



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 250 OF 2008 (O.S.)

IN THE MATTER OF AN ADVOCATE AND CLIENT

AND

**IN THE MATTER OF AN APPLICATION IN RESPECT OF INTEREST ACCRUED ON AN
ESCROW ACCOUNT**

**NEW KENYA CO-OPERATIVE CREAMERIES LIMITED.....
.....PLAINTIFF**

VERSUS

- 1. EDWARD MURIU KAMAU**
- 2. NJOROGE NANI MUNGAI**
- 3. PETER MUNGE MURAGE**
- 4. ESTHER NJIRU OMULELE**

**(ALL T/A MURIU MUNGAI & COMPANY
ADVOCATES).....DEFENDANTS**

R U L I N G

1. This ruling concerns the **notice of motion dated 15th July 2011** in which numerous supporting and opposing affidavits (not to mention other documents) have been filed. The application seeks the following main orders -

- (i) That the Defendants do release to the Plaintiff the sum of KShs 18,969,666/00 “being the undisputed interest... accrued in an escrow account”.
- (ii) That the 2nd Defendant (**Njoroqe Nani Mungai**) be cross-examined “on the correctness of paragraphs 8, 9, 10, 11, 12 and 13” of his affidavit sworn on 22nd September 2010”.
- (iii) That in the alternative the Court “do assess the interest accrued using commercial bank average weighted interest rates applicable” at the time of investment, and declare that any additional interest found be released to the Plaintiff.

2. The application is stated to be brought under **Order 13, rule 2; Order 19, rule 2; and Order 51, rules 1 and 2 of the Civil Procedure Rules, 2010 (the Rules)**. **Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21** have also been cited.

3. The grounds for the application stated on the face thereof are –

- (i) That although the Defendants admit holding the sum of KShs 18,969,666/75 as accrued interest they have failed/neglected to pay the same to the Plaintiff.
- (ii) That the contents of the 2nd Defendant's affidavit sworn on 22nd September 2010 "are based on falsehoods and misinterpretations of the correct amount of interest accrued on the (sum) of KShs 547,028,870/00".
- (iii) That in order for the ends of justice to be met, there is need for the court "to investigate the correct amount of interest earned and held by the (Defendants) by, among other things, having the (2nd Defendant)...cross-examined on his affidavit dated 22nd September 2010".
- (iv) That "the Plaintiff's calculation of the interest earned on the deposit is KShs 60,152,882/00, in addition to further interest unknown to the Plaintiff on the amount of KShs 101,500,000/00 as mentioned in paragraph 10 of (the 2nd Defendant's) affidavit aforesaid.

The supporting and all supplementary affidavits are sworn by the Plaintiff's learned counsel, **David Mukii Meroka**.

4. The initial replying affidavit as well as the further replying affidavits are all sworn by the 3rd Defendant, Peter Munge Murage. The grounds of opposition emerging from all the replying affidavits include –

- (i) That this present case is intimately connected with, and was in fact consolidated with two other matters between the same parties, and that no order should be made in any one matter in isolation of the other matters.
- (ii) That there are numerous taxations, and challenges to taxations, of advocate/client bills of costs between the Defendants and their erstwhile client, the Plaintiffs, and that it is desirable for all these taxations to run their courses and for an account between them to be taken, before any order for payment by one or the other can be made.
- (iii) That in any event the Plaintiff was ordered on 7th April 2011 in another matter between the parties (Nairobi HC Misc. Cause No. 189 of 2004 (O.S.)) to deposit with the Defendants KShs 14 million towards their costs, yet it had failed to comply.
- (iv) That the sum of KShs 101,500,000/00 paid to one **Cherry Hill Limited** belonged to Cherry Hill Limited, and any interest earned on it (and it is denied that there was any) would not be due to the Plaintiff.
- (v) That ultimately the advocate's costs that will be due to the Defendants from the Plaintiff will be far in excess of any claim that the Plaintiff may have against them.
- (vi) That the issue raised in connection with the interest earned on the deposit of KShs 547,028,870/00 is speculative and not well-founded.

5. I have considered the submissions of the learned counsels appearing. No authorities were cited.

6. This present application is based upon an order made in a ruling herein dated and delivered on 30th July 2010 (Rawal, J). That order was as follows –

“The upshot of all the above is that I allow the originating summons (in HCCC) No. 250 of 2008 and direct the Defendants to disclose under oath the interest earned, if any, on the amount of KShs 547,028,870/00 which was received and held by the Defendants in an escrow account jointly with another firm of advocates (acting for) the Vendors as per Agreement of Sale dated 16th November 2004 (PM3) within 45 days from the date hereof.

After the aforesaid disclosure of the interest earned, if any, the Defendants shall pay the interest duly accrued and payable to the Plaintiff.”

7. This order came at the very end of a considered ruling that is some 33 typed pages long in which the learned Judge considered many issues raised by the parties, including some issues now raised again in the replying affidavits.

8. As it happened, the Defendants complied with the first part of the order of 30th July 2010 by filing an affidavit on 24th September 2010. That affidavit was sworn by the 2nd Defendant on 22nd September 2010. It is the affidavit upon which the Plaintiff has taken issues in the present application.

9. In the said affidavit the Defendants disclosed that the interest earned by the deposit was KShs 18,969,666/75, and that they were holding the same.

10. The order of 30th July 2010 that required the Defendants to pay to the Plaintiff the accrued interest is still in place and has not been stayed. It was not conditional on anything, and the court never ordered any set-off against any costs that may eventually be found to be due to the Defendants from the Plaintiff. Although the ruling that contained the order also concerned another case between the parties (Nairobi HCCC No 204 of 2008 (O.S.)), the two originating summonses having been heard together, the learned Judge made a separate and distinct order in respect to each case. Regarding HCCC No 204 of 2008 (O.S.) the Judge ordered –

“I thus direct the Defendants to file their bills of costs in respect of Misc. Civil Applications Nos 693 of 2003, 722 of 2003 and 990 of 2003...within 21 days from the date hereof.

The Defendants to pay the costs of the suit.

The prayer for refund of KShs 4,000,000/00 to abide the determination of the bills of costs as...directed.”

11. Indeed in yet another matter between the parties (Nairobi HCCC No 189 of 2008 (O.S.) the court ordered in a ruling dated and delivered on 7th April 2011 (Rawal, J) –

“Giving my best consideration to this matter, I shall find that the Defendants shall release the remaining documents in their possession to the Plaintiff only on condition that the Plaintiff shall deposit KShs 14,000,000/00 with the Defendants.”

The Defendants clearly already have security for this KShs 14 million in the Plaintiff's documents they still hold. There would be no justification at all to mix up this KShs 14 million with the specific accrued interest in respect to which the order of 30th July 2010 was made.

12. I find no good reason why the Defendants have not obeyed that order. They should have paid the

interest as ordered when they filed their affidavit on 24th September 2010.

13. I will in the event order that **the Defendants shall within fourteen (14) days of delivery of this ruling pay to the Plaintiff the declared interest of KShs 18,969,666/00.** As there was no good reason for the Defendants to withhold the payment from the time it was declared, it shall carry interest at court rates from 1st October 2010 till payment as above in full.

14. The Plaintiff has challenged the interest disclosed by the Defendants. It alleges that the deposit must have earned a far greater sum in interest (over KShs 50 million) than the KShs 18 million odd disclosed by the Defendants. But there is not a single affidavit sworn by a director of the Plaintiff attesting to this claim. There is not a single affidavit or other document duly sworn or made by an expert in the field of finances supporting the claim. The claim has been made in the numerous affidavits sworn by the Plaintiff's advocate. He states that he based his calculations upon **Central Bank** interest rates applicable at the relevant time that are available on the internet.

15. The attack upon the Defendants on the veracity of the interest they declared is a very serious matter. It is not only about figures; it is also about the integrity of the Defendants, who are officers of this court. Why would not a single director of the Plaintiff swear an affidavit in support of that attack? Why was the attack not supported by an actuarial/financial document authenticated by an expert in the field?

16. Most baffling of all, why would the Plaintiff's advocate himself swear affidavits in regard to an issue that was obviously going to be hotly contested, and thus enter into the arena of the litigation?

17. I find the accusation that the Defendants did not disclose the true interest earned to be highly speculative and not supported by any evidence. The declared interest was supported by a calculation contained in a letter dated 25th August 2005 from the bank that held the deposit (a copy of the letter was annexed to the interest-declaration affidavit). Nothing has been placed before the court that tends to cast doubt upon that calculation.

19. The prayer for cross-examination of the 2nd Defendant upon his interest-declaration affidavit therefore has no merit and is hereby dismissed.

20. Likewise, the alternative prayer for the court to assess or calculate the interest has no merit and is similarly dismissed.

21. As for the claim for further interest raised in a supplementary affidavit (on the sum of KShs 101,500,000/00 paid to Cherry Hill Limited by the Defendants), I note that the application was never amended to accommodate this further claim. In any event, it appears to me that Cherry Hill Limited may have a better claim than the Plaintiff to any interest that may have been earned on that sum (and I am not holding that any was indeed earned as there is no evidence of the same) as the principal sum was ultimately paid to them.

22. The Plaintiff has partly succeeded in its application and partly failed. I will order that the parties do bear their own costs of the application. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF DECEMBER 2013

H.P.G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER 2013