



Margaret Gacigi Gecaga (suing in her own behalf and as next friend of Bethuel Mareka Gecaga) v Gateway Insurance Co. Ltd & 2 others (Civil Suit 86 of 2018) [2022] KEHC 12929 (KLR) (Commercial and Tax) (31 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12929 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 86 OF 2018
A MABEYA, J
AUGUST 31, 2022

BETWEEN

MARGARET GACIGI GECAGA (SUING IN HER OWN BEHALF AND AS NEXT FRIEND OF BETHUEL MAREKA GECAGA) PLAINTIFF

AND

GATEWAY INSURANCE CO. LTD 1ST DEFENDANT

UDI MAREKA GECAGA 2ND DEFENDANT

QUINVEST LIMITED 3RD DEFENDANT

(Formerly HCCC 387 OF 2014- CIVIL DIVISION)

RULING

1. Before court is an application dated December 23, 2021. it was brought pursuant to section 98 of the [Civil Procedure Act](#).
2. The application sought that the sum of Kshs 55,987,559,65 held in a joint interest earning account at Kenya Commercial Bank Limited A/C No. 11715xxxxx in the names of Hamilton Harrison & Mathews and JM Njenga & Co Advocates pursuant to the court order of June 4, 2015 be released to Hamilton Harrison & Mathews Advocates for the 2nd and 3rd defendant together with interest.
3. It also sought orders that the plaintiff's advocate J M Njenga having failed to execute the consent, the Deputy Registrar of this court do execute the consent and have the amount released or in the alternative, an order that the sum be released forthwith notwithstanding the refusal of JM Njenga & Co Advocates to execute the consent.



4. The application was supported by the affidavit of Natalie Sirawa sworn on December 23, 2021. The grounds were that on 4/6/2015, a consent of the parties dated 3/6/2015 was adopted as an order of the court. By that consent, Kshs 55,987,559.65 was deposited in an interest earning account at KCB pending the determination of the suit.
5. The suit was struck out on 16/4/2018 and the plaintiff filed an appeal which was dismissed on 7/2/2020. The plaintiff then filed an application dated 25/2/2020 in the Family Court in High Court Succession Cause Number 937 of 2017 *in the matter of the estate of the Bethuel Mareka Gecaga (Deceased)* seeking to restrain the release of the said sum of Kshs 55,987,559.65 but the same was dismissed on 16/12/2021.
6. That the funds on deposit belonged to the 3rd defendant and this court had determined on 27/5/2020 that the amount should be released to HHM Advocates for the 2nd and 3rd defendants but the plaintiff had disregarded that order. That the funds had been kept from the 3rd defendants for 6 years and it was in the interest of justice that the same be released.
7. The plaintiff responded *vide* her replying affidavit sworn on January 28, 2022. She averred she had filed a notice of appeal against the ruling of December 16, 2021 which had dismissed her application of February 25, 2020. She had also requested for proceedings. That she had also filed an application for stay of execution dated December 23, 2021 in the Court of Appeal seeking to stop the release of the funds. That that application had high chance of success as the funds in issue belonged to the deceased and the best forum to canvass the issue was at the succession court.
8. She contended that the release of the funds would be prejudicial to the plaintiff her as she had no other source of income.
9. The 3rd defendant filed submissions dated 4/02/2022 in support of the application. The plaintiff filed hers dated 25/2/2022. I have considered the affidavits and the submissions.
10. The main issue for consideration is whether the funds in issue ought to be released. The court has seen the ruling of 27/5/2020 that was attached to the application. The court notes that the issues herein had already been determined in that ruling.
11. In that ruling, the court found that a consent had been entered that the sum be deposited in a joint interest earning account and be held ‘until the hearing and determination of the suit or until further orders of the court.’ That the suit was struck out on 16/4/2018 and the Court of Appeal upheld that decision on 7/02/2020. The court then found that no appeal had been referred to the Supreme Court thus the suit had been determined.
12. This court also notes that the argument raised by the plaintiff here as regards the source of the funds and that the succession cause should deal with the dispute herein were already determined by that court. The court found that the plaintiff was attempting to re-litigate the suit and held that the consent entered into between the parties had a contractual effect and had not been set aside. The court thus directed that the contract be honoured and the sum be released to HHM Advocates pursuant to the order of 4/6/2015.
13. At the time when the ruling was delivered, the plaintiff had filed an application dated February 25, 2020 before the family court to restrain the release of the funds. However, that application was later dismissed on December 16, 2021.



14. The plaintiff in her response contended that she has appealed against that decision and there is pending an application for stay of execution pending appeal. The mere existence of an appeal or application for stay is no reason to stop execution of an order. There is no stay in force as of now.
15. What this court deciphers is that the plaintiff is determined to avoid the contractual terms of the consent. It is unsettling that the same plaintiff who brought the suit before the Commercial Court and dragged the defendants into litigation, is the same one who now contends that the issue can only be determined in the succession cause.
16. The court has carefully considered the plaintiff's response. Not only does she raise the same issues raised before Kasango J and conclusively determined, but she is also attempting to prosecute her application for stay pending before the Court of Appeal. It is also an attempt to appeal against the decision of February 16, 2021.
17. In view of the foregoing, the court finds the application to be meritorious and allows the same as follows: -
 - a. The sum of Kshs 55,987,559.65 held in a joint interest earning account at Kenya Commercial Bank Limited A/C No 117158xxxxx in the names of Hamilton Harrison & Mathews and JM Njenga & Co Advocates pursuant to the court order of June 4, 2015 be released to Hamilton Harrison & Mathews Advocates for the 2nd and 3rd defendant together with interest accrued thereon.
 - b. Messrs J M. Njenga Advocates do execute the consent within 7 days of this order failure to which the Deputy Registrar is directed to execute the same to have the amount released in line with prayer 1 above.
 - c. Costs of the application are awarded to the 2nd and 3rd defendant.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF AUGUST, 2022.

A. MABEYA, FCIArb

JUDGE

