



**Intercounties Imports and Exports v National Land Commission & 3 others;
Park Avenue Investments Limited & 3 others (Interested Parties) (Civil Appeal
377 of 2014) [2023] KEHC 17560 (KLR) (Civ) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17560 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 377 OF 2014

CW MEOLI, J

MAY 11, 2023

BETWEEN

INTERCOUNTIES IMPORTS AND EXPORTS PETITIONER

AND

THE NATIONAL LAND COMMISSION 1ST RESPONDENT

CHIEF LAND REGISTRAR 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

TELEPOSTA PENSION SCHEME 4TH RESPONDENT

AND

PARK AVENUE INVESTMENTS LIMITED INTERESTED PARTY

JUBILEE INSURANCE CO. LTD INTERESTED PARTY

TRUST BANK LIMITED (IN LIQUIDATION) INTERESTED PARTY

COMMISSIONER OF LANDS INTERESTED PARTY

(Ruling delivered by Njuguna J on March 23, 2016)

RULING

1. Before the court for determination are three (3) applications. The first is the Notice of Motion dated August 31, 2018 (hereafter the first application) brought by Intercounties Imports And Exports (hereafter the Petitioner) and is supported by the grounds laid out on the face of the first application and the facts stated in the affidavit of Naushad Abid, a principal officer of the Petitioner. By the



application, the Petitioner sought an order to the effect that the sum of Kshs 2,741,947/- deposited by Teleposta Pension Scheme (hereafter the 4th Respondent) pursuant to the ruling delivered by Njuguna J on March 23, 2016 be released to the Petitioner's advocate on its behalf.

2. In his supporting affidavit, Naushad Abid stated that the Bills of Costs filed separately by the Petitioner and Trust Bank Limited (In Liquidation) (hereafter the 3rd Interested Party) were taxed and that the Petitioner's bill of costs was taxed in the sum of Kshs 2,741,947/-. That the 4th Respondent subsequently sought to challenge the ruling on taxation and sought leave of the court to file a reference out of time, and which leave was granted on the condition that the 4th Respondent deposits the taxed amount in court.
3. That the 4th Respondent deposited the sum of Kshs 5,431,614/- as well as the revenue costs in the sum of Kshs 1,500,000/- on April 7, 2017. That subsequently, the 4th Respondent filed a reference on April 18, 2017 but which reference was dismissed by the court on May 31, 2018. Hence, it would be in the interest of justice for the order sought to be granted. The deponent added that the Respondents do not stand to be prejudiced in the process.
4. The Notice of Motion dated September 6, 2018 (hereafter the second application) was brought by the 4th Respondent herein and is supported by the grounds laid out on its face and the facts stated in the affidavit of advocate Anne W Mathenge. The second application seeks a declaratory order to the effect that the 4th Respondent is only entitled to pay a portion of the taxed costs amounting to Kshs 1,357,903.50 as per the ruling of the court delivered on March 6, 2015; an order directing the 1st, 2nd and 3rd Respondents to pay their portion of costs to the Petitioner and the 3rd Interested Party on pro rata basis; and an order directing the Deputy Registrar to release to the 4th Respondent the balance of the monies deposited in court after payment of its portion.
5. The gist of the affidavit sworn by Anne W. Mathenge is that the suit was originally filed by way of the petition dated October 30, 2014 wherein the Petitioner sought for the reversal of gazette notice number 15325 appearing at page 5425 of the Special Issue of the Kenya Gazette Vol CXV-No 172 published on December 6, 2013 revoking the title to the property known as L R No 209/13238. That the 4th Respondent is the only party who opposed the Petition, following which the matter was settled by way of a consent and the gazette notice was consequently revoked. The advocate stated that the parties were unable to settle the issue of costs, leading to the ruling by the High Court delivered on March 6, 2015 wherein the court awarded costs to the Petitioner and Interested Parties, to be borne by the Respondents jointly.
6. That the Petitioner and the 3rd Interested Party filed their Bills of Costs dated June 4, 2015 and June 24, 2015 respectively and which Bills were taxed by the taxing master at the respective sums of Kshs 2,747,947/- and Kshs 2,689,667/-. That being dissatisfied with the ruling on taxation, the 4th Respondent sought leave of the court to file a reference out of time and which leave was granted on March 23, 2017 on the condition that the taxed amount be deposited in court within 30 days therefrom.
7. The advocate averred that the 4th Respondent complied with the aforementioned condition by depositing the total sum of Kshs 5,431,614/- and further lodged the reference which was ultimately dismissed vide the ruling delivered on May 31, 2018. It was averred that in view of the dismissal order and the earlier ruling on costs to be borne by the Respondents jointly; coupled with the fact that the 1st to 3rd Respondents have not actively participated in the matter, it would only be fair for the 4th Respondent to only pay its portion of the costs out of the deposited sum of Kshs 5,431,614/-



(constituting the sum of Kshs 1,357,903.50) and that the remaining balance be released to it upon apportionment of the costs payable amongst the Respondents.

8. The Petitioner opposed the second application by putting in the replying affidavit sworn by Naushad Abid on October 3, 2018 averring that the affidavit sworn in support of the second application ought to be struck out since an employee of the 4th Respondent ought to have sworn the affidavit instead. The deponent further stated that the Petitioner is entitled to the release of the entire sum on costs owing to it and that the 4th Respondent has never made efforts to ensure the remaining Respondents contribute their share towards settlement of the taxed costs. It was averred that it would be contrary to the interest of justice to deny the Petitioner the entire costs and yet the security was provided by the 4th Respondent.
9. The same deponent also swore a further replying affidavit on May 30, 2022 averring that the Petitioner stands to be prejudiced if the amounts sought are released to the 4th Respondent and yet the court had set a condition for provision of security of costs to ensure that the Petitioner was secure in the event that the reference did not succeed.
10. The third application is the Notice of Motion dated September 24, 2018 brought by the 3rd Interested Party and anchored on the grounds set out on its body and the facts stated in the affidavit of advocate Fidelis Marabu Limo. The third application is seeking an order to the effect that the sum of Kshs 2,689,667/- which was deposited by the 4th Respondent following the ruling delivered by Njuguna J on March 23, 2016 be released to the 3rd Interested Party's advocate on its behalf. The facts deponed to in the supporting affidavit of Fidelis Marabu Limo are a rehash of the facts mentioned in the affidavits hereinabove sworn in support of the first and second applications, and I therefore see no need to restate them here.
11. The 4th Respondent put in the replying affidavit sworn by Peter K Rotich, the Administrator/Trust Secretary of the 4th Respondent on October 12, 2018 to oppose both the first and third applications, essentially reiterating the averments made in support of the second application save to add that the taxed amount was to be borne by the Respondents jointly pursuant to the court ruling of March 6, 2015 and hence it would only be fair for the 4th Respondent to only pay its portion of the costs as opposed to being condemned to pay the entire costs solely.
12. Following the directions by the court, the parties filed and exchanged skeletal written submissions, though it is noteworthy that the 1st to 3rd Respondents and the 1st, 2nd and 4th Interested Parties did not participate at the hearing of the applications or file any documents in reply thereto.
13. On the part of Counsel for the Petitioner in urging the court to allow the first application, it is submitted that in view of the rulings mentioned hereinabove, the Petitioner is entitled to the full costs out of the sum deposited by the 4th Respondent and that the latter cannot claim an interest in the said sums deposited to be held in the interest of the Petitioner and the 3rd Interested Party. Citing the case of *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR where the court determined that the decretal sum deposited ought to be released to the successful party.
14. The Petitioner also cited the case of *Dhanjal Investments Limited v Shabaha Investments Limited* (Civil Appeal 80 of 2019) [2022] KECA 366 (KLR) (18 February 2022) where the Court of Appeal sated that:

“Waiver on the other hand is defined in Black’s Law Dictionary, Ninth Edition as “the voluntary relinquishing or abandonment- express or implied - of a legal right or advantage”, while estoppel is defined as “a bar that prevents one from asserting a claim or right that contradicts what one has said or done before, or what has been legally established as



true”. The doctrine of equitable estoppel is a defense that is raised when such conduct or representation has been relied on by another party, with the result that the other party has suffered a detriment or injury.”

15. For the above reasons, the Petitioner prayed that the first application be allowed, alternatively praying that should the court find in favour of the 4th Respondent, then it would be a fair order for the 4th Respondent to be directed to pay interest on the costs from March 6, 2015 when the ruling on costs was delivered, amounting to the sum of Kshs 2,035,351.01.
16. The 3rd Interested Party on its part submitted in support of the first and third applications and in opposition to the second application, that the second application is purely intended to delay the execution process on costs, quoting the case of *Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others* [2014 eKLR where the court held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment-debtor...Civil process is quite different because, in a civil process, the judgment is like a debt hence the Applicants become and are judgment-debtors in relation to the Respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the Applicants. I presume, the security must be one which can serve that purpose.”

17. It was therefore submitted on behalf of the 3rd Interested Party that the third application ought to be allowed, whereas the second application is deserving of dismissal.
18. To support the second application, Counsel for the 4th Respondent contended that while it is not in dispute that costs were awarded to the Petitioner and the 3rd Interested Party, the principle of joint and several liability comes to play in this instance and hence the 4th Respondent cannot be condemned to settle the entire amount on costs. Counsel cited the case of *Harrison Wanjobi Wambugu v Felista Wairimu Chege & another* [2019] eKLR where the court determined that:

“In *Dubai Electronics v Total (K) Ltd & 2 others* HCC.Nairobi CC.870/98, the court stated:

“Clearly therefore where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability. However, in a purely several liability each tortfeasor is only liable to settle the sum due to the tune of his liability. Where, however, the liability is joint and/or several the plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them. That is my understanding of joint and several liability.”

19. Counsel for the 4th Respondent therefore urged the court to determine that it is only liable to settle a portion of the costs upon apportioning the costs equally amongst the Respondents.
20. The court has considered the material canvassed in respect of the first, second and third applications respectively. Noting that the orders sought in the three (3) applications arise out of the same circumstances, the court will first address the second application which will essentially determine the merits of the first and second applications.



21. As earlier mentioned, the second application which was brought by the 4th Respondent herein sought a declaratory order to the effect that the 4th Respondent is only entitled to pay a portion of the taxed costs amounting to Kshs 1,357,903.50 as per the ruling of the court delivered on March 6, 2015; an order directing the 1st, 2nd and 3rd Respondents to pay their portion of costs to the Petitioner and the 3rd Interested Party on pro rata basis; and an order directing the Deputy Registrar to release to the 4th Respondent the balance of the monies deposited in court after payment of its portion.
22. It is not in dispute that the Petition was settled by way of a consent and that the pending issue on costs was determined by the court vide the ruling delivered on March 6, 2015 when it held that the Respondents were jointly liable to pay the costs of the Petitioner and the Interested Parties who responded to the Petition (the 3rd Interested Party). Upon my further study of the record, it is not in dispute that the matter proceeded for taxation and that a ruling on taxation was delivered, thereby prompting the 4th Respondent to seek leave of the court to file a reference against the said ruling and which leave was conditionally granted. The record shows that the 4th Respondent deposited the total sum of Kshs 5,431,614/- being the total costs awarded to the Petitioner and the 3rd Interested Party. It is evident that the reference filed by the 4th Respondent was consequently dismissed, hence the instant applications.
23. That said, the key issue for consideration is whether the 4th Respondent is liable to pay the entire sum on costs in view of the non-participation of the 1st, 2nd and 4th Respondents and in light of the sum deposited in court as security.
24. The question of joint liability as well as joint and several liability has been discussed by superior courts in many decisions. The Court did not come across any decisions by the Court of Appeal or the Supreme Court on the subject and therefore turned to the persuasive case of *Harrison Wanjohi Wambugu v Felista Wairimu Chege & another* [2019] eKLR wherein the court addressed the above subject in the following manner:

“The concept of joint and several liability has been discussed in several decisions. In *Kenya Airways Ltd v Mwaniki Gichobi*, Milimani Commercial HCC 423/2002, the court said:

“The concept of joint and several liability comprehends one judgment and decree against two or more persons who are liable collectively and individually to the full extent of such decree; however, double compensation is not allowed and accordingly, whatever portion of the decree is recovered against one of such defendant cannot be recovered from the other defendant.” See HCC 256/2013 *Hellen Nyaga v Dr Wachira Murage*.

In *Dubai Electronics v Total (K) Ltd & 2 others* HCC Nairobi CC 870/98, the court stated:

“Clearly therefore where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability. However, in a purely several liability each tortfeasor is only liable to settle the sum due to the tune of his liability. Where, however, the liability is joint and/or several the plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them. That is my understanding of joint and several liability.”



25. From my reading and understanding of the above-cited authorities, it is apparent that in instances of joint liability, a successful party can claim the decretal sum and/or related costs from any or all of the unsuccessful parties entirely. In the present circumstances, since it has been established that the 1st, 2nd and 3rd Respondents did not participate at all in the matter and the 4th Respondent provided security for the entire costs owing to the Petitioner and the 3rd Interested Party as directed by the court, it is apparent that the latter are at liberty to pursue their costs from the 4th Respondent entirely, which going by the orders sought in the first and second applications, they appear to have done.
26. There is no bar preventing them from pursuing the taxed costs entirely from the 4th Respondent. In the premises, I am hesitant to find in favour of the 4th Respondent. In any event, the 4th Respondent, upon paying the costs taxed and which costs had already been secured, is at liberty to pursue any outstanding sums from its counterparts if it so wishes. In view of all the foregoing circumstances, I decline to grant the orders sought in the second application and I hereby dismiss it but with no order on costs, given the circumstances and nature of the application.
27. Concerning the first and second applications which I will tackle contemporaneously, upon my findings above and in the absence of any credible evidence to show the manner in which prejudice will be visited upon the 4th Respondent, I hereby allow both applications. Consequently, the following orders are hereby made:
- a. The Notices of Motion dated August 31, 2018 and September 24, 2018 are hereby allowed as prayed. However, parties shall bear their own costs of the respective motions.
 - b. The Notice of Motion dated September 6, 2018 is dismissed with no order on costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 11TH DAY OF MAY 2023.

C MEOLI

JUDGE

In the presence of:

For the Petitioner: Mr Omoiti h/b for Mr Ndolo

For the 3rd Respondent: Mr Gekonge h/b for Mr Mathenge

For the 4th Respondent: N/A

For the 3rd Interested Party: Mr Ogutu

C/A: Carol

