



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. 79 OF 2018

NGATIA & ASSOCIATES ADVOCATE.....PLAINTIFF

VS.

INTERACTIVE GAMING AND

LOTTERIES LIMITED.....DEFENDANT

MAMA FATUMA GOODWILL

CHILDREN'S HOME.....INTERESTED PARTY

RULING

1. It seems to this Court that had the parties herein put in more effort in resolving this matter, then these proceedings would have been less controversial.

2. Ngatia & Associates Advocate (the Advocates) at one time represented Interactive Gaming and Lotteries Limited (IGL or Clients). It is now common ground that the Advocates' fees has now been taxed at Kshs.9,110,323/=. Pending or in the course of the Taxation proceedings, the Advocates commenced this suit seeking the following prayers against the Clients:-

a) An order restraining Chase Bank Limited (in receivership) from releasing the sum of Kshs.33,781,100.76/=

b) That the said sum together with interest accrued thereon held in Chase Bank Limited on behalf of the Defendant be applied towards settling the costs due and owing to the Plaintiff from the defendant.

c) Costs

3. The Clients deny the claim and have themselves set up a Counterclaim against the Advocates alleging, inter alia, professional negligence.

4. Simultaneously with presenting the suit, the Plaintiff filed a Notice of Motion dated 22nd February 2018 seeking a temporary injunction to restrain Chase Bank (in receivership) from releasing the sum of over Kshs.33,781,100.76/= together with interest accrued thereon to IGL pending the hearing and determination of the suit. On 1st March 2018, Hon. Onguto J granted a temporary restrain order that is pending to date.

5. In the meantime, Mama Fatuma Goodwill Children's Home (Mama Fatuma) sought to be joined into these proceedings and for the discharge of those orders. Mama Fatuma cites the order of Court in No. 370 of 2010 Republic -vs- Interactive Gaming and Lotteries Limited (IGL) made on 8th July 2016 in which the Court ordered disbursement of the deposited funds as follows:-

(i) Kshs.34,632,709,636 to Kyalo & Advocates for Mama Fatuma.

(ii) Kshs.15,367,364/= to Mbugua Nganga & Co. Advocates for IGL.

6. There is then a third Application dated 23rd September 2019 by IGL seeking the setting aside or variation of the interim injunctive Orders

made by the Court on 1st March 2018.

7. This Court has considered the three applications and the representation made by each of the parties. But before giving its view on the matter, one observation has to be made.

8. Chase Bank Kenya Limited was acquired by SBM Bank Kenya Limited which retained a portion of the deposits of Chase Bank Kenya Limited while another portion was held by Kenya Deposit Insurance Corporation. Secondly, deposits held were to be paid to customers in tranches. This Court must bear these in mind as it considers the application.

9. Mama Fatuma has a Court order in its favour and should not be detracted by the Advocate – Client dispute between Ngatia & Co. Advocates and IGL. Because it was paid the principal sum, Mama Fatuma deserves to access its portion of interest ordered by Odunga J on 22nd November 2019.

10. As to the dispute between the Advocates and Clients, the Advocates Bill of Costs have now been taxed at a total sum of Kshs.9,110,323/= and four certificates of Taxation have been issued in favour of the Advocates. In so far as the certificates have not been set aside or varied, then the Advocates may stand in a strong position as regards that amount. In that event they may have a prima facie case with a probability of success for that sum. Yet this is not to downgrade the Client's counterclaim and on full trial it may turn out that the counterclaim will overawe the professional fees sought. But as it is for now, where the Advocates has certificate of taxation in their favour, the Advocates' case cannot be said to be a trifle.

11. In an affidavit sworn in support of the injunction application, Mr. Fredrick Ngatia depones:-

“13. In the event that the funds held at Chase Bank Limited(in receivership)are released to the Defendant ,the Plaintiff will not be able to recover the taxed costs from the defendant as the plaintiff is not aware of any assets owned by the defendant in Kenya. I verily believe that it has no assets and indeed it is doubtful that it has a place of business.”

12. In the face of that assertion, IGL would be expected to confront it by giving evidence of its assets and property. But nothing of that sort was forthcoming. See the Replying Affidavit of Adil Bashir sworn on 17th March 2018.

13. In the circumstances, the apprehension by the Advocates that they may not be able to realize their fees if the deposited amount is not protected is not without justification. On the other hand it does not make sense to protect more than Kshs.9,110,323/= which is the certified costs of the Advocates.

14. Now then the following orders commend themselves to this court:-

1. SBM Bank shall within 7 days herein furnish the Court with the sums available for payment out of the deposit made therein which some shall include interest.

2. Mama Fatuma Goodwill Children's Home shall be paid the interest on a pro rata basis as ordered by Court on 22nd November 2017.

3. Kshs.9,110,323/= shall remain held in the Account pending the hearing and disposal of this suit.

4. The balance after orders (2) and (3) are complied with shall be released forthwith to IGL.

5. The Plaintiff and the Defendants shall each bear their own costs in respect to the applications of 22nd February 2018 and 23rd September 2019.

6. The Plaintiff shall bear the costs of the Interested Party's application of 6th April 2018 and the Interested Party's costs on the application of 22nd February 2018.

7. The Parties shall attempt to work out what is due on each of orders (2), (3), and (4) and shall report back to Court within 14 days failing which the Court shall make its orders.

Dated, Signed and Delivered in Court at Nairobi this 17th Day of April 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this Ruling has been delivered to the parties online with their consent. They have waived compliance with Order 21 Rule 1 of the *Civil Procedure Rules* which requires that all Judgments and Rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159 (2) (d) of the Constitution which requires the Court to eschew undue

technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of Civil disputes.

F. TUIYOTT

JUDGE

PRESENT: