



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 370 OF 2010

REPUBLIC.....APPLICANT

VERSUS

HON. LUCAS M. MAITHA CHAIRMAN, BETTING

CONTROL AND LICENSING BOARD.....1ST RESPONDENT

A.O. KWASI, DIRECTOR, BETTING CONTROL

AND LICENSING BOARD.....2ND RESPONDENT

AND

FLINT EAST AFRICA LIMITED.....INTERESTED PARTY

NGATIA & ASSOCIATES ADVOCATES.....INTERESTED PARTY

MAMA FATUMA CHILDREN’S HOME.....BENEFICIARY

EX PARTE:

INTERACTIVE GAMING AND LOTTERIES LIMITED

RULING

Introduction

1. On 2nd September, 2011 **Musinga, J** (as he then was) expressed himself as follows:

“The 1st applicant must comply with the request made by the Board by its letter dated 2nd December, 2010. In particular, it must satisfy the court that it has paid or is prepared to pay to the Children’s Home 25% of the gross proceeds of the lottery. The service providers will have to provide to the 1st applicant the total number of SMS received so that the total amount of money raised through the lottery can be computed. Without that information it may not be possible to determine what the gross proceeds were.”

2. On 16th February, 2015 I delivered a ruling in this matter, after interrogating the provisions of section 36 of the ***Betting, Lotteries and Gaming Act***, Cap 131 Laws of Kenya, in which I expressed myself as follows:

“Blacks Law Dictionary 9th Edn. page 831 defined “gross income” as “Total income from all sources before deductions, exemptions, or other tax deductions”. Similarly “gross receipts” is defined at page 772 thereof as “The total amount of money or other consideration received by a business taxpayer for goods sold or services performed in a taxable year, before deduction.” “Proceeds” on the other hand is defined at page 1325 as *inter alia* “Something received upon selling, exchanging, collecting, or otherwise disposing of collateral”. “Net proceeds” on the other hand is defined at the same page as “The amount received in a transaction minus the costs of the transaction (such as expenses and commissions). Also termed net balance”...In this case the parties were agreed that section 36 of the Act applied to the lottery in question. That section deals with lotteries intended to raise funds for social service, public welfare, relief of distress or patriotic purposes or to provide recreational or sporting facilities. That being the object of the subject lottery the phrase “gross proceeds” must in my view be given an interpretation which promotes the object of the statute. If this interpretation is adopted it is my view that to interpret the phrase other than in the manner defined by *Blacks Law Dictionary* would defeat the purpose for which the lottery was licenced... It is therefore clear that no less than 25% of the gross proceeds is to be devoted to the object for which the lottery is promoted. However this percentage may be increased up to a maximum of 45%. It follows that the argument by the applicant that since there was no condition imposed the amount payable could go below 25% cannot be correct. To protect the promoters of the lottery, the section itself provides that the percentage devoted to the object for which the lottery is promoted cannot exceed 45% of the gross proceeds. Therefore the Act itself protects the interest of the promoter and that in my view bars the promoter from purporting to resort to self-protection as it were.”

3. Following this Court’s said ruling of 16th February, 2015, an application was filed on behalf of the Beneficiary herein, **Mama Fatuma Children’s Home**, dated 9th March, 2015 in which the Beneficiary sought an order for the release of the sum of Kshs 50,000,000/= plus interest held by the Court pursuant to the said order issued by **Musinga, J** to the beneficiary. It also sought an order for costs.
4. On 8th July, 2015, the partes herein recorded a consent in which they settled all matters the subject of the said application save for the issue of the interest. By that consent, it was agreed that the funds deposited in a joint interest earning account in the names of the Chief Registrar of the judiciary and Ngatia & Company Advocates be released and disbursed with the sum of Kshs 34,632,709.636 being released to the advocates for the beneficiary while the sum of Kshs 15,290,364.00 being released to the advocates for the ex parte applicant. The issues of the interest and costs were to be resolved by the Court.
5. By the ruling of this Court delivered on 30th September, 2015, this Court directed that the interest accruing from the sum deposited be disbursed to the account of the Beneficiary and the ex parte applicant on a pro rata basis in the ratio of their agreed entitlements pursuant to the consent recorded herein and that in the event that the parties were unable to agree on the exact sum due to each party the matter would be determined by the Deputy Registrar of this Court.
6. It is the above consent that sparked off the events that are the subject of this ruling.
7. By an application dated 1st December, 2015, the firm of **Ngatia & Associates Advocates** (hereinafter referred to as “the Firm”) joined the fray as it were by seeking that it be joined to these proceedings as an interested party. It also sought that the said consent order be stayed pending the hearing inter partes of its prayer that the same order be stayed and that the apportionment or distribution of the sum in the said joint account be stayed pending the taxation of the said firm’s costs as against the ex parte applicant in the various related suits. The said firm also sought an order that the said consent orders and consequential orders be set aside and discharged and substituted with an order that the said firm be entitled to offset and/or deduct all the costs due and owing from the ex parte applicant from the funds held in the said joint account and the balance be apportioned in the manner to be determined by the Court.
8. The said application was premised on the ground that the said consent orders did not take into account the fact that the firm of **Ngatia & Associates Advocates** was owed substantial fees by its former client, the ex parte applicant, for legal services rendered to it and hence had a lien on the

- funds held in the said joint account.
9. It was averred that the said funds are the only asset of the ex parte applicant known to the said Firm and in the event that the same is dissipated and/or apportioned in the manner set out in the consent order, the Firm would be left with no recourse and/or means to satisfy the sums that may be allowed in the taxation.
 10. It was further revealed that following the filing of the Advocate/Client Bill of Costs by the Firm, the Firm's fees in some of the matters were taxed in the sum of Kshs 13,750,727.44. It therefore sought a stay in respect of Kshs 20,000,000.00 to cater for its fees.
 11. There was also an application seeking that the Beneficiary produces an official receipt with respect to the payment made on behalf of the ex parte applicant for the said sum of Kshs 34,632,709.636 to which the Beneficiary responded that since there was no agency relationship between the ex parte applicant and the Beneficiary the prayers sought in the said application had no basis.
 12. By an application dated 17th February, 2016, the ex parte applicant sought for the issuance of summons to the Managing Director of Chase Bank to attend Court and produce documents relating to the said joint deposit. That application was allowed and the Bank through its Senior Manager, Legal Sector, **Collins Odhiambo**, duly filed documents pursuant thereto. Thereafter an affidavit sworn by the said **Collins Odhiambo** on 18th May, 2016.
 13. Following the swearing of the said affidavit, an application was made for the deponent to be examined thereon.
 14. On 2nd December, 2015 upon hearing the said firm ex parte, I issued an order joining the said firm to these proceedings and further stayed the execution of the said consent orders pending inter parts hearing. On 22nd December, 2015 I varied the said stay in the following terms:

“In the premises balancing the interests of the parties herein, I hereby vary the order given herein on 2nd December, 2015 and direct that the stay granted herein will only apply to the principal sum due to the ex parte applicant herein as well as the interests. In other words the principal sum due to the beneficiary minus interests will be released to the beneficiary pending the determination of the Firm's application.”

15. Prior to that variation by an application dated 10th December, 2015, the Beneficiary sought the following orders:

- 1. That the application herein be certified urgent and fit to be heard on priority basis.**
- 2. That this honourable court be pleased to vary and/or set aside the ex parte stay order issued on 1/12/2015 to the extent that the scope of the stay order be limited to the portion of the deposit and interest due and payable to Interactive Gaming and Lotteries Ltd.**
- 3. That in any event, the costs hereof be awarded to the Beneficiary/Applicant.**

16. According to the Beneficiary, the said order of stay was made on the mistaken premises that the deposit of Kshs 5,000,000.00 held by Chase Bank in favour of the Beneficiary was still the property of the ex parte applicant. However following the order disbursing the sum of Kshs 34,632,709.636 to the Beneficiary, the said sum together with interests was no longer the property of the ex parte applicant and consequently the firm of **Ngatia & Associates Advocates** could not lay a claim of lien over the whole sum as the only portion of the deposit available to the ex parte applicant was Kshs 15,367,290.364. Conversely the Beneficiary has no interest whatsoever in the outcome of the intended taxation between the said firm and the ex parte applicant since the said firm has never acted for the beneficiary.
17. It is on that basis that the Beneficiary sought that the stay order be varied so as to limit its scope to the portion of Kshs 15,367,290.364 apportioned to the ex parte applicant and not to the entire deposit since the Beneficiary does not owe the said firm any money in the form of unpaid legal fees.
18. On its part the ex parte applicant (IGL) averred that it is not disputed that the firm of **Ngatia &**

Associates Advocates initially acted for IGL referred to an that the funds herein were deposited by IGL in compliance with a condition precedent for maintenance of status quo issued by court on 29th December 2010. Following revocation of the lottery permit by the Respondent, the purpose for which the said funds were deposited ceased and the IGL applied for its release by court. Following a determination made by **Musinga J.** as he then was on 2nd September 2011, the Court *inter alia* determined that Mama Fatuma Goodwill Children's Home was entitled to receive 25% of the lottery proceeds and while the issue of quantum payable to Mama Fatuma was awaiting determination in HCCC 115 of 2011 and HCCC 281 of 2011, the said funds should be preserved in an interest earning account in the joint names of the Applicant and the Chief Registrar of the Judiciary.

19. According to the ex parte applicant, from the said ruling the court determined that Mama Fatuma Children's Home was entitled to a portion if not the whole of the said funds and what remained was a determination on quantum and the order to invest the funds in a joint interest earning account was meant to preserve the said funds and the respective claims of Mama Fatuma and IGL to the funds. From the Court Order aforesaid, the Court *inter alia* Ordered IGL to disclose the total amount raised through the lottery and whether 25% thereto has been paid to Mama Fatuma Goodwill Children's Home and if so documentary evidence to be provided and that the above should be done within 30 days and the matter be mentioned on 3rd October 2011.
20. According to the applicant, in compliance with the said Orders, the Applicant under cover of a letter dated 28th September 2011 filed in court a Statement of Accounts on 28th September 2011 and an Affidavit by Mama Fatuma confirming the proceeds payable to them. Of significance to note is page 9 of the said Statement of Accounts in which the quantum of legal fees payable to the Firm of **Ngatia & Associates Advocates** is set out as follows: -

Case No. JR 370 of 2010	750,000/-	
Case No. JR 21 of 2011	500,000/-	
Case No. 115 of 2011	1,200,000/-	
Case No. 281 of 2011	450,000/-	
	Case No. 313 of 2011	450,000/-
TOTAL	3,350,000/-	

21. It was averred that the said provision for legal fees was made by IGL after consultation and indeed with the concurrence of the Firm of **Ngatia & Associates Advocates**. To it, as such, there has never been any dispute with the Firm of **Ngatia & Associates Advocates** as regards the quantum of fees payable to him and no wonder since the Applicant ceased acting on 19th March 2013, no Bills of Costs were filed in court for taxation.
22. The ex parte applicant denied that the circumstances under which IGL changed legal representation were surreptitious as the Firm of **Ngatia & Associates Advocates** elected to cease acting for IGL. Accordingly, IGL had no choice but appoint another counsel to handle the matter. Whereas IGL intimated that it was ready to pay the fees as agreed and as set out in the said Statement of Accounts the Applicant declined. It was averred that IGL has at all times been ready, able and willing to pay the agreed fees of Kshs.3,350,000/- for all the cases the Applicant acted for it.
23. It was therefore the ex parte applicant's case that there being no dispute on quantum of fees payable to the Applicant, it was prepared to have the Consent Order of 8th July 2015 varied to the extent that the said agreed amount of Kshs.3,350,000/- be paid out to the Firm of **Ngatia & Associates Advocates** in full satisfaction of his fees and the balance together with interest be released to IGL.
24. It was further contended that the Applicant herein despite having acted for IGL never disclosed details regarding the said interest earning account and that so soon after this Court made Orders on

- how the said funds should be disbursed, both Mama Fatuma and IGL embarked on a very painful exercise in trying to locate the account and various correspondences were exchanged and until the Judiciary finally managed to get the details of the account from Central Bank, the Firm of **Ngatia & Associates Advocates** herein was tight lipped on the matter and it is not clear why he deliberately concealed such information. It was contended that as a signatory to the said account, the Applicant has an obligation to make a full and candid disclosure of interest accrued.
25. It was contended that since the Firm of **Ngatia & Associates Advocates** was at the time not a party to the suit, it could not possibly have been involved in the apportionment of the funds. Besides, its recourse can only be as against the funds ordered to be paid to IGL and not Mama Fatuma.
26. It was therefore averred that this Application appears to be actuated by bad faith and a desire to delay having been brought more than 2 years after the Applicant ceased acting. If there was any dispute on quantum of fees payable to the Applicant, he should have filed his Bills of Costs immediately the Advocate-Client relationship terminated. The applicant averred that it was a stranger to the allegation of missing court file.
27. According to the ex parte applicant, it was never served with a letter dated 22nd April 2016 allegedly sent to its Advocate forwarding the official receipt.
28. According to it, on the 16th June 2016, they reiterated our demand for proof of remittance of the funds to the Children's Home and a receipt from the Children's Home so that it be fully discharged from liability by the Regulator (**BCLB**). However, on the 17th June 2016, **Mr. Kyalo Mbobu Advocate** responded and intimated that the receipt supplied is sufficient. It was the applicant's case that as the beneficiary was the object of the lottery duly nominated by IGL, there was a clear understanding through the Deed signed on between the Beneficiary and IGL on 7th February 2011 *inter alia* giving IGL oversight mandate over utilisation of the said funds to ensure that the ultimate beneficiary (**destitute children**) benefit. In addition IGL is required by the Betting Control Licensing Board (**BCLB**) to provide proof of remittance by the actual Beneficiary and not the Beneficiary's agent. It was on that basis that the ex parte applicant legitimately requested that the Beneficiary provides the documents sought in the Application.
29. The ex parte applicant therefore prayed that: -
- i. The Applicant be ordered to make a full and candid disclosure of the interest accrued in the said deposit account and attach account opening form and bank statement since inception to date.
 - ii. Mama Fatuma's share of Kshs. 34,632,709.636 together with prorated interest be released to them forthwith as ordered by this court since there cannot be any conceivable lien as against property decreed by this court as belonging to them.
 - iii. The amount of Kshs. 15,367,290.364 together with prorated interest less agreed fees payable to the Applicant of Kshs. 3,350,000/- be released to IGL through its counsel on record, Mbugua Ng'ang'a & Co. Advocates.

Determinations

30. I have considered the issues raised hereinabove.
31. The first issue I wish to deal with is the role of Chase Bank and its said Manager in these proceedings. From the cross-examination that was conducted following the swearing of the affidavit by the said **Collins Odhiambo**, it is clear that what the parties sought to find out was the manner in which the joint account was operated and whether the sum disclosed by the Bank was or should have been the correct sum.
32. In my view and with respect to the parties in this suit the whole process of the said cross-examination was unnecessary and misplaced in these proceedings. These are judicial review proceedings which ordinarily are restricted to the decision making process. The order that the sum in issue be deposited in a joint account was in my view made pursuant to the inherent powers of the Court in order to preserve the subject matter of litigation. Once the litigation came to an end, the only issue that remained for determination was how that sum was to be disbursed.

33. It is not in dispute the sum deposited was Kshs 50,000,000.00. Whereas it is true that that sum ordinarily accrued interest, apart from the sum disclosed by the Bank as having been accrued, this Court in these proceedings cannot go into the issue whether the account was properly operated or not. That was not the issue that was before the Court when these proceedings were commenced. In my view judicial review proceedings ought not to be mutated as the proceedings go along in order to cover areas which ought to be properly dealt with by the ordinary civil courts.
34. In my view the manner in which the Bank operated the joint account and whether the sum declared was the correct sum ought to be the subject of litigation before a commercial Court. Accordingly, I do not intend to embark on a voyage that this Court was not meant to take when it set out on its journey at the time these proceedings were commenced.
35. With respect to the claim by the firm of **Ngatia & Associates Advocates** in this Court's ruling delivered on 22nd December, 2015, this Court extensively dealt with the conditions precedent for a lien to be claimed and expressed itself *inter alia* as follows:

“With respect to the exercise of the right to a lien, a general lien and a particular lien are both categories of a legal lien and a lien is a right at common law in one man to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims of the person in possession are satisfied...It is therefore clear that a lien is a possessory right as opposed to a proprietary right. Where therefore a person who would otherwise have a right of a lien over a property legally loses possession thereof it has been held that the lien is lost...What then is the position where a sum of money is deposited in an account in the joint names of the counsel for the parties pending, say, the hearing and determination of an appeal? As long as the stay is in place pending the determination of the appeal, none of the parties can claim entitlement to the amount and therefore at that stage no right to a lien can be claimed. However, upon determination of the appeal any of the counsel whose client is determined to be entitled to the said fund may claim a lien thereon for the payment of his fees. That therefore means that the advocate whose client is unsuccessful cannot lay claim to that money as his client's entitlement has been extinguished and a right to a lien by an advocate can only arise where his client is entitled to the money in question. Again for the right to a lien to succeed, the advocate must be in possession of the funds. Where the advocate is no longer, lawfully, in possession of the funds or the client's property, the right to a lien cannot be claimed. In this case it is not in doubt that the Firm ceased acting for the ex parte applicant herein. It is not contended that the Firm was unlawfully removed from the record...from the authorities it is clear that the Firm will only be entitled, if at all, to the sum due to the ex parte applicant herein which was its client. However, a lien is simply security for an advocate's fees and an advocate is not entitled to exercise a right to alien in respect of the whole property when his costs can only be recovered from part only of the property. In other words, the lien ought to be commensurate to the claim for fees and no more.”

36. The firm of **Ngatia & Associates Advocates** has however sought to rely on section 52 of the *Advocates Act* which provides that:

Any court in which an advocate has been employed to prosecute or defend any suit or matter may at any time declare the advocate entitled to a charge on the property recovered or preserved through his instrumentality for his taxed costs in reference to that suit or matter, and may make orders for the taxation of the costs and for raising money to pay or for paying the costs out of the property so charged as it thinks fit, and all conveyances and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a bona fide purchaser for value without notice, be void as against the advocate:

Provided that no order shall be made if the right to recover the costs is barred by limitation.

37. The procedure for an application under section 52 aforesaid is however provided under Order 52 rule 6 of the *Civil Procedure Rules*. Whereas I agree with the decision in **Peter Furmetz vs. James G. Muoko T/A Muoko & Company Advocates [2015] eKLR** that the Court can make an

order securing the payment of assessed costs and for the protection of the advocate's lien, if any, suffice it to say that in this case, the application made by **Ngatia & Associates Advocates** was not expressed to be seeking a charging order under the said provision or section 52 of the **Advocates Act**. Similarly, the sum deposited in the joint account cannot in my view be construed as a property which had been recovered. In fact if the same were to be construed as recovered the recovery would inure to the benefit of the Beneficiary. In any case as I have stated elsewhere in this ruling the deposit was pursuant to the exercise of the court's inherent jurisdiction and not at the instigation or instrumentality of any of the parties or their legal representatives.

38. Even if section 52 aforesaid was relevant to these proceedings, in **Ann Njeri Mwangi vs. Njomaita Investments Ltd [2014] eKLR**, it was held that:

“Under section 52 of the Advocates Act, the court may order for a charging order on property recovered or preserved through the advocates instrumentality in a matter (s)he defended the client. The property belongs to the client and therefore the advocate will be entitled to a lien over such property and not the entire sum. As the advocate was yet to tax its costs the court ordered that the sum be deposited in a joint interest-earning account in the names of the Advocate and the former client.”

39. It is clear in this case that the only basis upon which the firm of **Ngatia & Associates Advocates** can possibly claim lien over the sum deposited in the joint account is by virtue of the fact that it was a signatory to the said account. However the position of **Ngatia & Associates Advocates** with respect to the joint account is similar to that of the Chief Registrar of the Judiciary. Theirs' is that of trustees as opposed to possessory claim. Just as the Registrar cannot claim a lien over the said sum, it is the same way in which the said Firm cannot claim a lien thereat. If for some reason the said sum were to lawfully find their way into the said Firm's account, no doubt it could claim a right of lien over it. That however is not the position as the sum declared by the Bank to have accrued from the deposit was still being retained by the Bank.

40. The Firm of **Ngatia & Associates Advocates** seems to be concerned that the ex parte applicant herein has no other asset other than the sum the subject of these proceedings. It has been disclosed that the said Firm has taxed some of its costs. In my view nothing bars it from translating the certificate of costs into a judgement and thereafter proceeding under Order 22 rule 47 of the **Civil Procedure Rules** which provides for the attachment of a decree. However was rightly, in my view, held by **Janet Mulwa, J** in **Njuguna Matiri & Company Advocates vs. National Bank of Kenya Ltd [2016] eKLR**:

“...a party in whose favour a certificate of costs has been issued, and there being no objection to either the amount taxed or retainer, has an option to recover the costs by way of a separate suit or by way of an application within the miscellaneous cause to the judge to adopt the certificate of costs as judgement of the court. Only after that would a decree be issued for purposes of execution.”

41. In the same vein the same Judge in **Lawrence Mwangi T/A Mwangi & Co. Advocates vs. John Mathiaka Kimundu [2016] eKLR** expressed herself as hereunder:

“There is no dispute that there exists a certificate of costs issued by the Taxing Master in favour of the Respondent Advocates – in this application. The respondent has not demonstrated existence of judgement or decree arising capable of being executed. The holder of the certificate of taxation ought to apply for judgement in the High Court in terms of section 48, 49 and 51(2) of the Advocates Act to be entered based on the certificate of costs. Only after that would a decree issue and execution proceedings be undertaken.”

42. In my view the effect of claiming a lien under these proceedings was to achieve what ought to have been achieved under the said provisions.

43. It was also contended that since the funds were held in a joint deposit account the Firm ought to have been consulted before the order was made. In my view to make such a determination unless it is shown that the said Firm has an interest in the sum deposited may on occasion work injustice to

the parties. As stated in *Ann Njeri Case* (supra) decretal sums belong to the parties and not to the advocates and the latter's only claim thereat may be with respect to payment of their costs. However to state that in every case in which sums are held in a joint account, the Court must hear the signatories even if such signatories are advocates who are no longer on record would occasion injustice to the parties for whose benefit the said sums were deposited.

44. It is therefore my view that the application by the Firm of **Ngatia & Associates Advocates** for setting aside the consent and for prayers in the nature of declaration of a lien fails.

45. With respect to the application by the Beneficiary with respect to the interests as a held in the ruling of 22nd December, 2015, the Firm of **Ngatia & Associates Advocates**, if successful in its claim for fees, is only to be entitled to the sum due to the ex parte applicant herein which was its client. In other words there is no reason why the sum lawfully due to the Beneficiary should not be released to it as long as the same is determined.

46. In my view there is no basis for the prayers sought in the ex parte applicant's Motion dated 16th May, 2016 since the issue of payment between an advocate and his client is a matter purely between the two parties and the adversary has no business inquiring whether the client has actually been paid as long as he is released from liability upon settling the same either by the opposite party or its advocates on record.

Order

47. In the result, the ex parte applicant's Motion dated 16th May, 2016 is hereby dismissed. Similarly the application dated 1st December, 2015 by the Firm of **Ngatia & Associates Advocates** seeking that the orders made on 8th July, 2015 and all further and/or consequential orders be stayed and/or discharged is hereby dismissed. On the other hand the application dated 10th December, 2015 by the Beneficiary herein, Mama Fatuma Children's Home, succeeds to the extent that the order staying payment to it of the interests due from the sum deposited in the joint account is hereby vacated.

48. Each party will bear the costs of the said applications.

49. It is so ordered.

Dated at Nairobi this 22nd day of November, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nganga for the applicant and holds brief for Mr Kyalo for the Beneficiary

Mr Baraza for Mr Nyamodi for Collins Odhiambo and Chase Bank

Miss Olbara for Ngatia & Associates Advocates

CA Ooko