



Nthurima v Jubilee Insurance Company of Kenya Limited; Eagle Africa Insurance Brokers (K) Limited (Third party) (Commercial Case 408 of 2013) [2023] KEHC 24551 (KLR) (Commercial and Tax) (29 September 2023) (Ruling)

Neutral citation: [2023] KEHC 24551 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 408 OF 2013
MN MWANGI, J
SEPTEMBER 29, 2023**

BETWEEN

DANIEL ISAAH NTHURIMA PLAINTIFF

AND

THE JUBILEE INSURANCE COMPANY OF KENYA LIMITED DEFENDANT

AND

EAGLE AFRICA INSURANCE BROKERS (K) LIMITED THIRD PARTY

RULING

1. The defendant filed Notice of Motion application dated 26th May, 2022 pursuant to the provisions of Articles 48 & 50 of the Constitution of Kenya 2010, Sections 1A, 1B, 3A & 34 of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all the inherent powers of the Court seeking the following orders -
 - i. That this Honourable Court be pleased to discharge the order dated 15th February, 2022;
 - ii. That as consequence of the discharge of the order of 15th February, 2022, that an order do issue directing that the monies deposited in the High Court via RTGS by the defendant's Counsel on 24th February, 2022 in Judiciary of Kenya Account held at KCB Bank vide transaction reference 555444EZCNV9W8 be released back to the defendant through its Advocates whose account particulars are; (sic)

Name of Account : Majanja Luseno & Company

Advocates



Bank : NCBA Bank Kenya
Branch : Harambee Avenue
Account Number : 120640042
Swift Code : NCBACKENA
Mandatory Narration : J001/344/SBL

- iii. That costs of this application be in the cause.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on 26th May, 2022 by Philomena Theuri, the defendant's head of claims. In opposition thereto, the plaintiff filed a replying affidavit sworn by Daniel Isaiah Nthurima, the plaintiff herein, on 22nd June, 2022. The Third Party filed a replying affidavit sworn on 8th September, 2022 by Harun Gicho, the Chief Executive Officer of the Third Party herein.
 3. The instant application was canvassed by way of written submissions. The defendant's submissions were filed by the law firm of Majanja Luseno & Company Advocates on 29th September, 2022. The plaintiff's submissions were filed by the law firm of Gitonga Muriuki & Company Advocates on 24th October, 2022 and the Third Party's submissions were filed on 12th December, 2022 by the law firm of Kaplan & Stratton Advocates.
 4. Mr. Muchiri, learned Counsel for the defendant submitted that the terms of the consent dated 15th February, 2022 were clear that the sum of Kshs.1,075,821.00 was to be deposited in Court as a condition for stay of execution pending the hearing and determination of Civil Appeal (Application) No. E464 of 2021-The Jubilee Insurance Company of Kenya Limited v Daniel Isaiah Nthurima and Eagle Africa Insurance Brokers (K) Limited.
 5. He further submitted that Civil Appeal (Application) No. E464 of 2021 was determined vide a consent dated 12th April, 2022 directing that there be a stay of execution of the judgment and decree herein pending the hearing and determination of Civil Appeal No. E464 of 2021 with the condition that the applicant therein was to within 30 days from the date of the consent deposit the sum of Kshs.30 Million in a joint interest earning account in the names of Messrs. Kaplan & Stratton Advocates, Gitonga Muriuki Advocates and Majanja Luseno & Company Advocates at Diamond Trust Bank.
 6. Counsel submitted that on 12th April, 2022, the defendant complied with the consent order dated 12th April, 2022 by depositing the sum of Kshs.30 Million in a joint interest earning account No. 0774406001 at Diamond Trust Bank operated in the names of Counsel for parties herein. Mr. Muchiri stated that in view of the above and given that the terms of the consent order dated 15th February, 2022 have since been overtaken by events, there is no basis upon which the sum of Kshs.1,075,821.00 can continue being held by the Judiciary. He cited the Court of Appeal case of *Munyiri v Ndunguya* [1985] eKLR and submitted that the Consent Order dated 15th February, 2022 ought to be discharged having run its course.
 7. Mr. Muriuki, learned Counsel for the plaintiff relied on the case of *Kridha Limited v Peter Salai Kituri* [2020] eKLR and the Supreme Court's holding in the case of *Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 others* [2019] eKLR and submitted that the crux of the instant application centers on the aspect of exercise of judicial discretion. He further submitted that the defendant has not set out facts and circumstances which warrant them to benefit from this Court's discretion, and in any event, the defendant has on several instances admitted that it owes the plaintiff money in excess of Kshs.40,000,000/= in respect of the decretal sum in this matter.



8. Counsel stated that the plaintiff's party and party costs in this Court have been taxed in the sum of Kshs.639,933.00, which remain outstanding to date. He therefore urged this Court to direct that the said Kshs.1,075,821.00 do remain within the Court's ambit as security for his costs and interest. He stated that any amount over and above the said costs and interest can be applied towards satisfying the decretal sum. Mr. Muriuki contended that the defendant at paragraph 8 of its submissions is inviting this Court to shift the burden of proof from the defendant to the plaintiff and the third party in respect to the application herein and urged the Court to resist the said invitation as it is without basis and merit.
9. Mr. F. Ojiambo (SC), for the Third Party submitted that by a judgment and decree of this Court dated 9th October, 2020, the Court entered judgment for the plaintiff against the defendant for the sum of Kshs.18,621,354.00 plus interest on the said sum from 1st November, 2011 until payment in full, dismissed the plaintiff's claim as against the Third Party with costs to be paid by the defendant. He submitted that the plaintiff's costs were taxed at Kshs.639,933.00 and the Third Party's costs were taxed at Kshs.435,888.00. Senior Counsel stated that the defendant filed an appeal at the Court of Appeal against the said judgment being Civil Appeal No. E464 of 2021.
10. He stated that in the Court of Appeal, the defendant filed an application seeking stay of execution of the decree of this Court pending the hearing and determination of the said Appeal, but before the Court of Appeal could hear and determine the said application, the defendant filed another application dated 24th December, 2021 in this Court seeking stay of execution of the decree of this Court pending the hearing and determination of the application filed at the Court of Appeal. He further stated that on 15th February, 2022, the parties herein recorded a consent that the defendant deposits the sum of Kshs.1,075,821.00 in Court as a condition for stay of execution of this Court's decree, pending the hearing and determination of the application for stay of execution at the Court of Appeal, thus compromising the application filed in the High Court.
11. It was submitted that the parties herein compromised that application for stay of execution at the Court of Appeal by a consent dated 12th April, 2022, wherein the parties agreed that the defendant be granted an order for stay of execution of the decree of this Court pending the hearing and determination of the appeal, on condition that it deposits Kshs.30 Million in a joint interest earning account in the names of Counsel for the parties. It was stated by Counsel that the defendant has since complied with the said condition.
12. Senior Counsel expressed the view that the instant application is without merit since it is clear that the terms of the consent dated 15th February, 2022 were to secure the plaintiff and the Third Party in respect to the costs awarded to them and the defendant offered no security in terms of the decretal sum. He however stated that the consent recorded by the parties herein at the Court of Appeal will only offer the plaintiff security for the decretal sum in the event the appeal therein is eventually dismissed, thus leaving the Third Party to suffer great prejudice if the sums held in Court are released to the defendant. Mr. F. Ojiambo (SC) was of the view that in this case, justice demands that the monies deposited in Court pursuant to the Consent Order dated 15th February, 2022 be retained in Court pending the hearing and determination of Civil Appeal No. E464 of 2021 in the Court of Appeal.
13. He submitted that the defendant stands to suffer no prejudice in the event the instant application is not allowed since the said sum of Kshs.1,075,821.00 is secure and shall be available in the event the defendant is successful in its appeal. He urged this Court to seek to do substantive justice in furtherance of the overriding objective by disallowing the application herein as no sufficient grounds have been shown by the defendant as to why the said application should be allowed.



Analysis And Determination.

14. I have considered the instant application, the affidavit filed in support thereof, the replying affidavits by the plaintiff and the Third Party and the written submissions by Counsel for the parties. The issue that arises for determination is whether the money deposited in the Judiciary account by the defendant should be released to the defendant.
15. In the affidavit filed by the defendant, learned Counsel deposed that on 28th December, 2021 Hon. Lady Justice Abigail Mshila granted the defendant an order for stay of execution until 15th February, 2022.
16. The defendant averred that on 12th April, 2022, Civil Appeal (Application) No. E464 of 2021 came up for hearing when a consent was recorded to the effect that a stay of execution of the judgment and decree in HCCC 408/2013 was granted pending the hearing and determination of Civil Appeal No. E464/2021, on condition that the applicant was to within 30 days from the date of the consent, deposit the sum of Kshs.30 Million in a joint interest earning account in the names of Messrs. Kaplan & Stratton Advocates, Gitonga Muriuki Advocates and Majanja Luseno & Company Advocates at Diamond Trust Bank.
17. She further averred that the defendant has since complied with the said condition thus there is no basis for the Court to continue holding the sum of Kshs.1,075,821.00 pursuant to Consent Order dated 15th February, 2022 which has since been overtaken by events. Counsel stated that in any event, the plaintiff and the Third Party are sufficiently covered by the Kshs.30 Million deposited in the joint interest earning account.
18. The plaintiff in his replying affidavit deposed that it is not clear why the defendant is interested in the said small sum of Kshs.1,075,821.00 when it has severally admitted that it owes the plaintiff money in excess of Kshs.40,000,000/= in respect of the decretal sum in this matter.
19. He averred that the Court of Appeal's order for stay of execution did not cover the plaintiff's costs which have been taxed at Kshs.639,933.00 and remain outstanding to date. The plaintiff further averred that the said Kshs.1,075,821.00 is sufficient to cover the said costs and interest but is not sufficient to satisfy the decretal sum which is in excess of Kshs.40 Million owed to him by the defendant.
20. The Third Party in its replying affidavit sworn by its Chief Executive Officer deposed that on 15th February, 2022 the parties herein recorded a consent wherein a stay of execution of the judgment delivered on 25th May, 2021 was granted pending the hearing and determination of Civil Appeal (Application) No. E464 of 2021.
21. Third Party averred that on 24th February, 2022 the defendant through its Advocates Messrs. Majanja Luseno & Company Advocates deposited the sum of Kshs.1,075,821.00 into Court via RTGS in Judiciary of Kenya Account held at KCB Bank vide transaction reference 555444EZCNV9W8.
22. He further averred that Civil Appeal (Application) No. E464 of 2021 was coming up for hearing on 12th April, 2022 and on that day, a consent was recorded by the parties therein to the effect that there would be a stay of execution of the judgment and decree herein pending the hearing and determination of Civil Appeal No 464 of 2021, on condition that the applicant therein will within 30 days from the date hereof deposit the sum of Kshs.30 Million into a joint interest earning account in the names of the Advocates for the parties to the suit.
23. It was stated by the Third Party's Chief Executive Officer that it is not in the interest of justice to allow the application herein as the said Kshs.1,075,821.00 held by the Court is the only security in place for



the Third Party in respect to its taxed costs which were taxed at Kshs.435,888.00 and will be payable, in the event the defendant's appeal is dismissed. It was also stated that the Court of Appeal's order for stay of execution did not cover party and party costs which have since been taxed.

24. He further stated that the said costs of Kshs.435,888.00 remain outstanding to date thus the Third Party will suffer prejudice in the absence of any security of the party and party costs awarded to it should the sum of Kshs.1,075, 821.00 held by Court be released to the defendant pending the hearing of the appeal.

Whether the money deposited in the Judiciary account by the defendant should be released to the defendant.

25. This Court entered judgment for the plaintiff against the defendant for the sum of Kshs.18,621,354.00 plus interest on the said sum from 1st November, 2011 until payment in full and dismissed the claim as against the Third Party with costs to be paid by the defendant vide a judgment and decree dated 9th October, 2020. Dissatisfied with the said judgment and decree, the defendant lodged an appeal at the Court of Appeal being Civil Appeal No. E464 of 2021.

26. Thereafter, the defendant filed an application in the Court of Appeal dated 18th August, 2021 seeking an order for stay of execution of the decree of this Court pending the hearing and determination of the said Appeal. Before the Court of Appeal could hear and determine the application dated 18th August, 2021, the defendant filed another application dated 24th December, 2021 in this Court seeking stay of execution of the decree of this Court pending the hearing and determination of the application dated 18th August, 2021.

27. By the time the applicant filed the application dated 24th December, 2021, the plaintiff's and Third Party's costs had already been taxed at Kshs.639,933.00 and Kshs.435,888.00, respectively. On 15th February, 2022, the parties herein recorded a consent compromising the application dated 24th December, 2021, which culminated into a ruling by this Court. On perusal of the Court record, I note that in the ruling delivered on 15th February, 2022 this Court held that –

“The applicant to deposit the taxed costs into Court within 14 days. The application for stay of execution is hereby allowed on that condition pending hearing and determination of Civil Appeal (Application) No. E464 of 2021 (prayer No. 3). In default, parties be at liberty to execute. The defendant to bear the costs of this application.”

28. It is evident from the affidavits filed in support and in opposition to the application herein together with the written submissions by Counsel for the parties that the parties herein agree to the fact that the order for stay of execution granted by this Court on 15th February, 2022 was granted pending the hearing and determination of the application dated 18th August, 2021 filed at the Court of Appeal in Civil Appeal No. E464 of 2021, where the defendant was seeking an order for stay of execution.

29. It is not disputed that the application dated 18th August, 2021 has since been compromised vide a Consent Order dated 12th April, 2022. The terms of the said consent are that –

“A stay of execution of the judgment and decree in High Court Civil Suit No. 408 of 2013 be and is hereby granted pending the hearing and determination of Civil Appeal No. E464 of 2021 on condition that the applicant herein will, within 30 days for the date hereof, deposit Kshs.30 Million into a joint interest earning account in the names of Ms. Kaplan & Stratton



Advocates, M. Gitonga Muriuki Advocates and Majanja Luseno Advocates in the Diamond Trust Bank Limited. Costs to be in the appeal.”

30. In light of the consent entered into at the Court of Appeal, this Court finds that the application dated 18th August, 2021 was determined by the Court of Appeal on 12th April, 2022, which determination led to the issuance of an Order dated 12th April, 2022 by the Court of Appeal.
31. Having found that the application dated 18th August, 2021 seeking an order for stay of execution of the decree of this Court pending the hearing and determination of Court of Appeal Civil Appeal No. E464 of 2021 was heard and determined, it is this Court’s finding that the orders of 15th February, 2022 lapsed on 12th April, 2022 upon determination of the said application.
32. The submissions by the plaintiff and the Third Party to the effect that the sum of Kshs.1,075,821.00 currently held in Court pursuant to the ruling dated 15th February, 2022 should continue being held as security for the costs awarded to the plaintiff and the Third Party pending the hearing and determination of Court of Appeal Civil Appeal No. E464 of 2021 are not merited since the orders issued in the ruling dated 15th February, 2022 were only valid until the application dated 18th August, 2021 was heard and determined.
33. Furthermore, the said sum of Kshs.1,075,821.00 ought to have been released to the defendant once the application dated 18th August, 2021 was determined, since there were no further orders stopping the release of the said monies.
34. In the end, I find that the application dated 26th May, 2022 is merited and I allow it in the following terms –
 - i. The order dated 15th February, 2022 is hereby discharged;
 - ii. As a consequence of discharging the order dated 15th February, 2022, an order is hereby issued directing that the monies deposited via RTGS by the defendant’s Counsel on 24th February, 2022 in Judiciary of Kenya Account held at KCB Bank vide transaction reference 555444EZCNV9W8 be released to the defendant through its Advocates whose account particulars are;

Name of Account : Majanja Luseno & Company
Advocates
Bank : NCBA Bank Kenya
Branch : Harambee Avenue
Account Number : 120640042
Swift Code : NCBACKENA
Mandatory Narration : J001/344/SBL
 - iii. Costs of this application shall abide the outcome of the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 29th day of September, 2023. Ruling delivered through Microsoft Teams online Platform.

NJOKI MWANGI



JUDGE

