



Gatarwa & 3 others v Mangu Investments Ltd & 8 others (Environment & Land Case 349 of 2012) [2013] KEELC 160 (KLR) (17 September 2013) (Ruling)

Nahashon Ngugi Gatarwa & 3 Others v Mangu Investments Ltd & 8 others [2013] eKLR

Neutral citation: [2013] KEELC 160 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 349 OF 2012**

**JM MUTUNGI, J
SEPTEMBER 17, 2013**

BETWEEN

NAHASHON NGUGI GATARWA & 3 OTHERS & 3 OTHERS & 3 OTHERS & 3 OTHERS PLAINTIFF

AND

**MANGU INVESTMENTS LTD 1ST DEFENDANT
FRANK R GITAU 2ND DEFENDANT
DR. S N WAWERU 3RD DEFENDANT
P NDICHU 4TH DEFENDANT
D NJEHIAH NGUGI 5TH DEFENDANT
J N KAGO 6TH DEFENDANT
HON A KAMUIRU GITAU 7TH DEFENDANT
DANIEL KARIUKI MUNDIA 8TH DEFENDANT
PETER KIBICHA 9TH DEFENDANT**

RULING

1. Two Notices of Motion dated 18th March, 2013 and 2nd April, 2013 respectively were ordered to be heard together as they related and arose from an attempt by the 1st Defendant herein to execute for costs that had been awarded to it amounting to Kshs. 187,623 following the withdraw of the suit by the plaintiffs.



2. The 1st Notice of Motion application dated 18th march, 2013 is by Lucy Mumbi, wife to the 1st plaintiff, who filed a Notice of objection to attachment on the same date and objects to the attachment of what she describes as family property by Galaxy Auctioneers pursuant to a decree made against her husband together with other persons. The objector grounds her application on the fact that she and her husband live on L.R. No. Chania/Mataara1072 and that the proclaimed properties though being on the family property aforesaid belong to the objector. The objector avers that he 1st plaintiff does not own anything independently save for motor vehicles which are held as collateral in banks.
3. The proclamation attached to the objectors supporting affidavit lists attachable household goods e.g. sofaset, wall units, TV set, coffee tables etc and the objector avers that these goods are not wholly owned by the 1st plaintiff but are rather commonly owned by her and the 1st plaintiff.
4. The second Notice of Motion application dated 2nd April, 2013 filed, by the 1st plaintiff, Nahashon Ngugi Gatarwa seeks a stay of execution of the decree and further seeks a review of the order made on 19th October, 2012 certifying the costs payable by the plaintiffs to the 1st defendant and the application is founded on the grounds that he proclaimed property belongs to Lucy Mumbi (the objector) who is not a party to this suit and that the taxation was conducted without involving the applicants and that the assessed costs are excessive and should be reviewed and/or set aside.
5. I have reviewed the court record and note as follows:

th June, 2012 filed in court on 27th June, 2012 gave notice of their intention to withdraw the suit wholly against the defendants.th June, 2012 the counsel for the plaintiffs and 1st defendant attended the court before Hon. Justice Mwilu who upon a request by the plaintiff's counsel ordered the withdrawal of the suit with costs to the 1st defendant.st defendant filed a part y and party bill costs and a taxation Notice was issued for 27th September, 2012 when the plaintiffs were represented by counsel and sought leave to respond to the bill of costs and was granted 7 days from 27th September, 2012 and the matter was fixed for mention on 11th October, 2012 to confirm compliance.th October, 2012 and the court allocated a ruling date for 19th October, 2012.st Defendant costs of Kshs. 185,173.00 vide a ruling delivered on 19th October, 2012. On the application by the objector I am not satisfied that the objector has established she has a legal or equitable interest in the properties the subject of the execution. The objector has not demonstrated that any of the proclaimed goods were bought by her. The objector under paragraph 12 of the supporting affidavit states "That the receipts for the chattels in my house are misplaced and efforts to trace them have not resulted into anything meaningful" yet under paragraph 9 the objector states That my husband Nahashon Gaturwa does not wholly have anything of his own in the house as everything is commonly owned".
6. There appears a likelihood that the objector and the 1st plaintiff may indeed be acting in collusion. Grounds 4, 5, 6 and 7 on the face of the objector's application give this indication.
7. Ground 4 and 5 are in the following terms:-
 4. The case by the plaintiff against the defendant was withdrawn by the advocates without instructions for withdrawal.
 5. Execution has ensued against the objector's husband yet there were 39 plaintiffs.



8. In the premises unless the objector was able and in a position to prove that she alone specifically bought any of the items in her own name it is my view that the objection cannot be upheld and I accordingly dismiss the objection as lacking any merit.
9. As concerns the application by the 1st plaintiff it is to be noted that the 1st plaintiff appears to lay blame on their previous advocates for withdrawing the suit allegedly without their instructions. The plaintiffs have not applied to review and/or set aside the court order of 29th June, 2012 that ordered the suit withdrawn with costs to the 1st defendant and hence this order remains unchallenged.
10. The 1st plaintiff's application is to stay execution and to review the court order made on 19th October, 2012 assessing the costs and does not relate to the order withdrawing the suit.
11. The court granted a temporary stay of execution pending the hearing of the instant application and the issue now for determination is whether the 1st plaintiff has laid a basis to have the order of the court made on 19th October, 2012 reviewed and/or set aside. The order the court made on 19th October, 2012 assessing the costs flows from the order withdrawing the suit which I have held remains intact and unchallenged.
12. I have observed earlier that a bill of costs was filed by the 1st defendant and Notice of Taxation issued for 27th September, 2012 when the taxation was stood over to 11th October, 2012 to allow the 1st Plaintiff to respond to the bill of costs but on 11th October, 2012 the 1st Plaintiff was not represented in court and no response was filed and the court reserved its ruling which it delivered on 19th October, 2012.
13. No good reason and/or explanation has been offered for the plaintiffs failure to make a response to the 1st defendants party and party bill of costs. As observed the plaintiff's counsel was present in court on 27th September, 2012 when the Plaintiff was granted the leave of 7 days to file a response and in the absence of the plaintiff's counsel on 11th October, 2012 and there being no response the court was properly entitled to proceed to give a ruling date on the bill of costs. The failure on the part of counsel for the plaintiffs to execute his professional duties for the clients who had retained him is indeed a matter between the clients and their counsel. The law is clear that where a party suffers any damage on account of the professional misconduct and/or negligence on the part of counsel such a party has a cause of action against the counsel for professional negligence.
14. I have further reviewed the ruling rendered by the Deputy Registrar on the bill of costs and I am not able to hold that the Deputy Registrar erred in principle so as to entitle me to interfere in her exercise of discretion. While I am aware that I do not have a reference before me under Rule 11 of the Advocates (Remuneration) Order I would observe that I would at any rate not find any basis of interfering with the Deputy Registrar's taxation and I do not agree with the assertion by the plaintiffs that the taxed costs are exorbitant and extremely high noting that on the instruction fees the 1st defendant was claiming a high fee of Kshs. 14,202,000/= which the Deputy Registrar reduced to only Kshs. 150,000/=. The value of the subject matter being land that was said to be about 422 acres with a plot selling at Kshs. 500,000/= was equally high.
15. Having regard to the subject matter of the suit and the parties involved I would agree with the Deputy Registrar that an instruction fee of Kshs. 150,000/= would be reasonable.
16. The upshot is that I find both the objector's application and the 1st plaintiffs application to lack any merit and I order both applications dismissed with costs to the 1st Defendant.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF SEPTEMBER 2013.



J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiffs

..... for the Defendants

