



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 3004 OF 1996**

**STANDARD CHARTERED BANK LTD.....PLAINTIFF**

**VERSUS**

**OVERSEAS FOREX BUREAX LTD.....DEFENDANT**

**RULING**

**At the centre of the proceedings was a bankers draft in the sum** of kshs. 5,650,000/-. This sum was credited to account No.229737089 owned by the first defendant and held with the second defendant.

It turned out that the plaintiff's instructions to deposit the sum aforesaid were a fraud. The money had however been deposited per instructions.

The plaintiff then instituted a suit demanding the sum of kshs. 5,650,000/- as belonging to it. There was also a prayer for an injunction to restrain the disposal of the money pending the determination of the suit. In the alternative, the plaintiff sought an order that the said monies be placed on deposit to earn interest.

Alongside the plaint, the plaintiff filed an application for an injunction by way of chamber summons upon which interim orders were granted.

When the application came up for hearing inter partes, an order was recorded in the following terms:-

- “1 That the injunction granted by this Honourable Court on the 4th day of December, 1996 be and is hereby lifted.
- 2 That the 1st defendant do immediately release and mandate the 2nd defendant to pay the sum of kshs. 1,750,000/- to the plaintiff.
- 3 That the suit be set down for hearing by the parties taking a date at the registry.
- 4 That the costs of this application be in the cause.”.

By an application dated 14th August, 1998, the learned counsel for the second defendant moved the court for orders this suit has been adjusted and wholly settled by agreement of partes and that the costs of the suit and of this application be awarded to the second defendant. The said application which is by way of Notice of Motion under Order 24 Rule 6 of the Civil Procedure Rules is based on the affidavit of the learned counsel for the second defendant and the ground that the suit was wholly compromised by a lawful agreement made between the parties on 15th January, 1997.

The plaintiffs counsel filed grounds of opposition and a replying affidavit in which the orders sought were opposed. However when the application came up for hearing, the learned counsel for the plaintiff

conceded the application as the plaintiff does not wish to pursue the matter any more.

The first defendant however opposes the application and I have on record grounds of opposition and a replying affidavit. I also have the submissions of counsel appearing for the respective parties.

After the order of 15th January, 1997, the advocates for the plaintiff wrote to the advocates for the second defendant with reference to the said court order to the effect that after payment of the sum of kshs. 1,750,000/- to the plaintiff, the balance may be released to the first defendant. The letter giving those instructions is dated 4th February, 1997 the advocates for the second defendant executed those instructions by writing to both the advocates for the plaintiff and the first defendant. Acknowledgments followed but the advocates for the first defendant asked to be advised on the interest accrued.

The order of 15th January, 1997 did not address the issue of interest. However the order given on 4th December, 1996 directed that the monies be placed on deposit to earn interest. It did not direct in whose credit that interest should be. That being the case any party claiming the same share have to find another forum to agitate the same.

A suit is the property of the person or party who institutes the same.

Here it is the property of the plaintiff. The plaintiff has intimated to the court it does not wish to go on with the matter. In effect the plaintiff agrees, the suit has been wholly settled by agreement of the parties. The first defendant may not agree, but there is no way it can step into the shoes of the plaintiff and carry its mantle.

I find that the application must and hereby succeeds. The second defendant shall have the costs of this application.

Orders accordingly.

Dated and delivered at Nairobi this 19th day of February, 1999

A. MBOGHOLI MSAGHA

JUDGE

Nyawara for 1st defendant

Aruwa for Ougo for 2nd defendant

Miss Dar for plaintiff