



**Gatundu & Company Advocates v Penelly Construction &  
Engineering Limited (Miscellaneous Application E819 of 2021)  
[2024] KEHC 14728 (KLR) (Commercial and Tax) (22 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14728 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E819 OF 2021  
FG MUGAMBI, J  
NOVEMBER 22, 2024**

**BETWEEN**

**GATUNDU & COMPANY ADVOCATES ..... PLAINTIFF**

**AND**

**PENELLY CONSTRUCTION & ENGINEERING LIMITED ..... DEFENDANT**

**RULING**

1. This Ruling determines the defendant's application dated 13<sup>th</sup> August 2024, seeking a review of this Court's Ruling of 7<sup>th</sup> June 2024. It is premised on the ground of an apparent error on the face of the record at paragraph 23 of the Ruling. The application is supported by an affidavit sworn by Simon Chelugui on 13<sup>th</sup> August 2024.
2. The defendant contends that at paragraph 23 of the said Ruling, the Court indicated that the arbitral award is Kshs. 373,503,286.56/- yet the correct position is that the arbitral award was Kshs. 64,728,160/-. For this reason, the plaintiff contends that there is an arithmetical error in calculation of the figures in the said paragraph.
3. It is contended that the figure of Kshs. 29,955,286.64 is not based on the correct arbitral award and that will be highly prejudicial to the defendant in the final analysis on what the legal fees due to the plaintiff might be. The defendant argues that it will suffer irreparable harm if the error is not corrected and that the application has been brought timeously and in good faith.
4. The application is opposed by the plaintiff through a replying affidavit sworn by Advocate Alex Gatundu on 4<sup>th</sup> October 2024. The main ground raised is that the matter has already been heard and the issue of whether to base the instruction fees on the value of the subject matter of the arbitration



(the principle sum and the counterclaim of Kshs. 373,503,286.56/-) or the arbitral award of Kshs. 64,728,160/- is awaiting determination.

## Background

5. The background to the litigation between the parties is that the plaintiff filed an Originating Summons (OS) dated 22<sup>nd</sup> September 2021, seeking Kshs. 39,311,456.68/- as legal fees plus costs and interest, from the defendant. The claim arose from an advocate client relationship, by dint of written instructions dated 22<sup>nd</sup> December 2020. The plaintiff represented the defendant in an arbitration against Rural Electrification Authority (REA) and defended the counter-claim against them by REA. The arbitration was presided over by Mr. Paul Mwaniki Gachoka (the Arbitrator).
6. Pending the hearing and determination of the OS, the advocate filed an application dated 22<sup>nd</sup> September 2021 seeking pre-judgment attachment or deposit of security to the tune of Ksh. 39,311,456.68. This Court rendered itself in a Ruling dated 7<sup>th</sup> June 2024. It is this Ruling that has precipitated the present application.

## Analysis and Determination

7. The Court has power to grant a review of an order or decree pursuant to Section 80 of the Civil Procedure Act for the reasons expounded under Order 45 rule 1 of the Civil Procedure Rules. The power is discretionary and must be exercised with reason and not on a whim.
8. The defendant's application is based on the ground that there is an error apparent on the face of the record at paragraph 23. For ease of reference, paragraphs 23, 24 and 25 of the Ruling of 7<sup>th</sup> June 2024 are reproduced below:
  23. I am satisfied that the claim by the advocates is on the face of it prima facie claim to which the client has not presented evidence of financial capability to pay. I however agree with the client that the amount sought to be attached is not commensurate with the agreement between the parties. Be that as it may, I am convinced that a case has been made out for the attachment of monies equivalent to the amounts stated in the legal fees agreement between the parties. I see no reason as to why the same should not be attached from the monies held by the now discharged garnishee.
  24. The same shall be calculated based on 8% of the arbitral award of Kshs.373,503,583/= together with disbursements of Kshs. 75,000/= which adds up to Kshs. 29,955,286.64. On the amount will be added a provisional amount for costs of this application and of the suit should the advocate be successful, which amount is a contingency of Kshs. 500,000/=.

Disposition

  25. The advocates 1<sup>st</sup> application is overtaken by events and is therefore spent. The 2<sup>nd</sup> application is successful in as far as the amount to be attached in court shall be Kshs. 30,455,286.56. The rest of the monies shall be released and paid out to the client forthwith. The costs of this application shall await the outcome of the suit.”
9. From the above, I presume that the defendant intended to seek a review of the Ruling with respect to paragraph 24, not 23 and particularly the observation by the Court that ‘the same shall be calculated based on 8% of the arbitral award of Kshs.373,503,583/=’.
10. The defendant states that this amount is erroneous because it is the value of the subject matter of the arbitration, as the correct amount of the award is Kshs. 64,728,160/=. Neither of the parties attached



the arbitral award to the application to prove this disparity in the figures, which may possibly explain the inadvertent error. For the sake of finality of the matter I have however taken the liberty to peruse the Case Tracking System (CTS) and I have come across the award dated 8<sup>th</sup> March 2022 annexed to the plaintiff's application of 20<sup>th</sup> April 2023.

11. The award reads in part as follows:
  1. The Claimant is awarded the sum of Kshs 70,150,000/= with interest at 14% from the date of this award until payment in full.
  2. The Respondent is awarded the sum of Kshs 5,421,840,00/= with interest at 14% from the date of this award until payment in full.
  3. The sums awarded to the Respondent in (2) above shall be deducted and/or set off from the sums awarded to the Claimant in (1) above, and therefore, the amount payable to the Claimant by the Respondent shall be the sum of Kshs 64,728,160/=" (emphasis added)
12. On that account it is in fact true that the fee ought to have been calculated on the basis of the award, to wit Kshs. 64,728,160/=.

### **Disposition**

- a. Accordingly, the defendant's application dated 13<sup>th</sup> August 2024 is allowed. Consequently, the Ruling of 7<sup>th</sup> June 2024 is reviewed and varied to the extent that paragraph 24 shall read as follows:

‘The same shall be calculated based on 8% of the arbitral award of Kshs. 64,728,160/= together with disbursements of Kshs. 75,000/= which adds up to Kshs. 5,253,252.80. On the amount will be added a provisional amount for costs of this application and of the suit should the advocate be successful, which amount is a contingency of Kshs. 500,000/=.
- b. This amount shall accordingly be correctly reflected at paragraph 25 of the said Ruling. Each party shall bear their own costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 22<sup>ND</sup> DAY OF NOVEMBER 2024.**

**F. MUGAMBI**

**JUDGE**

