



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 352 OF 2011

MRS. NANCY WANJA GATABAKI.....PLAINTIFF

- VERSUS -

MUGA DEVELOPERS LIMITED.....1ST DEFENDANT
SURAYA PROPERTY GROUP LTD.....2ND DEFENDANT
SURAYA INVESTMENT FOURWAYS LTD.....3RD DEFENDANT
SURAYA SALES LIMITED.....4TH DEFENDANT
PETER KIARIE MURAYA.....5TH DEFENDANT
SUE WACHEKE MURAYA.....6TH DEFENDANT
EQUITY BANK LIMITED.....7TH DEFENDANT
I & M BANK LIMITED.....8TH DEFENDANT
FRANGIE INVESTMENT LIMITED.....9TH DEFENDANT

RULING

1. The plaintiff, **MRS NANCY WANJA GATABAKI**, has asked the Court to cite **MR. PETER KIARIE MURAYA** and **MRS SUE WACHEKE MURAYA** for contempt of court, and to thereafter order that they be detained in prison for a period not exceeding six (6) months.
2. The court order which is the subject matter of this application is dated 6th September 2011.
3. It is an order which was recorded with the consent of the parties.
4. In order to get a full appreciation of the order in question, the same is set out here below, as follows;

“IT IS HEREBY ORDERED BY CONSENT:

- 1. THAT the suit be and is hereby marked as settled on the following terms;**

i. The 2nd Defendant shall pay the Plaintiff the sum of Kshs. 725,619,000/- in the manner set out below:

- a. The sum of Kshs. 140,000,000/- to be paid within 15 days from the date hereof.
- b. The sum of Kshs. 262,219,000/- to be paid within 6 months from the date hereof.
- c. The balance of Kshs. 323,619,000/- to be paid in the form of houses to be allocated to the plaintiff as follows;
 - i. 24 Tulip 3 bedroom apartments valued at Kshs. 7,500,000/- each.
 - ii. 6 Daisy 2 bedroom apartments valued at Kshs. 4,900,000/- each.
 - iii. 12 Lilac bedroom villas valued at Kshs. 9,500,000/- each.
 - iv. All the above properties to be allocated and transferred to the plaintiff within 24 months from the date hereof without any liabilities and encumbrances at no costs.

2. The 2nd Defendant shall allocate and transfer to the Plaintiff land measuring 3.6 acres free from all encumbrances or costs within the next 24 months from the date hereof. The land to be allocated within the project area.

3. The Plaintiff and the 2nd Defendant shall pay the 7th and 8th defendants costs in the sum of Kshs. 15 million each making a total of Kshs. 30 million within the next 14 days from the date hereof. The said sum to be paid through the firm of Miller & Co. Advocates for onward transmission to the Advocates appearing herein.

4. The Plaintiff and the Defendant shall pay the firm of Iseme, Kamau & Maema Advocates, the sum of Kshs. 10 million within the next 14 days from the date hereof being the mediation costs.

5. The Winding Up Cause No. 24 of 2011 be marked as withdrawn with costs of Kshs. 5 million to be paid to the Petitioner's advocate by the respondents in the cause within 14 days.

6. The Plaintiff to resign as a director of the 1st defendant within 14 days from the date hereof. The resignation to be immediately registered with the company registrar.

7. That Sagana Developers Limited shareholding with Muga Holdings Limited shall be 33.3% only.

8. That Sagana Developers Limited shall cease being a shareholder of the 1st defendant and shall transfer its shares for the first defendant to Dr. Samuel Gatabaki absolutely within 14 days from the date hereof.

9. The interim orders issued on 25th August 2011 be discharged forthwith.

10. That the Plaintiff be discharged and indemnified by the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 9th defendants of all obligations and liability arising from or in connection with the subject development and that she owes no liabilities as a result of the charge of the suit property. In the event that there is a default of loan outstanding, Equity Bank shall not sell the properties thereabove allocated to the plaintiff.

11. That in the event of default of the terms set out in clauses No. 1 and 2 as payment to the plaintiff, the directors of the 1st to 6th defendants shall be personally liable.

12. That the charge in favour of Equity Bank save for the variations noted above, continues to be valid security and shall not be subject to challenge as a result of the guidelines and terms set out hereinabove”.

5. The plaintiff's complaint is that the defendants did not do the things which they were supposed to do, within the times set out in the order.

6. Houses were handed over in December 2014, which was more than 24 months from the date of the order.

7. Thereafter, the sub-leases for the 42 houses were transferred to the plaintiff in September 2015.

8. As regards the 3.6 acres of land, the same were transferred to the plaintiff between October and November 2015.

9. But whilst there was generally a delay in the transfer of the houses and of the parcels of land, both sides confirmed that the defendants did give effect to the orders, albeit late.

10. However, the defendants had failed to make payment to the plaintiff's advocates, in respect to the costs for the transfers.

11. It was the understanding of the plaintiff that Order No. 2, implied that the plaintiff was not supposed to meet the costs of the transfers, including the remuneration. Therefore, when the defendants failed to meet the remuneration for the plaintiff's advocates, the plaintiff submitted that that constituted contempt of court.

12. It is the plaintiff's case that the conduct of the defendant, when they failed to meet the remuneration for the plaintiff's advocates, constituted a defiance of the court's authority.

13. The said conduct was perceived to be a challenge to the fundamental supremacy of the law.

14. It is common ground that the parties were involved in negotiations for a considerable length of time, even after the consent order had been made.

15. The parties have confirmed to the court that they had a genuine desire to try and find an amicable solution to the delays which were bogging down the actualization of the consent order.

16. The court commends the parties for engaging in the negotiations; and the Court confirms that it did encourage the parties to pursue that route.

17. However, notwithstanding the negotiations, the defendants have insisted that they were under no obligation to settle the remuneration of the plaintiff's advocates, in relation to the transfer of the houses and the 2 parcels of land.

18. The plaintiff submits that the refusal to make that payment is an act of contempt of the court.

19. As regards the delay in the transfer of the properties and the 2 parcels of land to the plaintiff, it is the defendants position that the plaintiff was to blame.

20. It was said that the plaintiff refused to execute the Transfer Documents.

21. If the plaintiff had refused to cooperate with the defendants in giving effect to the transfers, it cannot be said that the defendants were in contempt of court.

22. But it is also noteable that the consent order did not impose upon the plaintiff, an obligation to perform any particular action within a specified time-frame.

23. In an ideal situation, when both sides were required to play some role in giving effect to the court order, the parties ought not to have stopped at the point where only one side was directed to comply within a specified period. The roles to be played by both sides should have been identified, and then each of the sides should have been assigned a specific time within which to perform its said functions.

24. If that had happened, and if the plaintiff had performed her role within the specified time, the defendants would not have had any legal reason for defaulting to comply with their obligations.

25. As things stand currently, the defendants admit that there were delays, but blames the delays upon the plaintiff.

26. I find that the plaintiff has not provided proof to show that she had done everything which was required of her, and which would then have enabled the defendants to perform their role.

27. Therefore, it cannot be said that the delay in transferring the houses and the 2 parcels of land, to the plaintiff constituted a contempt of court.

28. On the issue of *Mesne Profits*, the position is that the same were not mentioned in the consent order.

29. Indeed, the plaintiff confirms that when there were delays, the parties held meetings and that it is the said meetings which arrived at the conclusion that the 1st to 6th respondents would pay *mesne profits/rent*, at market rates, from 6th September 2013.

30. In effect, the agreement on *Mesne Profits* was arrived at outside the court order, and subsequent to the said court order.

31. If the 1st to 6th respondents are in breach of that Agreement, the plaintiff may well be entitled to take appropriate action, with a view to enforcing the agreement. However, this court cannot use the consent order, which did not incorporate anything on *Mesne Profits*, to enforce an agreement that was outside the court order.

32. As regards the costs payable to the plaintiff's advocates, in relation to the transfer of the houses and the parcels of land, the consent order specified that the same would be free from all encumbrances and costs.

33. According to the plaintiff, it was now too late for the defendants to seek to exclude any costs from the consent order.

34. The plaintiff's position is that the order was clear and unambiguous.

35. The defendants position is that they were not seeking to exclude any costs from the consent order. They were saying that the consent order, clear and unambiguous as it was, did not incorporate the costs payable to the plaintiff's advocates.

36. A reading of the consent order shows that it did not specifically mention the costs payable to the plaintiff's advocates.

37. Order 1 (c) (iv) makes reference to "no costs?"; whilst Order No. 2 says that the allocation and transfer shall be;

"free from all encumbrances or costs...?"

38. In my considered opinion the said orders meant that the plaintiff was to incur no costs, and that the transfers would be free of all costs.

39. Although the orders did not specify the costs of the plaintiff's advocates, the defendants and their advocates dealt with the advocates for the plaintiff when processing the allocation and the transfer of the houses and of the 2 parcels of land.

40. Surely, the defendants cannot have expected the plaintiff's advocates to have been working for free.

41. The defendants have not said that the plaintiff's advocates led them to believe that they would charge no fees.

42. But it is equally true that the plaintiff's advocates did not expressly state to the defendants that their remuneration would be payable by the defendants.

43. It is not impossible for a law firm to provide legal services pro bono. Therefore, it cannot be said that the advocates for the plaintiff had to be paid for their services.

44. The easiest thing would have been to incorporate into the consent order, a provision that either the plaintiff's advocates would be paid or that they would not be paid for any services they might render in relation to the transfer of the houses and of the 2 parcels of land.

45. In all probability, there was no intention of imposing upon the defendants, the obligation to pay the costs of the plaintiff's advocates. I so find because when the parties wished to impose any obligation for the payment of fees or costs, the same was stated explicitly. Secondly, the quantum of such fees or costs were also expressly specified.

46. Thirdly, the consent order did specify the party or parties whose obligation it was to meet such fees or costs.

47. In the circumstances, when the consent order did not impose on the defendants, or any of them, the obligation to pay the costs of the plaintiff's advocates; and when the fees or costs payable were not specified, the defendants cannot be said to be in contempt of court, when they have declined to pay such fees or costs.

48. In the result, I find no merit in the application dated 6th September 2011, and it is therefore dismissed, with costs to the 5th and 6th defendants.

DATED, SIGNED and DELIVERED at NAIROBI this 20th day of September 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Gathenji for the Plaintiff

Orare for Wena for the 1st Defendant

Orare for Wena for the 2nd Defendant

Orare for Wena for the 3rd Defendant

Orare for Wena for the 4th Defendant

Orare for Wena for the 5th Defendant

Orare for Wena for the 6th Defendant

No appearance for the 7th Defendant

No appearance for the 8th Defendant

Orare for Wena for the 9th Defendant

No appearance for the Interested Party

Collins Odhiambo – Court clerk.