



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

COMMERCIAL & TAX DIVISION

HCCC. NO 170 OF 2017 (O.S)

SAMSON KARIUKI NJENGI.....1ST PLAINTIFF

SUSAN WAITHERERO KARIUKI.....2ND PLAINTIFF

VERSUS

TOM KELVIN MOGENI T/A

MOGENI & CO. ADVOCATES.....DEFENDANT

RULING

1. The Court on 29th April 2020 rendered a Judgment in the following ultimate terms:-

44. Having considered the totality of the evidence, I come to the conclusion that Advocate holds the sum of Ksh 3,184,000.00 to the Plaintiff's account. This is arrived at as follows 14,150,000.00 – 10,566,000.00- 400,000.00. The said sum of Ksh 3,184,000.00 attracts interest at Court rates from the date of filing suit until payment in full. The Plaintiff shall also have costs of the suit. The amount ordered herein to be paid within 45(forty five) days of the date of this judgment.

2. On 1st May 2020 the Defendant filed a Notice of Appeal of his intention to appeal that decision and now seeks to stay its execution through a Notice of Motion dated 5th June 2020.

3. The Motion is brought under the provisions of Order 42 Rule 6. Sub-rule 2 thereof reads:-

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

4. As appreciated by counsel for both sides, the fate of the Motion turns on whether the Applicant has demonstrated that he will suffer substantial loss if stay is not granted. As to what amounts to substantial loss, Musinga J (as he then was) in **Daniel Chebutuk Rotich & 2 Others v Emirates Airlines – Civil Case No. 368 of 2001** held:-

“Substantial loss” is a relative term and more often than not can be assessed by the totality of the consequence which an applicant is likely to suffer if stay of execution is not granted and that the Applicant is therefore forced to pay the decretal sum”

5. In an affidavit sworn in support of the Motion, the Applicant alludes to substantial loss as follows:-

(12) THAT the substantial loss will result unless the order sought is granted as I act for a purchaser Alex Muriuki which money the Court has ordered released is being held pending completion of conveyance of ½ an acre out of L.R 2259/601

which the Plaintiff is yet to undertake completion.

(13) THAT there is danger and I will suffer substantial loss that in the event of non-completion of the transaction of ½ an acre belonging to Alex Muriuki I will be exposed to a suit for professional misconduct or negligence.

6. He has further stated that should he pay out the amount to the Respondent then chances of recovery are minimal.

7. In opposing the Application, the counsel for the Respondent argues that the contention of the Applicant is at best speculative as he (the Respondent) has not failed to complete the alleged transactions and that the purchaser has not filed any suit against the Applicant.

8. Counsel adds that in Paragraph 19 of his reply to the Originating Summons, the Applicant deponed that Mr. Muriuki had paid Kshs.4,847,500/= towards the purchase price and the balance was yet to be paid because the transaction was not complete. That in Paragraph 21 of the same affidavit, counsel further deponed that he did not hold any money in regard to the two transactions and that he had spent his own money to pay the debt, facilitate the subdivision of the property by paying surveying fees and land rates.

9. The Respondent submits that, in the absence of any explanation, the Applicant's admission that he is now holding money in his capacity as the Advocate for Mr. Muriuki is a complete departure from earlier statements made on oath.

10. In respect to the sum of Kshs.7,500,000/= paid by Mr. Muriuki, the Court in the impugned decision held:-

28. The Defendant's response to this as earlier outlined, is that on the basis of the consent order of 18th October 2017 the parties entered a binding consent on how to deal with the balances of the purchase price. It was then contended that the Court had no jurisdiction to deal with this issue. But the Court has rejected the argument, the Defendant is not exonerated from accounting on how much he received to the account of the vendors. The only monies to be dealt with in terms of consent are those truly held by the purchasers because completion had not happened.

29. On this aspect the Court agrees with the Plaintiff that payment of the purchase price was not subject to completion. Indeed, although not pointed out by the Plaintiff, this Court could not help but notice special condition (f) of the agreement which reads:-

"The vendor requires the purchase price herein to liquidate a debt which has been explained to the purchaser who have agreed to release the purchase price to the vendors' Advocate in terms of the Power of Attorney annexed hereto".

30. In terms of the sale agreement the purchase price was Kshs.7,500,000/=. The Court's reading of special condition (f) was that the purchaser had agreed to the release of the purchase price (that is Kshs.7,500,000/=) to the vendors' Advocate without any conditions. This further buttresses the case of the Plaintiffs that payment of the entire purchase price was not conditional on completion.

31. This Court holds that the entire sum of Kshs.7,500,000/= paid by Mr. Alexander Muriuki to the Defendants was in the favour of the vendors and to their account and no balance is held back by the purchaser Mr. Muriuki.

11. The effect of the finding would be that the Advocate in releasing part of the money to the Plaintiff cannot possibly be held to be in breach of his professional duties because release of the money was not pegged on any conditions. Yet, my decision on that aspect of the case could come under scrutiny of the Court of Appeal and that Court may come to a different conclusion. I cannot therefore say that the argument raised by the Applicant is frivolous in that respect.

12. That said, the Applicant states that he is ready and willing to deposit the entire decretal sum of Kshs.3,184,000/= in a joint interest earning account of the advocates for the parties. The Applicant having taken the position that the money held in Muriuki's transaction should not be released, then the Court must safely assume that the money to be deposited will have to come from elsewhere. The Court is not told that raising the money from the deposit will cause the Applicant substantial loss or undue hardship.

13. For that reason, I must wonder why the money should not be paid over to the Plaintiff instead of being deposited in a joint account as the Plaintiff, at least for now, has a money decree in his favour. While the Applicant had stated that chances of recovering the money once paid to the Plaintiff are minimal, he did not bother to give reasons for that apprehension. The Applicant did not, for instance, state that the Plaintiff is a man of straw who would not be in a position to pay back the decretal sum or that he is an obstructive litigant who would frustrate recovery of the money.

14. In the end, the Court finds that the Applicant has not demonstrated that he is likely to suffer substantial loss if stay is not granted. The Notice of Motion dated 5th June 2020 is therefore dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 5th Day of October 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 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT

Miss Mogere for the Plaintiff.

Musyoka for the Defendant.