



**REPUBLIC OF KENYA**

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

**Civil Suit 293 of 2008**

**THE AGA KHAN UNIVERSITY HOSPITAL (NAIROBI).....PLAINTIFF**

**-VERSUS-**

**ANTHONY WAINAINA.....1<sup>ST</sup> DEFENDANT**

**FIVE O FOUR AUTO & EQUIPMENT.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

By an amended chamber summons dated 23<sup>rd</sup> June 2008, made under the provisions of **Order XXXIX Rules 1, 2A(1 and 2), 3, 7 and 9, Order XXXVIII Rule 5** of the **Civil Procedure Rules** and **Sections 3A and 63(e)** of the **Civil Procedure Act**, the plaintiff sought an order of interlocutory injunction to restrain the defendants by themselves or their agents from demanding from or drawing from or otherwise dealing with funds held in the 1<sup>st</sup> and 2<sup>nd</sup> defendants' bank, namely Barclays Bank of Kenya Limited and more specifically on account of and to the credit of either defendants or their agents pending the hearing and determination of the suit. The plaintiff further sought an order of the court to restrain the defendants from demanding from or drawing from or otherwise dealing with the said funds which form the subject matter of **Nairobi Chief Magistrate's court Criminal Case No.587 of 2008** (*police file reference No.113/147/2008*) pending the hearing and determination of the suit. The plaintiff alternatively sought an order of the court to compel the defendants to furnish security to produce and place to the disposal of the court the sum of KShs.21,816,967/= or equivalent thereof as may be deemed reasonable by the court. The grounds in support of the application are on the face of the application. The application is supported by the annexed affidavit of Galeb Gulam, the chief financial officer of the plaintiff.

The application is opposed. The 1<sup>st</sup> defendant swore a replying affidavit in opposition to the application. In the said affidavit, he deponed that he was previously employed by the plaintiff in its general accounts department before he was suspended from employment on 4<sup>th</sup> April, 2008. He deponed that in the course of his duties, he was instructed to deposit a cheque No.023130 payable to the paymaster general. He recalled that he deposited the said cheque at Diamond Trust Bank on 6<sup>th</sup> March, 2008 and on 7<sup>th</sup> March, 2008 the Kenya Revenue Authority acknowledged receipt of the deposit slip in respect of the said payment. He deponed that he was surprised when on 21<sup>st</sup> April 2008, the police from the Banking Fraud Department interrogated him concerning an alteration which had been made in respect of the cheque which he had earlier deposited in the month of March. He denied having altered the cheque. He further denied having been involved in any transaction relating to the diversion of the said cheque into the account of the 2<sup>nd</sup> defendant. He denied any knowledge of the 2<sup>nd</sup> defendant. He urged the court to dismiss the application with costs and further make an order lifting the freezing of his personal account at Barclays Bank, Muthaiga Branch.

At the hearing of the application, I heard rival submissions made by Mr. Makori for the plaintiff and Mr. Mutinda for the 1<sup>st</sup> defendant. The two counsel basically reiterated the contents of the application and the affidavits filed in support of their respective clients' cases. The issue for determination by this court is whether the plaintiff established a case to enable this court grant the orders sought in the application. Certain facts are not in dispute in this case. It is not disputed that the plaintiff issued cheque No.023130 for the sum of KSh.21,816,967/= payable to the paymaster general. The said cheque was dated 5<sup>th</sup> March 2008. The 1<sup>st</sup> defendant stated that he deposited the said cheque at Diamond Trust Bank as per the

instructions of the plaintiff. He obtained a deposit slip from the said bank confirming the deposit of the said cheque. The deposit slip serial No.0367054 of the Kenya Revenue Authority, Domestic Taxes Department was annexed to the affidavit sworn in support of the plaintiff's application.

When the said cheque was forwarded to Diamond Trust Bank by Barclays Bank for settlement, the bank realized that the payee in the said cheque had been altered. Instead of the payee being the paymaster general, the names appearing in the cheque was a business name "*Five O Four Auto & Equipment*". The police attached to the Banking Fraud Department were duly informed. They interrogated the 1<sup>st</sup> defendant. Criminal proceedings were commenced before the Chief Magistrate's court against the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant was suspended by the plaintiff from employment. The plaintiff now seeks orders of this court to protect the said sum from being withdrawn from the account where it had been deposited pending the hearing and determination of the suit. The 1<sup>st</sup> defendant was not opposed to the application but craved the indulgence of the court to have the order freezing his account lifted.

The registered proprietor of the 2<sup>nd</sup> defendant is one Timothy Mwathe. According to the records kept by the Registrar of Companies, the physical address of the defendant is No.19A Embakasi Airport Road. Moses Musembi, a duly authorized process server was instructed by the plaintiff's advocate to serve the 2<sup>nd</sup> defendant. His search for the 2<sup>nd</sup> defendant proved futile. The plaintiff served the 2<sup>nd</sup> defendant by substituted service. The notice was published in the Daily Nation edition of 3<sup>rd</sup> July 2008. The 2<sup>nd</sup> defendant neither entered appearance nor filed any papers in opposition to the application. This court therefore deemed that the 2<sup>nd</sup> defendant was not opposed to the application.

I have carefully considered the facts of this case. It was evident that an attempt was made, at least by the 2<sup>nd</sup> defendant who is the beneficiary of the cheque, to defraud the Kenya Revenue Authority from collecting tax from the plaintiff. While it was not clear at what stage of the banking process of the said cheque the payee of the cheque was altered to be in favour of the 2<sup>nd</sup> defendant, what is without doubt is that the plaintiff established that it issued the particular cheque in settlement of income tax due from its employees for the month of February 2008. The 1<sup>st</sup> defendant is not claiming the amount deposited in the account of the 2<sup>nd</sup> defendant. The plaintiff has been unable to trace the 2<sup>nd</sup> defendant despite applying much effort.

It was for that reason that the court allowed the plaintiff to serve the 2<sup>nd</sup> defendant by substituted service. This court is of the opinion that the facts of this case disclose circumstances under which this court can exercise its inherent jurisdiction and make right an unlawful act which apparently was perpetrated by fraudsters. The said fraudsters intended to deny the Government of Kenya its legitimate revenue obtained from taxation. This court therefore invokes its inherent jurisdiction under **Section 3A** of the **Civil Procedure Act** and order the said sum of KShs.21,816,967/= which is currently deposited in the 2<sup>nd</sup> defendant's account at Barclays Bank of Kenya Limited to be withdrawn therefrom and be paid to the rightful beneficiary on the said cheque i.e. the paymaster general. I hereby order Barclays Bank of Kenya Limited to issue a banker's cheque of the said amount of KShs.21,816,967/= in the name of the paymaster general and thereafter release the said banker's cheque to the plaintiff to enable the plaintiff settle the income tax due in respect of its employees for the month of February 2008. It was apparent that there was a possibility that the 1<sup>st</sup> defendant was a victim of circumstances. Since the a Criminal Case against him is pending before the Chief Magistrate's court, I will refrain from making further comments regarding his conduct during the material period.

In the circumstances of this case, since the 1<sup>st</sup> defendant is not laying any claim on the amount which is the subject matter of the suit, I decline to make any orders against him as prayed by the plaintiff. The costs of this application shall be in the cause.

**DATED at NAIROBI this 30<sup>th</sup> day of July 2008.**

**L. KIMARU**

**JUDGE**