



Katesai Marketing Limited & 2 others v Co-operative Bank of Kenya Limited (Commercial Case 505 of 2004) [2024] KEHC 11275 (KLR) (Commercial and Tax) (23 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11275 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 505 OF 2004
JWW MONG'ARE, J
SEPTEMBER 23, 2024**

BETWEEN

**KATESAI MARKETING LIMITED 1ST PLAINTIFF
ALORA FLOWERS LIMITED 2ND PLAINTIFF
TONY J.K. KETTER 3RD PLAINTIFF**

AND

CO-OPERATIVE BANK OF KENYA LIMITED DEFENDANT

RULING

1. What is before the court for determination is the Plaintiffs' Notice of Motion application dated 1st July 2019 made under section 1A, 1B, 3A, 63(e) of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) and Rule 11 and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010 where they seeking the following orders:
 1. That the Defendant be and is hereby Ordered to furnish to this Honourable Court a detailed Statement of Account of the Escrow Account in which the Defendant has been holding the Sum of Kshs.19,500,000/= from Sale of the Plaintiffs' Two (2) Charged Properties Land Parcel LR No. 9230/7 (Uasin Gishu) and Kajiado Kitengela/6159 which were Subjects of this Suit in Terms of the Defendants Letters dated 8th April 2005 and 1st July 2005 together with all Accrued Interest thereon from the date of receipt of the funds to date within such Limited Period as the Court may determine
 2. That the hearing of this Suit or any settlement hereof do await the provision of a detailed Statement of the Escrow Account.



3. That in default of provision of the said Statement of the Escrow Account within such time as shall be determined by this Honourable Court, the Plaintiffs be at Liberty to Appoint a qualified Accountant to Compute Interest on the Sum of Kshs.19,500,000/= from 1st July 2005 using applicable Central Bank governing Interest Rates on Fixed Deposits until the date of such Report to be filed in Court before the matter proceeds for hearing.
 4. That the Costs of this Application together with the Costs of such appointed Accountant be paid by the Defendant in any event.
2. The application is supported by the affidavit of the 3rd Plaintiff sworn on 1st July 2019 and it is opposed by the Defendant through the replying affidavit sworn by its Legal Officer, Elissa Otemba on 12th November 2019. The application was disposed by way of written and oral submissions from the parties' respective counsel.

The Application and the Plaintiffs' Submissions

3. The Plaintiffs contend that this suit was filed on 17th September 2004 together with an application for Injunction following service of a Notification of Sale by M/s Nguru Enterprises Auctioneers upon the Plaintiffs and on instructions of the Defendant to sell the Plaintiffs' Charged Properties; LR No. 9399/16 Nandi Hills, LR No. 9230/7 - (I.R No. 52117) Kitale, Title No. Kajiado/ Kitengela/6159 and Title No. Kajiado/ Kitengela/ 2086 in exercise of its statutory power sale to recover a sum of Kshs.293,868,174.75/=.
4. The Plaintiffs pleaded that they did not owe the Defendant the Sums claimed as they had already sold two properties in Nairobi namely LR No. 209/11367 and 209/11673 in the name of Charity Holdings Limited to clear the loans between August 1996 and September 1998 and Title No.Kajiado Kitengela/2086 in the name of the 3rd Defendant was duly discharged in 1998 and subsequently sold to Irrico International Limited which also filed a suit in Nairobi HCCC 659 of 2004 after seeing the said Property had been advertised for Sale by the Auctioneer on instructions of the Defendant.
5. The Court (Azangalala J.,as he was then) issued orders of interim injunction stopping the sale advertised for 1st December 2004 and ordered the Plaintiffs to pay the Advertisement Charges of Kshs.81,200.00/= and furnish an undertaking for damages which the Plaintiffs claim they did. The application for injunction was subsequently heard on full merits by the Late Khaminwa J., and confirmed by a Ruling dated 13th December 2011 pending the final hearing and determination of this suit in respect of only one title LR No. 9399/16 - Nandi Hills.
6. The Plaintiff avers that during the intervening period between December 2004 and July 2005, the parties agreed to sell by private treaty LR No.9230/7 - Uasin Gishu for Kshs.17,500,000.00/= and Title No. Kajiado/Kitengela/6159 for Kshs.4,000,000.00/= out of which Kshs.2,000,000.00/= was paid to the Plaintiffs and Kshs.2,000,000.00/= was paid to the Defendant and that by its letters dated 25th January 2005, 3rd February 2005, 8th April 2005 and 1st July 2005, the Defendant undertook to deposit the sale proceeds totalling Kshs.19,500,000.00/= in an escrow account pending the hearing and determination of this suit or any agreement/settlement between the parties.
7. The Plaintiff states that after the Ruling of 13th December 2011, the parties attempted further negotiations on a without prejudice basis to settle the suit but the negotiations collapsed and the suit was fixed for hearing on 25th March 2014 before Kamau J., but the same could not proceed as parties had not complied with the pre-trial steps under the amended Order 11 of the *Civil Procedure Rules*, 2010. That the Plaintiffs thereafter complied with Order 11 by filing their List of Witnesses, Witness



- Statement and List and Bundle of Documents dated 12th May 2016 while the Defendant failed to comply.
8. The matter was fixed for Hearing on 21st September 2018 before Tuiyott J.,(as he was then) who ordered parties to take out Pre-Trial and Case Management Conference within 45 days before the Deputy Registrar and the case was fixed for Pre-Trial Conference on 21st November 2018 when the Defendant again failed to comply as parties attempted further negotiations leading to several Mentions before the Deputy Registrar and reported in Court on 29th April 2019 that settlement had been achieved and the Defendant's Advocates needed 21 days to obtain a Statement of the Escrow Account from the Defendant before parties could record a final settlement and the matter was fixed for Mention on 30th May 2019. That on the said 30th May 2019, the Defendant's Advocates reported to Court before the Deputy Registrar that they were not able to provide/furnish a Statement of the Escrow Account despite the Defendant's undertaking and letters dated 8th April 2005 and 1st July 2005 whereupon the Deputy Registrar granted the Defendant a final chance to comply and file their List of Witness, Witness Statement together with the List and Bundle of Documents within 21 Days and gave a final Mention date for 27th June 2019.
 9. The Plaintiffs state that the Defendant again failed to comply and the matter was consequently referred to the Judge by the Deputy Registrar on 27th June 2019 and that in light of the facts set out herein and the Undertaking and letters by the Defendant, it has become necessary for the Plaintiffs to file this application before the matter proceeds for hearing on merits as the sale of the two Properties was done during the pendency of these proceedings by Private Treaty following agreement by both parties and undertakings by the Defendant to hold the funds in an Escrow Account pending the hearing and determination of this suit. A such, the Plaintiffs urge the court to grant the orders sought as the Defendant has acted contrary to its own undertaking and letters aforesaid to the detriment of the Plaintiffs.
 10. The Plaintiffs' counsel submitted that the late Majanja J., on 15th January 2020 ordered the Defendant to file an affidavit to explain and confirm the status of the escrow account and having failed to do so, they were to file an affidavit to show cause why the Escrow Account was not opened and how the Kshs.19,500,000.00/= was utilized. Counsel submitted that the Defendant filed an affidavit sworn by Raphael Makau on 18th August 2020 which merely attached disputed statements of accounts which were the basis of filing this suit and that the same did not show cause why the Escrow Account was never opened and why the Defendant utilized funds agreed to be kept in an escrow account into disputed loan accounts which were the subject of the suit and subsisting orders of injunction.
 11. Counsel submitted that the fact that the Defendant was holding the Kshs.19,500,000.00/= in escrow was captured by the court in its ruling of 13th December 2011 and that the same was being held for four years before the ruling. That the Defendant had been paid Kshs. 43 million from the sale of a property in Muthaiga against a debt of Kshs. 31 million. The Plaintiffs thus assert that its debts with the Defendant had been cleared hence the reason why the injunction was granted. Counsel submits that the Bank was not able to show the funds in the escrow account were utilized against the disputed debt hence the ruling by the late Justice Majanja. Counsel thus stated that if the Defendant is not able avail the Escrow account which the Defendant has confirmed was not opened, then they seek that prayers No. 2 and 3 of the application be granted. Counsel thus submitted that the Plaintiffs will be highly prejudiced proceeding with a hearing which the Defendant have violated the orders of the court.
 12. Counsel submits that the Defendant applied the money in the escrow account to the disputed account as if there was no injunction. That if the Defendant was aggrieved by the said orders, it ought to have sought a review or correction



The Defendant's Reply and Submissions

13. In response, the Defendant deposes that at all material times, the Plaintiffs were indebted to the Defendant to the tune of the sum of Kshs.295,000,000.00/= which debt the Plaintiffs have previously admitted. That on or about 4th January 2005, the Plaintiffs through their advocates sought the consent of the Defendant to sell property title number LR No. 9230/7 - Uasin Gishu and Kajiado/Kitengela/6159 by way of private treaty. The Defendant vide a letter dated 5th January 2005 gave the Plaintiffs conditional consent for the sale of the properties, and the Defendant states that one of the terms of the mutual agreement was that the sale proceeds were to be deposited directly with the Defendant and held in an escrow account pending completion of the sale transaction. That the Escrow account was opened to hold money for a short period of time during the transaction and that the same was not an interest earning account and that upon completion of the sale transaction, the funds in the escrow account were credited to the Plaintiffs' working capital account to reduce its liabilities with the Defendant and the arising balance transferred to the loan arrears account to further reduce the 2nd Plaintiff's indebtedness. The Defendant deposes that it is impractical for a debt of Kshs.295,000,000.00/= to be extinguished by sale proceeds of Kshs.19,500,000.00/=.
14. The Defendant states that the escrow account was closed after the funds were utilized to offset the amounts owed by the Plaintiffs to the Defendant after the sale transaction was completed and that that the proposal to settle the matter out of court by the Plaintiffs is admission that they have outstanding liabilities with the Defendant. The Defendant thus presents that the present application is filed in bad faith to mislead the court and is an abuse of court process.
15. Counsel for the Defendant submitted that they filed a list of documents and explained the contents of the statement of accounts as directed by the court on 15th January 2020 through the affidavit of Raphael Makau sworn on 18th January 2020. That the parties agreed to sell the two properties as per the Defendant's letters of 25th January 2005, 3rd February 2005, 8th April 2005 and 1st July 2005 and that funds were to be held in escrow pending completion of the sale of the properties.
16. Counsel submitted that in the Court's ruling of 13th December 2011, there was no order restraining the Defendant from applying the sale proceeds against the liabilities of the Plaintiffs to the Defendant. That if such an order of injunction exists, then the order has lapsed under Order 40 Rule 6 of the Civil Procedure Rules and that the Plaintiffs have not demonstrated if the order has been extended. Counsel asserted that there is no escrow account that was opened between the parties to hold the purchase price pending the hearing and determination of the suit hence prayer no.2 cannot be granted. He urged the court to refrain from making substantive determinations and that the same should be reserved after a full hearing. Counsel relied on inter alia the case of *Gladys Boss Shollei v Judicial Service Commission*; Petition 39 of 2013 [2013] KEIC 1 (KLR) (Employment and Labour) (22 November 2013) (Ruling) to buttress their position. Counsel contended that the court's ruling of 13th December 2011 and the findings therein were not on merit as the issues are still alive. He further urged that if the Plaintiffs seek to rely on an expert witness, they do not need the orders of the court to avail one.

Analysis and Determination

17. From the parties' pleadings and submissions, the court's determination of whether the Plaintiffs are entitled to the orders they seek boils down to the interpretation of the court's ruling of 13th December 2011. At pgs. 4 and 5 of the Ruling, the court held in part as follows:

“The Plaintiffs fully repaid their loans in August 1996. After commencement of this suit 2 propertieswas sold for 4 million and 2 million was paid to Defendant. Balance was kept



in Escrow Account. The bank is holding a total 19,500,000/= in escrow accounting pending finalization of this matter"

18. From the above, the court found, at least on a prima facie basis, that the Plaintiffs fully repaid their loans in August 1996 and that the Defendant is holding a total Kshs.19,500,000/= in escrow pending the hearing and determination of this matter. This ruling was never appealed against by the Defendant and the Defendant never sought a review from the court. As such, the position of the court remains for now that the Plaintiffs have fully repaid their loans and that the Defendant was to hold the Kshs.19,500,000.00/= in escrow pending finalization of this matter.
19. It is based on this position and assumption that the Defendant was holding the Kshs.19,500,000.00/= in an escrow account that the court on 15th January 2020 ordered the Defendant to confirm the status and position of the escrow account within 21 days and on 7th February 2020 the court further ordered the Defendant to file a further affidavit in support of the statement of account stating the same. As stated, the Defendant filed an affidavit sworn by Raphael Kamau on 18th August 2020 where it stated that there was no escrow account holding the said Kshs. 19,500,000.00/= and as submitted and stated above, the Defendant had applied the same towards the Plaintiffs' impugned liabilities. In my view, the Defendant has discharged the orders of the court of 15th January 2020 and 7th February 2020 as it has confirmed the status and position of the escrow account and that it filed an affidavit explaining and supporting the statement of accounts it had annexed. Whether the explanation is satisfactory or agreeable to the Plaintiffs was not a requirement of the court orders and if anything, is an issue reserved for trial.
20. As such, it is my finding that the Prayer No. 1 and 2 are now spent. In Prayer No. 3, the Plaintiff seeks to appoint a qualified Accountant to compute Interest on the sum of Kshs.19,500,000.00/= from 1st July 2005 using applicable Central Bank governing Interest Rates on Fixed Deposits until the date of such Report to be filed in Court before the matter proceeds for hearing. On this, I am in agreement with the Defendant's counsel's submission that the Plaintiffs are indeed at liberty to rely on whatever experts they wish to have as witnesses or persons they feel will bolster their case and they do not need a court order to do so. This prayer is therefore unnecessary but since it is not opposed by the Defendant, then the same is hereby granted by court. However, since it is the Plaintiffs that seek to appoint and rely on the said accountant, then they are the ones to bear the cost of their appointment and not the Defendant. If at all the Plaintiffs will be successful in this suit, then I believe the said costs will be factored in during taxation and paid back by the Defendant (See [John Nabashon Mwangi v Kenya Finance Bank Limited \(In Liquidation\)](#) ML Comm HCCC No. 212 of 2009 [2019] eKLR)

Conclusion and Disposition

21. The upshot of the above is that the Plaintiffs' application dated 1st July 2019 is allowed to the extent that the Plaintiffs are hereby granted liberty to appoint a qualified Accountant to compute interest on the sum of Kshs.19,500,000.00/= from 1st July 2005 using applicable Central Bank governing Interest Rates on Fixed Deposits until the date of such Report to be filed in Court before the matter proceeds for hearing. The said Accountant's fee shall be met in the first instance by the Plaintiffs, however, if the Plaintiffs are successful in the suit, then the same shall be paid back to the Plaintiffs by the Defendant after taxation. Each party to meet its costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2024.

J.W.W. MONG'ARE



JUDGE

In the Presence of:-

1. Mr. Kongere for the Plaintiff/Applicant.
2. N/A for the Defendant/Respondent.
3. Amos - Court Assistant

