



Gatabaki & 2 others (All suing as the Co-administrators of the Estate of Samuel Mundati Gatabaki - Deceased) v Muga Developers Limited & 4 others (Commercial Case 151 of 2017) [2024] KEHC 11277 (KLR) (Commercial and Tax) (19 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11277 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 151 OF 2017
PM MULWA, J
SEPTEMBER 19, 2024**

BETWEEN

**NANCY WANJA GATABAKI 1ST PLAINTIFF
ESTHER SUSAN WANGARI GATABAKI 2ND PLAINTIFF
JOSEPHINE BEATRICE GATHONI 3RD PLAINTIFF
ALL SUING AS THE CO-ADMINISTRATORS OF THE ESTATE OF SAMUEL
MUNDATI GATABAKI - DECEASED**

AND

**MUGA DEVELOPERS LIMITED 1ST DEFENDANT
SURAYA SALES LIMITED 2ND DEFENDANT
SURAYA PROPERTY GROUP LIMITED 3RD DEFENDANT
EQUITY BANK LIMITED 4TH DEFENDANT
WATTS AUCTIONS 5TH DEFENDANT**

RULING

1. What is before the court for determination is the plaintiffs' Notice of Motion dated 31st October 2023 made under Orders 25 (5) and 27(1),(3) of the *Civil Procedure Rules* and Sections 1A, 3 and 3A, 63(e) of the *Civil Procedure Act* where the plaintiffs seek the release of Kshs. 2,000,000.00 to their advocates that was deposited in court pursuant to the court's orders of 12th September 2022. The application is supported by the grounds on its face and the supporting affidavit of the 1st plaintiff sworn on 31st October 2023. It is opposed by the 4th defendant through the replying affidavit sworn by its Manager,



Legal Services Kariuki King'ori on 3rd April 2024. The application has been disposed by way of written submissions which are on record and which I will make relevant references to in my analysis and determination later on.

2. The plaintiffs aver that the application for injunction, for which the conditional order for payment of the Kshs. 2,000,000.00 was ordered, has been overtaken by events by virtue of the court's subsequent rulings in this matter including that of 20th April 2023 that cited the plaintiffs for contempt and that of 22nd August 2023 where the court directed that survey works be undertaken on the parcels of land charged to the 4th defendant or the plaintiffs risked being committed to civil jail.
3. According to the plaintiffs, the court's order on contempt and the subsequent sentencing therefore meant that they lost control over Plot No. LR 28223/33/T.5A (IR NO. 182814), the property subject of the application for injunction and that the purpose for which the temporary injunctive orders had been issued by this Court was extinguished by virtue of the ruling on the contempt application.
4. The plaintiffs state that given that the deposit of Kshs.2,000,000.00 was given as security for the conditional injunctive orders and the said orders having been overtaken by events, there is no basis for the monies to continue being held in the Judiciary account. That it is imperative that the court orders the immediate release of the Kshs. 2,000,000.00 deposited in the Judiciary account to the plaintiffs' advocate's bank account, that the defendants shall not suffer any prejudice if the said sum is released to the them and that this application be allowed as prayed.
5. In response, the 4th defendant depones that paragraph 7 of the consent judgment recorded on 21st December 2021 and of the decree issued of 8th February 2024 states: "The plaintiffs are to pay the bank's costs for the High Court Civil Case 157 of 2017, High Court Commercial Case No. 30 of 20020 (formerly Nairobi Environment & Land Court Case No. 364 of 2019) and Civil Appeal E282 of 2021 to be agreed between the plaintiffs' advocates and the bank's advocates and in event the advocates are unable to agree to be taxed by the court where the matters have been instituted."
6. That the plaintiffs and the 4th defendant have not agreed on the latter's costs in this matter and that the 4th defendant has filed its bill of costs dated 27th February 2024 for the sum of Kshs.11,391,312.00 which is awaiting taxation by the taxing master of this court.
7. The 4th defendant further claims that the plaintiffs owe it costs in respect of HCCOMM No. 30 of 2020 (formerly Nairobi ELC No. 364 of 2019). That costs were taxed at Kshs. 17,576,031.00 on 28th July 2022 and the plaintiffs filed a reference challenging the decision of the taxing master which was set to be decided on 11th April 2024 and; Court of Appeal Civil Appeal No. E282 of 2021 - Nancy Wanja Gatabaki Josephine Beatrice Gathoni Gatabaki v Muga Developers Limited and 17 others where the 4th defendant's bill of costs for the sum of Kshs.1,507,100.00 is filed and is yet to be taxed.
8. The 4th defendant contends that the sums that the plaintiffs owe it on account of costs are colossal and that the sum of Kshs, 2,000.000.00 should be released to it to reduce the plaintiffs' indebtedness.

Analysis and determination

9. From the parties' pleadings and submissions, the main issue for determination is whether the Kshs. 2,000,000.00 should be released back to the plaintiffs or released to the 4th defendant as part settlement of the taxed costs in HCCOMM No. 30 of 2020. I agree with the plaintiffs that the court, in directing them to deposit the Kshs. 2,000,000.00 was similar to an order of security for performance, or damages, for the duration that they enjoyed the interim orders of injunction (See [*Abdibamid Sheikh Abdulla t/ a Jambo Matt Supermarket & 2 others v Tecno Holdings Limited & 2 others*](#) [2019] eKLR).



10. Whereas it is correct that the 4th defendant has filed its bill of costs in this suit, I am persuaded by the plaintiffs' contention that it would be speculative, abstract and premature for the court to release the deposited sum to the 4th defendant when there is no determination made on the same.
11. However, I note that in para. 7 of the Consent reproduced above, the plaintiffs committed to pay costs in various suits inter alia HCCOMM No. 30 of 2020 where the bill of costs has already been taxed and a certificate of taxation issued. Even though the plaintiffs have filed a reference against the same I note, as argued by the 4th defendant, that there is no evidence of a stay of execution of the ruling. The certified taxed sum of Kshs. 17,576,031.00 remains payable to the 4th defendant. Further, the court, in issuing the order of depositing the Kshs. 2,000,000.00 was aware that the plaintiffs had admitted indebtedness to the 4th defendant at least going by the consent order.
12. Therefore, in addition to the Kshs. 2,000,000.00 being deposited as security for the duration when the plaintiffs were enjoying the injunction, the same was also deposited as security for the plaintiffs' indebtedness as they prosecute their case against the defendants. The consent compromised the suit and resulted in judgment being entered in favour of the 4th defendant.
13. I agree with the 4th defendant's submissions that this court can invoke its inherent power to ensure justice is served more so for a successful party. This position was echoed by Kuloba J., (as he was then) in *Machira T/A Machira & Co Advocates v East African Standard (No. 2)* [2002] KLR 63 as follows:

“...to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”
14. It is for the above reasons that I have find that the ends of justice will be served if the Kshs. 2,000,000.00 deposited in court on 12th September 2022 is released to the 4th defendant to reduce the plaintiffs' indebtedness in respect of the certified taxed costs of Kshs. Kshs. 17,576,031.00 in High Court Commercial Case No. 30 of 2020.

Disposition

15. In the upshot, the plaintiffs' Notice of Motion dated 31st October 2023 has no merit and is hereby dismissed. The sum of Kshs. 2,000,000.00 deposited in court by the plaintiffs on 12th September 2022 is to be released to the 4th defendant in part settlement of the taxed costs in High Court Commercial Case No. 30 of 2020.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF SEPTEMBER 2024.

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P.MULWA

JUDGE

In the presence of:

Ms. Wanyonyi for plaintiffs/applicants

Ms. Mwangi h/b for Mr. Kimani for 4th defendant

Court Assistant: Carlos

