Party to expense.

Firstly, the Interested Party had been improperly referred to as Post Bank Limited; the Interested Party had not, of its own motion, applied to Court to be enjoined as such party; the Interested Party having been served with the pleadings, found it necessary to defend, and so, instructed Advocates; the Chamber Summons, which carried 11 grounds, first came up for hearing on 1<sup>st</sup> October, 2007, and on that occasion, the applicant sought leave to amend; the applicant then filed an application by Notice of Motion, but it otherwise retained the content of the Chamber Summons; when the matter came up for hearing on 15<sup>th</sup> October, 2007, it had to be adjourned, due to want of proper service; on hearing date, on 24<sup>th</sup> October, 2007, learned counsel **Mrs. Kagiri** raised an *objection*, which the learned Judge upheld, for the purpose of having the matter transferred to the High Court in Nakuru; and thereupon, the applicant's advocate applied to be allowed to *withdraw* the proceedings. Effectively, the matter would then terminate before this Court. All consequences, therefore, fall to be determined before this Court.

Learned counsel for the Interested Party submitted that costs occasioned by the withdrawal of proceedings are linked to the question whether the proceedings are of a "civil" or a "criminal" nature. It was urged that the proceedings against the Interested Party had been brought by the *applicant*, not by a Government department responsible for prosecution; and the applicant "primarily seeks to be allowed to *operate its account with the Bank* [Interested Party], and certainly is for [for applicant's] personal gain." Counsel noted that the proceedings were set to be conducted by way of *affidavit evidence*, "as opposed to oral evidence which is the hallmark of criminal proceedings." Counsel urged that "the result of relying on affidavit evidence is that the degree of proof is on a balance of probabilities, which is consistent with civil proceedings."

To lend authority to that line of argument, counsel cited the English case, **Amand v. Home Secretary and Minister of Defence of Royal Netherlands Government** [1943] A.C. 147 (at p.162 – *per Lord Wright*):

***"The principle which I deduce from the authorities I have cited and the other relevant authorities which I have considered, is that if the cause or matter is one which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment such as imprisonment or fine, it is a 'criminal cause or matter.' The person charged is thus put in jeopardy. Every order made in such a cause or matter by an English Court is an order in a criminal matter, even though the order, taken by itself, is neutral in character and might equally have been made in a cause or matter which is not criminal."***

Since the only relief sought by the applicant against the Interested Party was the opening, or "defreezing" of its account, counsel urged that the applicant was only seeking a *private interest*, against the Interested Party.

Counsel urged that the applicant ought to have proceeded against the Interested Party by way of *judicial review* proceedings, or *constitutional reference*, and the procedure adopted by the applicant was wrong. It was submitted that the applicant had, in effect, acted in a manner that usurps the High Court's jurisdiction and power to call for records of trial Courts, by virtue of s.362 of the Criminal Procedure Code (Cap.75, Laws of Kenya); and besides, the applicant had sought to be heard, by virtue of *criminal revision* provisions, and this would be contrary to s.365 of the Criminal Procedure Code, which has no place as of right, for parties urging their claims.

**Mr. Nderitu** submitted that the question falling for determination by the Court, was not a *criminal charge* against the Interested Party, nor against the Commissioner of Police or the Attorney-General; rather, it is about the *propriety of procedures* said to have been adopted by officers of the Criminal Investigation Department, and by the Nakuru Chief Magistrate, in issuing certain warrants; and such warrants are now being challenged for being, as alleged, unconstitutional.

Counsel submitted that the proceedings initiated by the applicant were "civil" proceedings; and therefore,

this Court may rightly consider the question of costs – and it would be immaterial that counsel for the applicant headed the matter as a “miscellaneous criminal application.”

On that basis counsel submitted that, in civil proceedings, the unsuccessful litigant bears the burden of compensating the successful party for the expense of litigation, through an *award of costs*.

Counsel urged that the Interested Party was entitled to the costs of these proceedings: the *applicant* had *withdrawn the proceedings* following the Court’s order to transfer them to Nakuru, which order was based on submissions of counsel; no good reason will justify a departure from normal judicial practice – costs follow the event – in this case.

Counsel asked that the Interested Party’s costs be paid on the basis of Schedule VI of the Advocates (Remuneration) (Amendment) Order, 2006 which sets the scale-fees for proceedings in the High Court.

Counsel for the applicant, when served with the written submissions for the Interested Party, filed his response, in which he stated he had moved the Court for *revision*, by virtue of s.362 of the Criminal Procedure Code, and he had then done no more than invite the High Court to exercise its supervisory jurisdiction over a Subordinate Court, namely the Chief Magistrate’s Court at Nakuru. Counsel submitted that the challenged record of the Subordinate Court was one embodying criminal proceedings. He submitted that the relevant matters would have been governed by the Criminal Procedure Code, and not by the Civil Procedure Act (Cap.21) and its rules. This argument led counsel to the inference that since the revision provisions of the Criminal Procedure Code do not provide for costs, it is not possible in the instant matter to claim for costs.

It is not known how the applicant’s Chamber Summons of 24<sup>th</sup> September, 2007 would have been determined at the High Court in Nakuru, since the applicant withdrew it, rather than have it heard and determined as directed by the High Court in Nairobi. But the act of withdrawing the application left questions as to its *status and consequences at the Nairobi High Court Registry*, and before the Judge seised of the matter.

It is provided in s.365 of the Criminal Procedure Code that –

**“No party has a right to be heard either personally or by an advocate before the High Court when exercising its powers of revision...”**

Therefore the applicant had no right, in law, to move the Court by Chamber Summons to hear their application founded on the criminal revision powers provided for in ss.362 – 365 of the Criminal Procedure Code.

In any event, the joinder of parties, which brought in the Interested Party, was somewhat extravagant, as the concern of the applicant was a Subordinate Court warrant emanating only from a judicial office. Since the Interested Party was not a party in any criminal matter, and so no orders in the exercise of the criminal jurisdiction could have issued against the Interested Party, it follows that the Interested Party could only come before the Court in a *different kind of jurisdiction* – such as an ordinary civil jurisdiction, a judicial review jurisdiction, or some other kind of non-criminal jurisdiction. If this legal point had not been clear to the applicant, that fact, by itself, will not allow the applicant to invoke a principle governing the criminal jurisdiction, such as that relating to *non-award of costs*. For all practical purposes, the application in question, and in relation to the Interested Party, fell squarely within the ambit of the *civil jurisdiction*.

I will uphold the general tenor of the submissions made for the Interested Party; and on that basis, I will exercise the unlimited jurisdiction of this Court in both criminal and civil matters, to order as follows:

**1. The applicant shall pay costs to the Interested Party, in respect of the Chamber Summons of 24<sup>th</sup> September, 2007.**

**2. The applicant shall pay costs as aforesaid, on the basis of Schedule VI of the Advocates (Remuneration) (Amendment) Order, 2006.**

**DATED and DELIVERED** at Nairobi this 16<sup>th</sup> day of June, 2008.

**J.B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court Clerk: Huka**

For the Applicant: Mr. Ojienda

**For the Respondents: Mrs. Kagiri**

**For the Interested Party: Mr. Nderitu**