



**Rothschild Investment Limited v Eric Kaburu Advocates;  
M'Mukindia & another (Interested Parties) (Civil Suit E593 of 2023)  
[2024] KEHC 13972 (KLR) (Commercial and Tax) (11 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13972 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E593 OF 2023  
JWW MONG'ARE, J  
NOVEMBER 11, 2024**

**BETWEEN**

**ROTHSCHILD INVESTMENT LIMITED ..... PLAINTIFF**

**AND**

**ERIC KABURU ADVOCATES ..... DEFENDANT**

**AND**

**KIRUGI LAIBON M'MUKINDIA ..... INTERESTED PARTY**

**TOTAL ENERGIES (K) LIMITED ..... INTERESTED PARTY**

**RULING**

1. Before the court are two Applications. The 1<sup>st</sup> Application is a Notice of Motion dated 4<sup>th</sup> December 2023 in which the Applicant seeks to restrain the Defendant or any other person acting at his behest from releasing all or any part of the money held by him on stakeholder basis and amounting to Kshs.47, 196, 000 to either 1<sup>st</sup> Interested Party or his new advocates.
2. The Application is supported by the grounds set out on the face of it and by the sworn Affidavit of Michael Mutisya who states that the Plaintiff/ Applicant is apprehensive that the herein Defendant intends to run away, discard and or deprive it of its lawful Commission as enumerated in the authority letter dated 12<sup>th</sup> October 2021.
3. In response to the Application, the Respondent filed the Replying Affidavit dated 19<sup>th</sup> January 2024.
4. The 2<sup>nd</sup> Application is a Notice of Motion by the 1<sup>st</sup> Interested Party dated 1<sup>st</sup> March 2024 seeking orders that the Court compels the Defendant/Respondent to deposit the sum of Kshs.1,415,880/=



- being 3% of the rent and the amount in dispute here to the court forthwith pending the determination and hearing of this suit.
5. In addition, the court to issue an order compelling the Defendant/Respondent to immediately release the sum of Kshs.45,780,120.00/= plus accrued interest being the balance of the rent owed to the Applicant herein through his Advocates M/S Mithega & Kariuki Advocates.
  6. The Application was supported by the grounds on the face of it and by the sworn Affidavit of Kirugi Laiboni M'mukindia.
  7. All the two applications are defended and/or opposed as the parties have since exchanged responses as hereunder:-
    - a. The 1<sup>st</sup> Interested Party filed his Replying Affidavit to the Plaintiff's Application dated 4<sup>th</sup> December 2023. The Replying Affidavit was sworn by one Kirugi Laiboni M'mukindia on 19<sup>th</sup> January 2024.
    - b. The Defendant equally filed his Replying Affidavit to the Plaintiff's Application dated 4<sup>th</sup> December 2023. The said Replying Affidavit was sworn on 4<sup>th</sup> March 2024.
    - c. The Plaintiff responded to the 1<sup>st</sup> Interested Party's application dated 1<sup>st</sup> March 2024 vide its Replying Affidavit sworn by one Michael Mutisya on 7<sup>th</sup> May 2024.
    - d. Equally so, the Defendant filed his Replying Affidavit to the 1<sup>st</sup> Interested Party's dated 1<sup>st</sup> March 2024. The Replying Affidavit is sworn by one Eric Murimi Kaburu on 10<sup>th</sup> May 2024.
  8. The parties herein filed their written submissions which the court has carefully considered alongside the Applications and the responses thereto.

### **Analysis and Determination**

9. The Background of this Application is that the herein Defendant was, at all material times relevant to this suit, the Advocate of the 1<sup>st</sup> Interested Party, the latter being the registered proprietor of land parcel number Nairobi Block 84/1218.
10. Subsequently, in a letter dated 12<sup>th</sup> October 2021 and titled as, "Authority to Lease of Property Title Number Nairobi Block 84/1218 Ino Kirugi Laibon M'mukindia", the herein Defendant appointed the Plaintiff/ Applicant as agents with instructions to identify and recommend a Lessee to lease the property at a monthly rent of Ksh.360,000.00/=. Upon executing the above instructions, the Plaintiff/ Applicant would be entitled to 3% commission of the monthly rent and any sum over and above the monthly rent.
11. The Plaintiff/Applicant identified the herein 2<sup>nd</sup> Interested Party who is hitherto the Lessee on the said property. To this end, the Plaintiff/Applicant argued that it has performed its duty and or instructions and is thus entitled to the 3% commission and all the sum over and above the monthly rent.
12. Further to the above, the Plaintiff/Applicant is aware, that the herein 2<sup>nd</sup> Interested Party released a sum of Ksh.47,196,000.00/= to the herein Defendant/ Respondent to hold on a stakeholder basis pending registration of the lease in favor of the 2<sup>nd</sup> Interested Party, the Lessor. The said monies were released to the herein Defendant/ Respondent on the strength of a Professional Undertaking dated 10<sup>th</sup> November 2021. However, since November 2021, the Plaintiff/Applicant has never been paid its commission by the Defendant/Respondent to date.



13. It was the Plaintiff's case that despite all the follow-ups and or demands made by the Plaintiff/Applicant to the Defendant/Respondent, the Defendant/Respondent refused to release the said monies allegedly since he is holding the said monies on stakeholder basis.
14. On the other hand, the 1<sup>st</sup> Interested Party maintained that the amount in contest is Kshs.1,415,880/= which is 3% of the rent and the balance of Kshs.45,780,120/= should be released to him.
15. Based on the above, the court frames the following issues for determination:
  - a. Whether the Plaintiff has established all the conditions precedent for grant of interim orders to restrain the release of the money.
  - b. Whether the sum of Kshs.47,196,000/= should be deposited in court pending the hearing and determination of the main suit.
16. The Plaintiff herein is essentially seeking an interim order of injunction against the Defendant from releasing all or any part of the money held by him on stakeholder basis and amounting to Kshs.47,196,000/= to either 1<sup>st</sup> Interested Party or his new advocates.
17. In order for the court to grant the said orders, the Plaintiff is obligated to satisfy the court that it has a prima facie case with a probability of success at the trial and that in the absence of an injunction it shall suffer irreparable harm and injury which cannot be adequately compensated by an award of damages as enunciated in the case of *Giella –vs- Cassman Brown & Co. Ltd* [1973] EA 358.
18. The first question this court therefore needs to ask is whether the Plaintiff established a prima facie case with a probability of success? A prima facie case was defined by the Court of Appeal in *MRAO Limited – Versus - First American Bank of Kenya Limited & 2 others* (2003) eKLR.

“so what is “a prima facie case” I would say that in civil cases it is a case in which on the material presented to the court or tribunal properly directly itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
19. It is common ground that there exists a sum of Kshs.47,196,000/= held by the Defendant on a stakeholder basis. It is from this amount that the Plaintiff based its claim as the agent and stated that it is entitled to the 3% commission and all the sum over and above the monthly rent.
20. It was the Plaintiff's case that it has a legitimate claim based on the letter of authority dated 12<sup>th</sup> October 2021 as it performed its duty as per the said letter and is therefore entitled to remuneration as per the terms of the letter.
21. Equally, the 1<sup>st</sup> Interested Party acknowledged that there is a commission amount owed and the only contention is on the exact amount owed. While the 1<sup>st</sup> Interested Party maintains that it was 3% of the rent; the Plaintiff and the Defendant stated that it was a term in the letter that it was “3% commission and all the sum over and above the monthly rent.”
22. Evidently, the Plaintiff has indeed established a prima facie case with a probability of success and the question that then follows is whether the Plaintiff will suffer irreparable harm. On this it was the Plaintiff's submission that since it cannot sue the 1<sup>st</sup> Interested Party directly for recovery of the monies in dispute, in the event the monies are released, the Plaintiff's claim will have suffered permanent loss as it will not be able to recover its fees and/or commission.



23. In sum, I am satisfied that the Plaintiff has met the threshold for grant of temporary injunction. The same is hereby allowed as prayed.
24. Turning to the 2<sup>nd</sup> Application, it was the 1<sup>st</sup> Interested Party's contention that the Defendant be compelled to deposit the amount in contest Kshs.1,415,880/= which is 3% of the rent and the balance of Kshs.45,780,120/= released to him.
25. In contrast, the Defendant submitted that he already paid to the 1<sup>st</sup> Interested Party a sum of Kshs.11,949,140/= and a further sum of Kshs.6,528,000/= paid to Kenya Revenue Authority. Further, the Defendant averred that the 1<sup>st</sup> Interested Party owes him a sum of Kshs.301,460,000/= as legal fees. In addition, it is notable that the 1<sup>st</sup> Interested Party in the Affidavits did acknowledge that he owes the Defendant the sum of Kshs.5,300,000/=
26. As it stands, it is unascertainable how much is owed to which party. It is therefore the court's view, in the exercise of its discretion and in the interest of justice that the whole sum of Kshs.47,196,000/= be deposited in court pending the hearing of the suit following which each party's stake in the suit amount shall be ascertained.
27. The upshot of the above is that the Plaintiff's Application dated 4<sup>th</sup> December 2023 is allowed while the 1<sup>st</sup> Interest Party dated 1<sup>st</sup> March 2024 is disallowed. Each party will bear their own costs of these applications.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11<sup>TH</sup> DAY OF NOVEMBER 2024**

.....  
**J.W.W. MONG'ARE**

**JUDGE**

In The Presence Of

Mr. Shisanya for the Plaintiff.

Mr. Isoe for the Defendant.

Mr. Kariuki for the Interested Party.

Amos - Court Assistant

