

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO.3665 OF 1991

PETER NGANGA MUIRURI.....PLAINTIFF

VERSUS

CREDIT (K) LIMITED..... DEFENDANT

RULING

By a Notice of Motion filed on 3.11.2000 the applicant is asking for Orders that:

(1) That the Defendant do forthwith pay Ksh.981,704/03 being the deficit owing on the fixed deposit together with interest thereon at 15% per annum from the 28th March to 2000 to the date of payment into the joint interest earning fixed deposit account No. 01520-7 36451 with the Standard Chartered Bank, Harambee Avenue Branch.

(2) That the balance outstanding on the said fixed deposit account be released to the plaintiff/applicant in terms of paragraph 2 of M/s Nyachae's letter dated 22nd July, 1997.

The applicant's reason for demanding this money is that the defendant delayed in opening the fixed deposit account and that the amount falls short of the amount due.

In the Supporting affidavit the Plaintiff depones that the defendant in compliance with the Court of Appeal Order opened the account with the sum of kshs.1,658,949/65 leaving a deficit of kshs.584,640/27. He depones further that the ownership of the money had been decided by a consent order entered into by the parties. For these reasons he asks that the court orders the release of the money to the applicant.

The application is opposed on the grounds that any delay in opening the account was caused by the defendant and or his advocates who had refused to comply with the requirements demanded by the Bank. The joint account was opened on 27.3.2000 when Mr. Wamalwa the Learned Counsel for the applicant complied with the requirement of the Bank.

I have read the affidavits in support and against this application. The application emanates from a Court of Appeal No. 263 of 1998. To understand what is in dispute it will be necessary to look at the Order itself. The Order in the relevant part reads:

"M/s Nyachae and Company Advocates are hereby ordered to deposit within the next 30 days the sum of Shs.1,373,832.40 plus interest thereon @ 15% per annum from the date of payment thereof by the advocates to the Bank until the date of such deposit, in an interest bearing account in the joint names of M/s Nyachae and F.N. Wamalwa and Company Advocates and that such sum shall remain so deposited until the dispute as to the said amount is resolved. We also Order further that the joint account be opened not with Credit Bank Limited but with any Nairobi Branch of Barclays Bank of Kenya Limited....."

Let us now see whether the parties have complied with the Order as it is, so as to pin point the area of dispute.

The Order directs the parties that the Joint Account be opened in the names of the two firms of advocates with Barclays bank Limited. It was therefore the duty of each firm to meet the requirements asked for by the bank to open such an account. From the facts in the affidavit it is quite clear that the firm of F.N. Wamalwa & Company Advocates were not able to meet those requirements. They had to get the Order varied so that they can use another Bank. This is not in dispute. The delay if any in opening the

account can not be attributed to the firm of Nyachae & Company Advocates' but to F.N. Wamalwa & Company Advocates who are now trying to put the blame on Nyachae & Company Advocates . This being the position the applicant cannot rightly expect the defendants to pay for any deficit which is based on the delay in the opening of the account and which is not due to the defendants fault.

The Order specifically directs that the sum should remain so deposited until the dispute is resolved. Mr. Wamalwa the Learned Counsel for the applicant asks that this deposited amount be released to the plaintiff applicant. He did not in making this request show that the dispute has been resolved. Release of this money would contravene the Order. I do not quite understand on what basis the money is to be released in the face of these clear terms of the Order.

It is in the same vein that I fail to understand the contention by Mr. Wamalwa during the hearing of this application that the opening of the account was directed to the respondents. The order clearly refers to the two firms and not to one.

I find that the Court of Appeal Order is quite clear on what the advocates were ordered to do and the Order is still valid. I do not need to go outside the explicit terms of this order to determine this application. I find no merit in this application which to my mind is premature. I dismiss the application with costs to the Respondents.

Delivered and dated this 3rd day of February, 2001

KASANGA MULWA

JUDGE