



Koinange Investment & Development Company Limited v Ngethe & 3 others ((Suing As Personal Representatives Of The Estate Of Robert Nelson Ngethe (Deceased) (Civil Case 3164 of 1995) [2022] KEHC 13452 (KLR) (Commercial and Tax) (23 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13452 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 3164 OF 1995
EC MWITA, J
SEPTEMBER 23, 2022**

BETWEEN

**KOINANGE INVESTMENT & DEVELOPMENT COMPANY
LIMITED APPLICANT**

AND

**IAN KAHIU NGETHE & 3 OTHERS RESPONDENT
(SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF ROBERT
NELSON NGETHE (DECEASED)**

RULING

1. On October 14, 2021, the court delivered a ruling by Tuiyot J (as he then was) dated September 29, 2021. The ruling arose from three applications dated June 9, 2014 for an order cancelling the transfer of LR No 209/9099/2; July 7, 2014 for leave to amend defence and counterclaim and July 8, 2014 for review. Of material to this application, was what the learned judge stated at paragraphs 34 and 35 of that ruling:

(34) In the end what endears this court as a just way of resolving this old matter is by ordering the estate of the deceased to pay Koinange Investments the sum of Kshs 50,000,000 (without any interest thereon) less costs that may be due to the estate emanating from the various proceedings related to the suit property which may be unpaid. Parties to agree on what is due and when is to be paid. An agreement in this regard to be reached within 14 days hereof failing which any party shall be at liberty to apply. (emphasis).

The court was later make final orders with regard to the three applications.



2. As it turned out, parties neither agreed on costs payable within the time given by the court nor when the costs were to be paid. Exercising the option of liberty to apply, Koinange Investment and Development Company Limited (Koinange investment) took out motion on notice dated December 2, 2021, under sections 1A, 1B & 3A of the *Civil Procedure Act*, and orders 50 (1) and 45 of the *Civil Procedure Rules*, seeking number of orders to vary and/or set aside the orders issued on October 14, 2021; listing of applications dated June 9, 2014, 7th and July 8, 2014 for final orders allowing those applications and an early date for hearing of the counter-claim.
3. The application is premised on the grounds on its face and affidavits sworn by Eddah Wanjiru Mbiyu on December 1, 2021 and January 26, 2022 respectively. The basis of the application as can be seen from the grounds and depositions in those affidavits and submissions is the time within which parties were to resolve the issue of costs lapsed on October 28, 2021, thus the plaintiffs are in default; that the late Robert Nelson Ngethe did not pay any money for the suit property when the option to purchase was purportedly exercised and that Koinange Investment is entitled to the orders sought in the three applications.
4. According to Koinange Investment, it was obliged to file this application due to failure by the plaintiffs to give indication of their costs or when the balance of the amount ordered was to be paid within the timelines set by the court; that the court orders did not contain the conditions contained in the plaintiffs' letter of January 19, 2022; that costs of Kshs 2,817,302.50 were exaggerated and even then, the balance of Kshs 47,182,697.50 had not been tendered, thus the plaintiffs had no interest to comply with the court orders.
5. Koinange Investment maintained that the court ordered the estate to pay Kenya Kshs 50,000,000 less costs which were to be agreed within 14 days but no agreement had been reached or payment made; that there was no communication from the plaintiffs concerning costs and that a meeting suggested in the correspondence dated November 9, 2021 came outside the 14 days the court had given.
6. Koinange investment took the view that the court had stated at paragraph 31 of the ruling that it would make final orders on the three applications after payment of Kshs 50,000,000 less costs which parties were to agree on costs and when to be paid but this did not happen.

Response

7. The plaintiffs filed a replying affidavit sworn by Ian Kahiu Ngethe, (Kahiu) one of the personal representatives of the estate of the late Robert Nelson Ngethe, sworn on January 21, 2022. Kahiu stated that the estate is ready and willing to comply with the orders issued on October 14, 2021 and blamed Koinange Investment for not responding to request for a meeting to discuss and agree on settlement terms. According to Kahiu, communication was sent through their advocates' email of November 9, 2021 but Koinange Investment's advocates only wrote a letter on November 30, 2021 stating they were filing an application since the meeting had not materialize.
8. Kahiu asserted that their advocates pointed out through another email of December 10, 2021 that the court did not impose a deadline for making payment; their advocates again sent a letter dated January 19, 2022 to Koinange Investment's advocates with settlement proposal but the letter did not elicit a response. The plaintiffs maintained that since there was no response to the proposal, Koinange Investment cannot rely on the failure to agree on costs to urge for the orders sought.
9. The plaintiffs asserted that a proposal had been made on how the money was to be paid which again Koinange Investment did not respond to. The plaintiffs' take was that the three applications whose



final orders were reserved as well as the present application should be dismissed since the present application is trying to address issues that had been decided by Tuiyoti J.

Determination

10. I have considered the application and the response. I have also perused the ruling by Tuiyoti J (as he then was) delivered on October 14, 2021. In that ruling, the court considered three applications that had a connection. The first application dated June 9, 2014 was for an order cancelling the transfer of LR No 209/9099/2, the application dated July 7, 2014 was for leave to amend defence and counterclaim and that of July 8, 2014 was for review.
11. The court considered each of the applications and made conclusive determinations save for the final orders. It was with regard to the application for review, that the learned judge ordered the plaintiffs to pay Koinange Investment Kshs 50,000,000, less costs. Parties were to agree on costs and how to be paid within 14 days. The court granted liberty to apply, hence this application.
12. The gist of the application is that costs having not been agreed within the time given by the court, and even after the plaintiffs proposed their costs which were, in any event exaggerated, the balance of the money was not paid or tendered, thus the present application should be allowed. The plaintiffs on their part took the view that their advocate sent communication to Koinange Investment's advocate who did not respond. They eventually suggested costs of Kshs 2,817,302.50 but no response was again received. For that reason, Koinange is not justified to seek the orders in the application.
13. The ruling delivered on October 14, 2021 was clear that parties were to agree on costs and when to be paid. The court placed the burden of agreeing on costs to both parties and not the plaintiffs alone. The plaintiffs suggested a meeting a fact that was communicated to the advocates for Koinange Investment but no response was received. The suggested costs were again sent but again no response was received. The argument by Koinange Investment was that the move by the plaintiffs had been done outside the timeline set by the court.
14. The court placed the obligation to resolve the issue of costs on both parties. Whereas the plaintiffs took steps and sent communication to Koinange Investment's advocates even though late, as Koinange Investment argued, there was no effort on the part of Koinange Investment to respond to that communication on the issue of costs. The position taken by Koinange Investment that the initiative from the plaintiffs had come late was, in my view, mistaken and not correct. Koinange Investment had an equal obligation, just like the plaintiffs, to seek to hear from the plaintiffs on how to comply with the court's directions. Having failed to do so, Koinange Investment could not turn and blame the plaintiffs that they had failed to comply with directions of the court.
15. Koinange having received communication on proposed costs did not respond but has now taken the position that the costs were exaggerated. How can that be when it did not give its view on the amount, a counter proposal or reasons why it thought the proposed costs were exaggerated? That notwithstanding, Koinange Investment urged the court to allow this application, revisit and allow the three applications that had been considered and were the subject of the ruling of October 14, 2021.
16. I have carefully read ruling delivered on October 14, 2021. That ruling is clear that the court determined the three applications, reserving only the final orders which were to be made once parties resolved the issue of costs. In fact, the court took the position (at paragraph 31 of the ruling) that it was time to conclude this old matter once and for all
17. Parties did not agree on costs and, as it were, only the plaintiffs offered what they thought were the costs. Koinange Investment did not address the issue or even respond to the costs suggested by the



plaintiffs. As already stated, where the court directed parties to agree on costs, it was incumbent upon both parties to try and comply with those directions. One party could not leave it upon the other party to comply while taking no action towards that end.

18. In my view, therefore, the best way to determine this application is to reinforce the orders made by the court on October 14, 2021, so that this old matter can be brought to an end. This is so, because the court found at paragraph 31 of that ruling that the purchase price had been tendered by the deceased but not accepted by Koinange Investment. The court also found at paragraph 33 that the plaintiffs had been willing to pay the purchase price of Kshs 50,000,000 and indeed during the hearing of the present application, the plaintiffs maintained that they were still willing to comply with the directions of the court given on October 14, 2021.
19. In the circumstance, the appropriate orders to issue in this matter, must be orders that will bring this suit to conclusion instead of escalating it further. Since Koinange Investment did not state what would be reasonable costs, it should be taken that the costs suggested by the plaintiffs were not objected to.
20. In the premise, I make the following orders:
 - i. The plaintiffs do pay the balance of the purchase price being Kshs 47,182,697.50 to Koinange Investment Development Ltd within ninety (90) days from the date hereof.
 - ii. In default of (i) above, Koinange Investment Development Ltd shall be at liberty to execute.
 - iii. The applications dated June 9, 2014, July 7, 2014 and July 8, 2014 are declined and dismissed with no order as to costs.
 - iv. Each party do bear costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2022

E C MWITA

JUDGE

