



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
HCCC NO. 282 OF 2011

WAKI KENYA LIMITED PLAINTIFF

- VERSUS -

KITAYAMA CONSTRUCTION LIMITED 1ST DEFENDANT

MARWA KEMERO MAISORI 2ND DEFENDANT

JENIFFER AKOMO MAISORI 3RD DEFENDANT

R U L I N G

1. Before the court is a Notice of Motion application dated **10th October 2013**. The application is expressed to be brought under Section 1A, 1B and 3A of the Civil Procedure Act, Order 45 of the Civil Procedure Rules, Order 22, Rule 6 and 22 and Order 51 of the Civil Procedure Rules and Chapter 21 of the Laws of Kenya.
2. The application seeks the following orders:-
 1. *That this application be certified urgent.*
 2. *That service of this application be dispensed with in the first instance and heard ex-parte in the first instance.*
 3. *That there be a stay of execution of the Judgement and decree and consequential orders entered against the Defendants in suit pending the inter-partes hearing of this application.*
 4. *That there be a stay of execution of the judgement and decree and all consequential orders entered against the Defendants in this suit pending the hearing and determination of this suit.*
 5. *That this Honourable court be pleased to review its orders for the 30th May 2013 requiring the Defendants to deposit the entire Judgement sum into a joint account in the names of the respective advocates and substitute it with an order allowing the Defendants to deposit titles of its properties:-*
 - i. *Bukira/Bwisaboka/2765*
 - ii. *Bukira/Bwisaboka/2793*
 - iii. *Nyabasi/Busonga/834*
 - iv. *Bukira/Bwisaboka/1964*

- v. *Nyabasi/Bomerani/551*
- vi. *Bukira/Bwisaboka/130 (Mutation Form)*

to be held jointly with the Plaintiff's or by the court as security for the entire judgement sum.

6. *That this Honourable court be pleased to review its orders for the 30th May 2013 and set aside the Judgement and decree and all consequential orders against the Defendants and the Defendants be granted leave to amend their defences on condition that the substituted security of properties:-*

- i. *Bukira/Bwisaboka/2765*
- ii. *Bukira/Bwisaboka/2793*
- iii. *Nyabasi/Busonga/834*
- iv. *Bukira/Bwisaboka/1964*
- v. *Nyabasi/Bomerani/551*
- vi. *Bukira/Bwisaboka/130 (Mutation Form)*

is held jointly by the parties or deposited in court pending the hearing and determination of this application.

7. *That time be enlarged by reviewing the order of 30th May 2013 so as to give effect the orders sought herein that costs of this application be provided.*

3. The application is based on the following grounds:-

- i. *That the Defendants are experiencing financial difficulties and have been unable to raise the funds ordered on 30th May 2013.*
- ii. *That the Defendants are desirous to have this suit heard and determined on the merits of a defence that they have properly instructed counsel.*
- iii. *That the Defendants are making this application in good faith with regard to the spirit requiring the Judgement amount secured.*

- iv. *That the value of the properties listed as:-*

- i. *Bukira/Bwisaboka/2765*
- ii. *Bukira/Bwisaboka/2793*
- iii. *Nyabasi/Busonga/834*
- iv. *Bukira/Bwisaboka/1964*
- v. *Nyabasi/Bomerani/551*
- vi. *Bukira/Bwisaboka/130 (Mutation Form)*

is sufficient to secure the entire Judgement sum and allow the Defendants to defend the claim.

- v. *That the Defendants upon their inability to raise the said sums have now sought advice from counsel to make this application which has been filed right away.*

- vi. *That the Defendants do not wish this matter delayed and all these efforts are being made so that they can be heard on the merits of the case.*

- vii. *That it is only fair and just that this application be allowed.*

- iv. In support of the application is the supporting affidavit of the 2nd Defendant **MARWA KEMERO MAISORI** dated **10th October 2013** with its annexures.

5. The application is opposed by a replying affidavit of **MICHAEL WAMAE MAINA** dated **31st October 2013** with its annexures.
6. The brief history of this application is that by the Ruling of this court dated 30th April 2013 the court allowed the Defendant's application dated 13th March 2012 which sought to have the Judgement herein to be set aside, on the condition that the entire decretal sum then due to be deposited in interest earning account in the joint names of the parties' advocates. The account was to be opened and the said deposit made within 30 days of the said Ruling. However, that was not to be, and five months down the line the Defendants have now filed this application seeking a stay of the said Ruling and consequences arising therefrom, and also an order substituting the cash or money demands of that Ruling with provisions of titles as security.
7. Mr. Wangila counsel for the Defendant/Applicant submitted that the cash deposit envisaged under said Ruling is now over Kshs.15,000,000/= which is exceedingly difficult for the Plaintiff to raise and yet the Defendants still wish to defend the suit. Instead, he urged the court to substitute the cash demand with the titles as security, and verbally submitted that the combined value of the said property is over Kshs.50,000,000/=. As to why the application was filed after a long delay Mr. Wangila submitted that the Applicant had challenges securing the file from their previous advocates on record.
8. In reply M/s Matata for the Plaintiff/Respondent opposed the application arguing that there are no sufficient grounds for the review of the said orders. Further, she submitted that the titles attached as proposed security are not good since they are family farms and if differences arose within the Defendants it would be hard to sell them. Further, there is no valuation to confirm the value of the said titles, and that the application has been filed too late to warrant a consideration by this court and lastly that the application was filed in bad faith on the day when there was a notice to the Defendants to show cause why they should not be jailed for failure to comply with the court order.
9. I have considered the application and applied the merits of all the submissions. Firstly, for a court to review its orders there must be very good reasons which may include an error on the face of the records, a mistake which was unintended, or that there is now available information or evidence which if the court had been seized of, a different finding could have resulted. A review cannot be founded on the basis merely that the Applicant is not happy with one of the remedies given in the order, and can easily provide an alternative remedy. That is not correct.
10. This application does not satisfy conditions which a court would consider for reviewing its own orders. More than that, there is everything faulting this application. I will not go deep into them but will mention them in passing. There is no satisfactory explanation as to why there was a delay for over five months before this application was filed. The Applicants did not only delay to file this application, but they also abrogated the order of this court which required them to comply with the court order within 30 days from the date of that order.
11. Also, the application is filed in bad faith, as indeed it was filed and scheduled for hearing on the same day a Notice to Show Cause against the Defendants was to be heard, with the effect that that Notice to Show Cause was never heard, and finalization of this matter was further delayed.
12. However, the greatest fault to this application is that it has provided as substitutory security titles of land in Migori County. Those titles may be owned by the 2nd Defendant but is it not clear whether he holds them in trust for other family members or if they are his absolutely, and as if this is not enough, there is no valuation to verify the value of those titles. How is this court expected to put a value to those titles? The decretal sum is now alleged to be over Kshs.15,000,000/=. That is not a small amount of money. The value of property in the counties which are not cities also cannot be made on the basis of guesswork. It would be a travesty of justice to substitute a known value of a decretal sum of over Kshs.15,000,000/= for 6 titles in Migori County in the absence of their valuation.

13. Pursuant to the foregoing the order that appears to me to be just is to dismiss this application with costs. However, this court is not only a court of justice it is also a court of equity. At other times, it may also exercise its merciful and gracious jurisdiction under its inherent powers to deliver justice. In that regard, I will make the following orders:-

1. ***The Defendant's application before the court is allowed with the following variations:-***

- a. ***The Defendant/Applicant shall within 30 days from the date of this Ruling deposit 50% of the decretal sum due or Kshs.7,000,000/= whichever is the lower sum, in a joint interest earning account to be opened in the names of the parties advocates.***
- b. ***The Defendants shall within 21 days from the date of this Ruling deliver to this court the following titles mentioned in the said application to be held as security by this court for the Judgement decree herein.***
 - i. ***Bukira/Bwisaboka/2765***
 - ii. ***Bukira/Bwisaboka/2793***
 - iii. ***Nyabasi/Busonga/834***
 - iv. ***Bukira/Bwisaboka/1964***
 - v. ***Nyabasi/Bomerani/551***
 - vi. ***Bukira/Bwisaboka/130 (Mutation Form)***
- c. ***The Defendants to file an application to amend their defence within 30 days from the date of this Ruling.***
- d. ***The costs of this application assessed at Kshs.10,000/= shall be for the Plaintiff/Respondent and shall be payable within 21 days from today.***
- e. ***Save as provided in above orders all consequential orders arising from the Ruling dated 30th May 2013 are herewith stayed pending the hearing and determination of the suit.***

DATED, READ AND DELIVERED AT NAIROBI

THIS 21ST DAY OF JANUARY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Okemuma holding brief for Matata for Plaintiff

M/s Mutua holding brief for Wangila for Defendants

Teresia – Court Clerk