



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

Civil Suit 3665 of 1991

PETER NG'ANG'A MUIRURI.....PLAINTIFF/RESPONDENT

-VERSUS

CREDIT BANK (K) LTD.....DEFENDANT/APPLICANT

RULING

This is a preliminary ruling in the nature of directions, regarding the defendant's Notice of Motion dated 10th February, 2005 and filed on 22nd February, 2005. The application was filed under sections 3A and 34 of the Civil Procedure Act (Cap.21), and Order L of the Civil Procedure Rules. Its prayers are for orders:

- (i) that, the sum of Kshs.1,794,193/90 with accruing interest standing on Fixed Deposit Account No. 01520-736451-00, Standard Chartered Bank of Kenya Ltd, Harambee Avenue Branch as at 1st July, 2003 in the joint names of M/s. Nyachae & Co. Advocates and F.N. Wamalwa & Co. Advocates, rightfully belongs to the defendant;
- (ii) that, the aforesaid sum be released to the defendant;
- (iii) that, costs be awarded to the defendant.

Counsel, **Mr. Wamalwa** for the plaintiff/respondent, and Mr. Ashitiva for the defendant/applicant, appeared before me on 16th May, 2005. It immediately became clear that there was no agreement regarding the hearing of the instant application. Whereas Mr. Wamalwa stated that there was agreement that the matter be deferred, during the pendency of a constitutional application before the Chief Justice, touching on the same subject, Mr. Ashitiva was of the view that the said constitutional matter did not give reason for delaying hearing in the instant application. It became necessary to direct that the matter be mentioned before me on 10th June, 2005.

On 10th June, 2005 **Mr. Ashitiva** stated that the matter which was before the Chief Justice, had already been mentioned the previous day, on 9th June, 2005; and in the premises, it was right to now proceed with the instant application. He said the object of the instant application was to determine the rightful owner of money currently held in the joint account held by the two firms of advocates, whereas the matter before the Chief Justice was in a different cause. Counsel submitted that it was inappropriate, in the circumstances, to stay the hearing of this matter pending the disposal of the matter before the Chief Justice.

Mr. Wamalwa submitted that the constitutional matter pending before the Chief Justice raises the issue of

ownership of the money in question. In his view, it was not proper to entertain the present application and thereby deal with matters that will be determined in a constitutional Court, as this would lead to conflicts in Court orders. Learned counsel noted that, what had been before His Lordship the Chief Justice on 9th June, 2005 was a mention for directions, for the hearing of the constitutional application; and that counsel for the applicant herein, had already been granted leave to file a preliminary objection in the other application. Therefore, counsel submitted, the constitutional application was already in progress, and it should be given time to proceed. The constitutional application, **Mr. Wamalwa** stated, touched on the same money which is the subject of the instant application.

Learned counsel **Mr. Ashitiva**, thought otherwise: “ownership of the money is not the issue before the Constitutional Court.” In his view, the constitutional case has more to do with the powers exercised by the Chief Justice as a Judge — and so it would not go to the question of ownership. Mr. Ashitiva saw no connection between the two applications; and he submitted that there were no limiting rules in the way of the Court proceeding with the Notice of Motion of 10th February, 2005.

However, **Mr. Ashitiva** suggested that since the constitutional matter was due for mention before the Chief Justice on 25th July, 2005 the instant application could also be placed before him on that occasion, to enable His Lordship to give necessary directions. Learned counsel, **Mr. Wamalwa** was not in support of the suggestion, for the reason that the instant matter is not a constitutional matter. In his view, it should be taken that the instant matter has no priority over the constitutional application, and so it should be stood over generally. **Mr. Ashitiva**, however, submitted that since the constitutional matter was already before the Chief Justice, this matter also should be placed before him, as he had powers to entertain this matter either substantively or for the purpose of giving directions.

While considering counsel’s submissions, I have not had the advantage of first-hand information on the records of the constitutional matter itself; but it is clear from the submissions that the constitutional matter touches on an aspect of the claim which is the subject of the application now before me. It is not possible for me to establish the merits of the contending claims about the extent of coincidence in the issues raised by the two applications. It is not necessary for me, however, to determine this question on the merits, at this stage. This is only a directions stage; and directions can indeed be given, as learned counsel **Mr. Ashitiva** suggests — by the Chief Justice who is now seized of the constitutional matter and is due to mention it again on 25th July, 2005. It will do no harm, but instead will greatly help to steer things forward, for the Chief Justice to have before him the two files, on 25th July, 2005.

Therefore, I now direct that the *Deputy Registrar shall arrange for this file to be placed before His Lordship the Chief Justice, on 25th July, 2005* when counsel will be appearing before him. His Lordship, as he mentions the constitutional matter, will also, on that occasion, have the opportunity to give appropriate hearing directions in relation to the defendant’s Notice of Motion of 10th February, 2005. **Directions accordingly.**

DATED and DELIVERED at Nairobi this 24th day of June, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Defendant/Applicant: Mr. Ashitiva, instructed by M/s. Nyachae & Co.

Advocates

For the Plaintiff/Respondent: Mr. Wamalwa, instructed by M/s. Wamalwa & Co.

Advocates.