



Mbuka Ventures Company Limited v Karanja Mbugua Advocates (Commercial Case E125 of 2023) [2024] KEHC 12775 (KLR) (Commercial and Tax) (14 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12775 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E125 OF 2023
MN MWANGI, J
OCTOBER 14, 2024**

BETWEEN

MBUKA VENTURES COMPANY LIMITED PLAINTIFF

AND

KARANJA MBUGUA ADVOCATES DEFENDANT

JUDGMENT

1. The plaintiff filed an Originating Summons dated 24th March, 2023 pursuant to the provisions of Sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 52 Rule 4(e) of the Civil Procedure Rules, 2010 and all other enabling provisions of the law seeking orders inter alia that the defendant be directed to pay the plaintiff Kshs.7,514,875.00 being the balance of the judgment sum issued in Nakuru CMCC 575B of 2017- Mbuka Ventures Limited v Kenya Orient Insurance Limited and paid to the defendant. The plaintiff also prays for the defendant to be directed to account for Kshs.8,316,875.00 paid to them in defrayal of the judgment sum issued in the aforesaid suit, and that the defendant do pay interest at 12% from 2022 until payment in full.
2. The suit is premised on the grounds on the face of the Summons and is supported by an affidavit sworn on the same day by Jane Gathoni Mburu, the plaintiff's Director. She averred that the plaintiff engaged the defendant to file and prosecute Nakuru CMCC 575B of 2017- Mbuka Ventures Limited v Kenya Orient Insurance Limited. That the said suit was successfully prosecuted, resulting in a judgment delivered on 11th March, 2022. She deposed that thereafter, the parties in the said suit entered into a consent dated 25th May, 2022 where it was agreed that the judgment amount would be paid in monthly instalments. She further deposed that the last instalment was paid in January 2023 to the defendant's account and the said suit was marked as settled.



3. Ms. Mburu contended that they then followed up with the defendant for the payment of the full judgment sum but only received Kshs.802,000.00, leaving a balance of Kshs.7,514,875.00 still due and owing to them from the defendant. She stated that despite repeated demands, the defendant has refused to pay them the balance of the judgment sum in Nakuru CMCC 575B of 2017 that they are duly entitled to. She also stated that the defendant has no legal justification for withholding the sums in question, as no claim has been made that the plaintiff owes the defendant any money.
4. In opposition thereto, the defendant filed a replying affidavit sworn on 6th May, 2024 by Joseph Karanja Mbugua, an Advocate of the High Court of Kenya, and the defendant herein. He averred that judgment in Nakuru CMCC 575B of 2017 was delivered on 11th March, 2022 awarding the plaintiff Kshs.7,840,000.00. He averred that the defendant in that case was dissatisfied with the said judgment and appealed in Nakuru Civil Appeal No. E39 of 2022, which appeal is still pending in the High Court. That on 17th April, 2023, the High Court ordered that the aforesaid judgment amount should not be disbursed to the plaintiff herein, until further directions or the determination of the appeal. That despite this, Jane Gathoni Mburu, a Director of the plaintiff, collected Kshs.902,000/= in cash from the defendant as part of the award.
5. The defendant stated that he has received complaints from other family members of Jane Gathoni Mburu, accusing her of excluding them from the case after their father, the majority shareholder of the plaintiff company, passed away. That the said family members allege that she is collecting the funds for her own use, and that they have filed an application in Nakuru CMCC 575B of 2017 as interested parties, seeking entitlement to the judgment sum, and that the application is still pending. The defendant argued that releasing the funds solely to Jane Gathoni Mburu would prejudice them. He also challenged this Court's jurisdiction to hear the suit herein, noting that the case and appeal were filed in Nakuru, and the parties reside and conduct business there.
6. In a rejoinder, the plaintiff filed a supplementary affidavit sworn on 17th May, 2024 by Jane Gathoni Mburu, the plaintiff's Director. She stated that despite the fact that there were stay orders issued in Nakuru Civil Appeal No. E39 of 2022, the said appeal was withdrawn on 29th May, 2023 effectively discharging the said orders. She further stated that since the funds in question belong to the plaintiff company, there is no demonstrable justification by the defendant to withhold them.
7. The Summons herein were canvassed by way of written submissions. The plaintiff's submissions were filed on 17th May, 2024 by the law firm of Maingi Musyimi & Associates Advocates. It is however evident from the Court record and the Case Tracking System that the defendant neither filed any written submissions nor did he make any oral submissions in opposition to the Summons herein.
8. Mr. Maingi, learned Counsel for the plaintiff cited the provisions of Rule 13 of the Advocates Accounts Rules and submitted that since the defendant has not disbursed the entire judgment sums received by him to the plaintiff, he is duty bound to avail the details of how such sum has been used or treated. He referred to the provisions of Order 52 Rule 4(1) of the Civil Procedure Rules, 2010, and relied on the case of Leisure Lodges Limited v Japheth S. Asige S. O. Anyanzwa t/a Asige, Kaverenge, & Anyanzwa Co. Advocates [2017] eKLR. He submitted that no loss and/or prejudice shall be suffered by the defendant if the orders sought are granted. Counsel cited the case of John Nyamu & another v Muu & Associates Advocates [2008] eKLR, and stated that the defendant has not demonstrated any reason to warrant him to continue holding the funds in question, and for that reason, the instant Summons should be allowed as prayed.
9. Mr. Maingi referred to the case of North End Trading Company Limited (Carrying on the business Under the Registered Name of) Kenya Refuse Handlers Limited v City Council of Nairobi [2019]



eKLR, and stated that the defendant has failed to support the assertions contained in his replying affidavit with supporting documents hence the said assertions have no probative value to this suit.

10. On the issue of jurisdiction, Counsel relied on the case of *Korea Nyamai v Neema Parcels Limited* [2021] eKLR, and asserted that this Court has jurisdiction to determine the dispute between the parties herein.

Analysis And Determination.

11. Upon consideration of the Originating Summons filed herein, the affidavits filed in support thereof, the replying affidavit by the defendant and the written submissions by Counsel for the plaintiff, the issues that arise for determination are –
 - i. Whether this Court is clothed with the requisite jurisdiction to determine the dispute herein; and
 - ii. Whether the orders sought herein should be granted.

Whether this Court is clothed with the requisite jurisdiction to determine the dispute herein.

12. In the case of the Owners of the Motor Vessel “Lillian S’ v Caltex Oil (Kenya) Ltd [1989] KLR 1, Nyarangi, JA., held as follows on the issue of jurisdiction -

...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

13. Section 15 of the *Civil Procedure Act* provides that suits should be instituted where the defendant resides or where the cause of action arises. It states as follows -

Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction -

- a. the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or
 - b. any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or
 - c. the cause of action, wholly or in part, arises.
14. In this case, the primary suit being Nakuru CMCC 575B of 2017 and the subsequent appeal were filed in Nakuru, the parties herein reside and carry on business in Nakuru, and the cause of action that led to the institution of Nakuru CMCC 575B of 2017 also arose in Nakuru. Accordingly, the suit herein ought to have been filed in Nakuru. It is however also important to note that Article 165(3)(a) of *the Constitution* of Kenya, 2010 provides that the High Court shall have unlimited original jurisdiction in criminal and civil matters. Further, Section 1B of the *Civil Procedure Act* imposes a duty on Courts to



further the overriding objective when handling disputes. This duty is also anchored on Section 3A of the Civil Procedure Act which provides that-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

15. The Court of Appeal in the case of Kenya Power & Lighting Company Limited v Benzene Holdings Limited T/A Wyco Paints, Civil Appeal No. 132 of 2014 when discussing the import of Section 3A of the Civil Procedure Act stated that -

Section 3A of the Civil Procedure Act appears to have been introduced to augment the provisions of Section 3, vesting in the courts inherent power to make any orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Of course this power has now been broadened by the introduction in 2009 of Overriding Objective in sections 1A and 1B and 2010 by Article 159 of the Constitution.

16. Having in mind the provisions of Article 165(3)(a) of the Constitution of Kenya as read with Section 15 of the Civil Procedure Act, I am of the considered view that since this case is already before this Court, it is only fair and just for this Court to invoke its jurisdiction under Section 3A of the Civil Procedure Act, especially considering the fact that the parties herein filed their respective pleadings and what is pending is the delivery of the judgment on the said issues. The defendant herein filed a Notice of Preliminary Objection (P.O.) dated 9th May, 2023 raising the issue of whether this Court has the jurisdiction to hear this suit, but later filed a Notice of Withdrawal of the preliminary objection (P.O.) on 29th September, 2023. In the premise, this Court finds that it is clothed with the requisite jurisdiction to determine the dispute between the parties herein.

Whether the orders sought herein should be granted.

17. Courts have the jurisdiction to order an Advocate to deliver accounts and documents, pursuant to the provisions of Order 50 Rule 4(1) of the Civil Procedure Rules, 2010 which states as follows-

Where the relationship of advocate and client exists or has existed the court may, on the application of the client or his legal personal representative, make an order for -

- a. the delivery by the advocate of a cash account;
 - b. the payment or delivery up by the advocate of money or securities;
 - c. the delivery to the applicant of a list of the money or securities which the advocate has in his possession or control on behalf of the applicant;
 - d. the payment into or lodging in court of any such money or securities;
 - e. the delivery up of papers and documents to which the client is entitled.
18. It is not disputed that there exists Client - Advocate relationship between the plaintiff and the defendant, respectively. The defendant was instructed by the plaintiff to institute and prosecute Nakuru CMCC 575B of 2017. The said suit was successfully prosecuted and judgment was entered in favour of the plaintiff on 11th March, 2022 for Kshs.7,840,000.00 as per the judgment annexed to the plaintiff's affidavit in support of the instant suit. From the evidence adduced by the defendant, it is evident that out of the said Kshs.7,840,000.00, the deponent of the plaintiff's affidavit has since



received a total of Kshs.902,000.00 from the defendant, leaving a balance of Kshs.6,938,000.00 that is still due and owing from the defendant to the plaintiff.

19. The defendant asserted that being dissatisfied with the judgment delivered on 11th March, 2022, in Nakuru CMCC 575B of 2017, it lodged an appeal at the High Court in Nakuru being Nakuru Civil Appeal No. E39 of 2022. He averred that the said appeal is still pending and on 17th April, 2023, the High Court ordered that the aforesaid judgment amount should not be disbursed to the plaintiff until further directions or until the determination of the Appeal. His contention is that the funds that remain due and owing to the plaintiff from the defendant cannot be released to the plaintiff.
20. The plaintiff has however produced to this Court a copy of the proceedings in Nakuru Civil Appeal No. E39 of 2022 which shows that on 29th May, 2023, the said Appeal was marked as withdrawn with no order as to costs. It then follows that the orders barring the defendant from releasing the decretal sum to the plaintiff were automatically vacated by the withdrawal of the Appeal. In the premise, this Court finds that the defendant cannot rely on the orders issued by the High Court in Nakuru Civil Appeal No. E39 of 2022 in declining to release the balance of the judgment sum to the plaintiff.
21. The defendant has alleged that he received complaints from family members of Jane Gathoni Mburu, accusing her of excluding them from the case after their father, the majority shareholder of the plaintiff company, passed away. This Court however notes that in as much as the defendant claims that this complaint was received by him in writing, a copy of the said complaint was not produced before this Court by the defendant to substantiate the said allegation. The defendant further claimed that the said family members have since filed an application in Nakuru CMCC 575B of 2017 as interested parties, seeking entitlement to the judgment sum, which application is still pending in Court. I however note that a copy of the said application has not been produced before this Court vide the response filed by the defendant, for this Court to ascertain of its existence and determine if the prayers sought therein warrant the plaintiff being kept away from the fruits of its judgment.
22. From the defendant's replying affidavit, it is evident that he does not claim that the plaintiff owes him any money to warrant him to withhold the balance of the decretal sum in Nakuru CMCC 575B of 2017. In the premise, I am persuaded that the defendant has no legal right and/or justification whatsoever to withhold the balance of the judgment sum in Nakuru CMCC 575B of 2017 from the plaintiff. The allegation that the deponent of the affidavit in support of the instant suit is not entitled to the said monies holds no evidential value since it is not disputed that she is the Director of the plaintiff company and has every right to act on behalf of the plaintiff company. I however note that the monies belong to the plaintiff company and not to Jane Gathoni Mburu in her individual capacity.
23. On the issue of the interest payable, the Court in *Nelson Andayi Havi t/a Havi & Company Advocates v Jane Muthoni Njage t/a J.M Njage & Company Advocates* [2015] eKLR held that –

It may be said that, conduct such as being complicit in or deliberately withholding Plaintiff's money would earn the advocate penalty in form of interest for having denied the Plaintiff his money. See the case of [*Naphatali Paul Radier v David Njogu Gachanja HCCC No.582 of 2003*](#) (OS) where Justice H.P.G Waweru held as follows -

The Defendant has withheld the Plaintiff's money from August 2002. Justice demands that he pays it with interest. As no particular rate of interest was contracted, I shall award at court rates.



24. Similarly, in the case of *Nderi & Kiingati Advocates v Kiruti & Company Advocates* [2021] eKLR Muchemi J., when dealing with a similar issue held that -

It is trite law that so long as monies that was undertaken to be paid remains unpaid, interest on it for the unpaid period provided.

25. In the circumstances, of this case, it is my finding that the plaintiff is entitled to interest on the withheld amount from January 2023 when the last instalment was received by the defendant until payment in full. In view of the fact that the defendant does not deny having received the amounts in issue in Nakuru CMCC 575B of 2017 for onward transmission to the plaintiff, there is no order barring the defendant from releasing the said sum to the plaintiff.

26. It is important to note that in as much the judgment delivered on 11th March, 2022 was for Kshs.7,840,000.00, in the consent between the parties in Nakuru CMCC 575B of 2017 dated 25th May, 2022, it was agreed that the decretal sum in the said suit would be defrayed by way of monthly instalments. The decretal sum given in the said consent was Kshs.8,316,875.00. Further, the defendant herein did not deny having received Kshs.8,316,875.00 from the defendant in Nakuru CMCC 575B of 2017. He contended that the judgement amount was Kshs.7,840,000/= and not Kshs.8,316,875.00. This Court will however proceed by way of the decretal sum as per the consent filed in the lower Court. For that reason, and noting that Jane Gathoni Mburu, the plaintiffs' Director has since received Kshs.902,000.00 from the defendant, this Court finds that Kshs.7,414,875.00 is due and owing to the plaintiff from the defendant, and the defendant has no legal justification to continue withholding the said funds from the plaintiff.

27. In the premise, this Court finds that the plaintiff's Originating Summons dated 24th March, 2023 is merited. As a result, I make the following orders –

- i. The defendant is hereby directed to pay the plaintiff company Kshs.7,414,875.00 being the balance of the decretal sum in Nakuru CMCC 575B of 2017; less the defendant's legal costs if any is outstanding;
- ii. The outstanding amount less the defendant's legal costs if any is outstanding, shall accrue interest at the rate of 12% per annum from January 2023 being the date when the last instalment was made by Kenya Orient Insurance Limited, until payment in full; and
- iii. Costs of this suit shall be borne by the defendant.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF OCTOBER, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Maingi for the plaintiff

No appearance for the defendant

Ms B. Wokabi - Court Assistant.

