



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI**

Civil Case 342 of 2005 (O.S)

**IN THE MATTER OF ERIC OLOO NYANGOL ADVOCATE
t/a ALOO & COMPANY ADVOCATES**

BETWEEN

**DIXON OBEL OTONDO.....PLAINTIFF/
APPLICANT**

VERSUS

**ENOCK ALOO NYAGOL t/a ALOO & CO.
ADVOCATES.....DEFENDANT/RESPONDENT**

R U L I N G

The Plaintiff is the erstwhile client of the Defendant. By originating summons dated 6th June, 2005 he sought the following orders against the Defendant:-

“1. That the Defendant/Respondent do render to the Plaintiff/Applicant a just and true account of all the monies received by the Defendant/Respondent on behalf of the Plaintiff/Applicant in respect of the sale proceeds of property known as L.R. No. Nairobi/Block 97/450 situate at Tassia Estate, Outer Ring Road, Nairobi, wherein the Defendant/Respondent had acted for the Plaintiff/Applicant in his capacity as the Plaintiff/Applicant’s advocate.....

2. That the Defendant/Respondent do pay and/or deliver up to the Plaintiff/Applicant all monies found to be lawfully due and owing from the Defendant/Respondent to the Plaintiff/Applicant on the taking of accounts pursuant to prayer 1 above.

3. That in default of payment within 14 days of the date of the order judgment be entered against the Defendant/Respondent for the sum of KShs.5,000,000/= together with compound interest thereon at the rate of 25% p.a. with effect from 1st October 2004 until the date of payment thereof in full.

4. That any other or further order be made as may suit the circumstances of this case.

5. That the Defendant do pay to the Plaintiff his costs of this summons.....with interest at court rates.....”

The Defendant was served with the summons sometime in June 2004. He did not file a replying affidavit. When the originating summons came up for hearing on 27th July 2005 the Defendant sought adjournment

and leave to file and serve replying affidavit out of time. Both were granted. It was ordered that the Defendant do file and serve his replying affidavit (in response to the originating summons) within ten (10) days. He was also ordered to pay the day's court adjournment fees before the date given for hearing, which was the 21st September, 2005. The Defendant did not pay those court adjournment fees as a result of which the matter was not listed for hearing on 21st September, 2005. The Plaintiff paid the court adjournment fees and was granted another hearing date, being 25th October 2005. On that date the Defendant had not filed any replying affidavit and yet again sought adjournment upon the ground that he was attending to his sick wife. He also stated that he had filed a constitutional reference by notice of motion dated 20th September, 2005 which ought to be heard first. The application for adjournment was opposed strenuously by the Plaintiff. The court reluctantly allowed it but made it clear to the Defendant that should he seek to rely on the ground of his wife's alleged illness in another application for adjournment, he shall be required to produce a medical certificate to that effect. The matter was then fixed for 3rd November, 2005 for argument whether or not the notice of motion dated 20th September, 2005 raises any constitutional issue to be referred to the Constitutional Division.

On 3rd November, 2005, again the Defendant sought adjournment upon the ground of the alleged illness of his wife. As no medical certificate verifying that alleged illness was produced adjournment was refused. The learned counsel who made the application for adjournment on behalf of the Defendant had no further instructions in the matter, and the Plaintiff therefore proceeded ex parte. The Plaintiff's learned counsel, Mr. Kibet, submitted that there is no constitutional issue raised in the notice of motion dated 20th September, 2005. He pointed out that the originating summons merely sought an order for an advocate to account to his client for the proceeds of a sale of land in which the advocate (the Defendant) acted for the client (the Plaintiff). Mr. Kibet further submitted that despite being served with the originating summons way back in June 2004 the Defendant had not filed any replying affidavit in response thereto. Therefore, the facts as they were stated in the affidavit sworn and filed in support of the originating summons are undisputed. Mr. Kibet finally submitted that looking at the affidavit sworn and filed in support of the notice of motion the only issue raised is, that concurrent with the originating summons, there has been a criminal charge preferred against the Defendant for theft of the Kshs.5,000,000/= which is the same amount upon which the Plaintiff seeks an account in the originating summons. He pointed out that section 193A of the Criminal Procedure Code, Cap 75, provides that a criminal charge can co-exist with a civil suit. In his view there is no constitutional issue whatsoever raised and the notice of motion is an abuse of the process of the court. The points argued by Mr. Kibet are set out in the grounds of opposition dated 27th October, 2005. He also cited the case of **Mitchell and Others v Director of Public Prosecutions and Another (1987) LRC (Const) 127** in support of the submission that the notice of motion was an abuse of the process of the court. This is a case of the Court of Appeal of Grenada. I am sure Mr. Kibet would have found a relevant authority here at home had he looked.

Section 193A of the Criminal Procedure Code provides:-

“193A. Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

I think, with respect, that Mr. Kibet has misapprehended the meaning of this section. There are no criminal proceedings before me sought to be stayed on account of any civil proceedings. On the contrary it is the civil proceedings before me that are sought to be stayed or struck out on account of a criminal proceeding pending before a subordinate court. But having said that, no law has been brought to my attention under which I would have to stay the present proceedings on account of the criminal proceeding. But the immediate issue before me is whether or not the notice of motion dated 20th September, 2005 raises any constitutional issue that may be referred to the Constitutional Division for determination. I have read the said notice of motion and the affidavit sworn by the Defendant in support thereof. In that application the Defendant seeks three declarations as follows:-

a) that the instant suit constitutes a breach of the Defendant's constitutional right to a fair trial under section 77 of the Constitution of Kenya;

b) that the pendency and/or continuance of the instant suit constitutes a breach and continuing breach of the Defendant's constitutional right to a fair trial under section 77 of the Constitution; and

c) that the orders made by the court on 27th July, 2005 constitute a breach and a continuing breach of the Defendant's constitutional right to a fair trial under section 77 of the Constitution of Kenya.

(The order of 27th July, 2005, it will be recalled, is the one that granted the Defendant leave to file and serve his replying affidavit out of time to the originating summons and fixed the originating summons for hearing on 21st of September, 2005, *inter alia*.)

The Defendant also seeks two orders in the notice of motion; one, to stay permanently the said order of 27th July, 2005 and, two, to strike out the present originating summons and dismiss the instant suit.

In the supporting affidavit the Defendant has deponed that he has been charged with the offence of theft by agent contrary to section 283 of the Penal Code, Cap 63, in Kibera SPM Criminal case No. 9673 of 2004. He further depones that the facts giving rise to that charge are the same as have given rise to the present suit, and further that he was criminally charged as above following the complaint of the Plaintiff. He has further deponed that it is practically impossible for him to address himself to the issues of fact in this present suit without compromising his intended line of defence in the criminal case should it be necessary for him to defend himself, and further that he is apprehensive that the continuance of this present suit and the aforesaid orders of court of 27th July, 2005 compromise his constitutionally guaranteed right to a fair trial in the criminal case under section 77 of the Constitution of Kenya.

To my mind the Plaintiff's right to have an account from the Defendant of monies received on his behalf by the Defendant is equally guaranteed by the Constitution. I cannot see how the Plaintiff's pursuit of that right can compromise the Defendant's right to a fair trial in the criminal case. Nor can I see how a reply by the Defendant to the originating summons could possibly compromise his right to a fair trial in the criminal case. It would not be just to allow the Plaintiff to be obstructed in his pursuit of an account from the Defendant of monies received on his behalf merely because the Defendant is facing a criminal charge over the same monies. To do so would be to trifle with judicial process.

For the above reasons I do not find any constitutional issue disclosed in the notice of motion dated 20th September, 2005 that I should refer to the Constitutional Division for determination. The application is indeed an abuse of the process of the court. In the event, therefore, the said notice of motion is hereby struck out with costs to the Plaintiff.

Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF NOVEMBER, 2005.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 2ND DAY OF DECEMBER, 2005.