



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC NO. 227 OF 2017

MARGARET WANJIRU WANDIA..... PLAINTIFF/APPLICANT

VS

METUMI POWER COMPANY LIMITED.....DEFENDANT/RESPONDENT

RULING

1. By a motion dated the 25/11/2020 the Applicant sought orders as follows;

a. That the Honourable Court be pleased to order that the interest held in the escrow account at I&M Bank Garden City branch be released together with the Principal amount of Kshs 15,000,000/- held therein as per clause 7 of the Consent order dated the 22/6/2020 in furtherance of the one dated the 12/11/19.

b. That the costs of this application be provided for.

2. The application is premised on the grounds annexed thereto and the supporting affidavit of the Applicant. In it she deponed that the suit between the Applicant and the Respondent was compromised inter alia through consent orders dated the 12/4/2018 and 12/11/19 where the parties inter alia agreed to deposit the sum of Kshs 15,000,000/- in a joint interest-bearing account pending the registration of the easement rights over parcel No LOC19/GACHARAGE/2985 in favour of the Defendant.

3. It is the Applicant's averment that there has arisen a disagreement between the parties as to who is entitled to interest accrued in the joint earning escrow account. She opines that the interest should be to the account of the Applicant.

4. That because of the disagreement aforementioned the terms and conditions of the consent order dated the 12/11/2019 with respect to the satisfaction of orders 6 and 7 are pending completion.

5. That it has become necessary for the parties to refer the matter to Court for its determination.

6. The application is opposed. The Respondent averred that in 2014 the Respondent undertook to develop a small hydropower plant in Mathioya, Muranga County to subsidize the cost of power in tea factories in Murang'a County. Towards the implementation of the project, the Respondent sought to purchase the suit land and initiated negotiations with the Applicant. Later the parties agreed to compromise the suit vide a consent order dated the 16/4/18 that provided inter alia the deposit of Kshs 15 m in an escrow account held by the Advocates of the parties.

7. That the purpose of the monies was consideration for the grant of easement rights to the Defendant for purposes of the undertaking. That in the second order dated the 11/11/19 the holders of the joint account was amended to incorporate the current Advocates for the Applicant.

8. That on the 22/6/2020 the parties again agreed that upon the successful registration of the easement against the suit land in favour of the Respondent, the sum of Kshs 15 million held in the escrow account would be released to the Applicant forthwith and in any event within 21 days of the registration of the easement.

9. That the Applicant is only entitled to the sum of Kshs 15 million held in the escrow account upon registration of the easement and not the accrued interest.

10. That the sums in the joint account were not decretal amounts that would be subject to interest on payment. Further that the interest due accrued in the in the escrow account does not form part of the consideration for the compromise and settlement of the matter as executed in all the consents signed by the parties. In addition, he added that the Applicant has no basis for claiming interest on account that the delay in

completing the transaction has been occasioned by the Applicant misrepresenting that she had proper title to the suit land. That none of the grounds that vitiate a consent have been pleaded by the Applicant and in any event the consent orders are binding and in force, they, having not been appealed, reviewed and or set aside.

11. On the 9/12/2020, the parties appeared before me in open Court and elected to file written submissions. The Court directed the Applicant and the Respondent to file written submissions by 22/12/2020 and 15/1/2020 respectively. None of the parties have filed written submissions.

12. I will therefore determine the application based on the pleadings on record.

13. The singular issue in this matter is who between the Applicant and the Respondent is entitled to the accrued interest on the sum of Kshs 15 million in the joint account of the Advocates of both parties.

14. It is not in dispute that the parties entered into various consents that culminated into orders of the Court. In para 7 of the orders dated the 12/11/2019 the sum of Kshs 15 million was to be released to the Applicant within 21 days upon the successful registration of the easement in favour of the Respondent. The full text of the orders are set out below;

a. That a joint escrow account to be held at I & M Bank Limited in the names of both the Plaintiff's Advocates and Defendant's Advocates be opened within seven days from the date of this consent.

b. That upon opening the joint escrow account referred to in (1) above, the Defendant do transfer therein the sum of Kenya Shillings fifteen million only (Kshs. 15,000,000) which is currently held in an escrow account with the Plaintiff's previous Advocates, Njoroge Kugwa & Company Advocates.

c. That the Land Registrar, Murang'a does hereby cancel and or revoke the title deeds over the parcel of land known as LOC.19/GACHARAGEINI/3878 and LOC.19/GACHARAGEINI/2985 registered in name Margaret Wanjiru Wandia.

d. That the Land Registrar, Murang'a does hereby cancel and or revoke the title deed over the parcel land known as LOC.19/GACHARAGEINI/2985 registered in the name of Margaret Wanjiru Wandia and the title revert to Mary Mwhiki Wandia (deceased).

e. The Plaintiff does conclude succession proceedings with respect to the estate of Mary Mwhiki Wandia (deceased) within the shortest practicable

f. Upon successful conclusion of the succession proceedings and lawful transmission of LOC.19/GACHARAGEINI/2985 from the Estate of Mary Mwhiki Wandia (deceased) to the Plaintiff parties herein do proceed with the registration of the right of easement against title number LOC.19/GACHARAGEINI/2985 in favour of the Defendant.

g. Upon successful registration of the easement rights in favour of the Defendant the sum of Kshs.15,000,000 in the joint escrow account be released forthwith to the Plaintiff's Advocate for onward transmission to the Plaintiff and in any event within 21 days of the registration of the easement rights.

h. The order lifting the order for injunction issued on 28/9/2017 remain in force and there be a stay of proceedings herein pending further orders and fulfilment of the conditions herein above.

15. It is clear that para 7 of the orders decreed that the sum of Kshs 15 million will be released to the Applicant upon successful registration of the easement. It is on record that the parties were/are at the stage of negotiating and entering into an easement agreement when the question of the interest on the escrow account arose and the parties damaged. The parties have submitted this issue for the determination by the Court. It was stated that as at now the process of registration of the easement has stalled as a result.

16. It was a term of the agreement that upon payment into the escrow account of the sum of Kshs 15 million, the Defendant/Respondent and its agents would take over the full control of the suit land LOC9/GACHARAGEINI/2985 and continue the construction therein.

17. It is borne by the record that as early as 2013 the Respondent embarked on the project to set up a power plant and trenched through the suit land. Several photographs are on record in support of the position on the ground, a position that is admitted by the Respondent.

18. The Respondent has proffered reasons why the Applicant is not entitled to the interest. That inter alia the amounts in the escrow account are not decretal sums to entitle the Applicant of the same; the Applicant misrepresented to the Respondent that she held title to the land. In my view this issue was addressed by the consent of the parties when it was agreed among other things on the manner of rectifying the title. The Respondent acquiesced to the process of rectification and Respondent is therefore estopped. The orders did not provide a deadline within which the title was to be rectified and therefore a claim of delay on the part of the Applicant is unfounded.

19. It is the view of the Court that the Respondent having taken over the land is not entitled to the interest accrued on the account. Allowing this will lead to unjust enrichment on the part of the Respondent. In any event the amounts held in the escrow account are to the account of the Applicant.

20. The main reason the parties agreed to deposit the funds in an escrow account was for the due performance of the orders. What loss did the Respondent suffer to warrant the payment of interest? I am unable to find none. If the Applicant had been paid at the time of entering the consent, what interest would the Respondent be paid for and by whom?

21. It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract, or if certain conditions remain to be fulfilled, which are not carried out. Both parties are bound by the terms of the said orders unless and until they are set aside, appealed and or varied.

22. Having held that there is an undisputed contract between the parties, the issue is who between the parties is entitled to the interest accrued on the fixed interest earning account held jointly by the Advocates of the parties. The starting point is the consent orders/contract of the parties. The Court is entitled in law to give effect to the intentions of the parties as far as expressed in the consent orders as well as the conduct of the parties before during and after the consent orders.

23. Nothing stops the Court from implying terms into an agreement where there is ambiguity and uncertainty. In the case of **Campling Bros & Vanderwal Ltd (supra)** the Court of Appeal for Eastern Africa held that – a “term can only be implied if it is necessary in the business sense to give efficacy to the contract.” Explaining this holding the Court in the case of **Rufate –Vs- Union Manufacturing Co. (Ramsbottom) (1918) L.R. I K.B. 592** said: -

“” The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract that is, if it is such a term that can comfortably be said that if at the time the contract was being negotiated someone had said to the parties, “what will happen in such a case” they would have replied “of course so and so will happen, we did not trouble to say that; it is too clear.” Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed.”

24. The escrow account was created for due performance of the contract which had become an order of the Court, it was also to safe guard the rights of both parties.

25. The parties set time lines for the period when the amount would be deposited and the payment would be upon registration. The terms required immediate deposit of the amount as demonstration of commitment from the Respondent and also ensured the Applicant follows up on the registration without delay.

26. For the above reasons, I allow the application.

27. The Respondent shall meet the costs of the application.

28. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 11TH DAY OF FEBRUARY 2021

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Makura for the Plaintiff

1st & 2nd Defendants – Absent

Court Assistant; Njeri