Muriu & another v Embakasi Ranching Company Limited & another (Environment and Land Appeal E093 of 2021) [2024] KEELC 5383 (KLR) (18 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5383 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E093 OF 2021

JO MBOYA, J

JULY 18, 2024

BETWEEN

STEPHEN WAMBUGU MURIU ..... 1ST APPELLANT

JAMES KAMAU WANYOIKE ..... 2ND APPELLANT

AND

EMBAKASI RANCHING COMPANY LIMITED ..... 1ST RESPONDENT

ELIZABETH NJANGO MBOCHE ..... 2ND RESPONDENT

RULING

Introduction and Background:

1. The 2nd Respondent/Applicant has approached the court vide Application dated 26th March 2024; and in respect of which same [2nd Respondent/Applicant] has sought the following reliefs [verbatim]:

    i. That an order be and is hereby issued for the release to the firm of Guandaru Thuita & Co. Advocates of the monies amounting to KShs. 300,000/- only together with interest held by Sidian Bank in account number 01052150024589 and account name: Muchangi Nduati & Co. & Guandaru Thuita & Co. Advocates.

    ii. That the cost of this Application be provided for.

2. The subject Application is premised on the various grounds which have been in the body thereof. Furthermore, the Application beforehand is supported by the Affidavit of Mr. Guandaru Thuita, Advocate sworn on 26th March 2024 and wherein the deponent has rehashed [highlighted] the circumstances leading to the deposit of the monies in question in an Escrow account.

3. Upon been served with the Application beforehand, the Appellants/Respondents responded thereto vide a Replying Affidavit sworn by one James Kamau Wanyoike [the 2nd Appellant herein].

Instructively, the Deponent of the said Affidavit has contended inter alia that the monies at the foot of the Application beforehand ought not to be released in the manner sought because the Appellants herein have since filed an appeal before the Court of Appeal, namely, Civil Appeal No. E567 of 2023.

4. First forward, the Application beforehand came up for hearing on 30th May 2024 whereupon the Advocate[s] for the respective parties agreed to canvass and dispose of the Application by way of written submissions. For coherence, the 2nd Respondent/Applicant thereafter proceeded to and filed written submissions dated 30th May 2024 while the Appellants/Respondents filed written submissions dated 3rd June 2024.

5. Suffice it to point out that the two [2] sets of written submissions [details in terms of the preceding paragraphs] form part of the record of the court.

Parties Submissions:

2nd Respondent/Applicant's Submissions:

6. The 2nd Respondent/Applicant filed written submissions dated 30th May 2024 and wherein same [Applicant] has adopted the grounds contained in the body of the Application as well as the averments in the Supporting Affidavit. Furthermore, the Applicant herein has thereafter highlighted two [2] salient issues for determination.

7. Firstly, learned counsel for the Applicant has submitted that the Supporting Affidavit which has been sworn by counsel, is competent and lawful taking into account the fact that the averments contained thereunder are within the knowledge of the Deponent. In any event, learned counsel has cited and invoked the provisions of Order 19 Rule 3 of the *Civil Procedure Rules* 2010, which underscore that an affidavit shall be confined to such fact[s] as the deponent is able of his/her knowledge to prove.

8. Arising from the foregoing, learned counsel for the Applicant has submitted that the contention by and on behalf of the learned counsel for the Appellants, is erroneous and informed by misapprehension of the law.

9. In support of the foregoing submissions, learned counsel for the Applicant has cited and relied on the holding in the case of *Regina Waithera Mwangi Gitau vs Boniface Nthenga* [2015] eKLR and *Cartridge and Print Services Kenya Limited vs Tecno Services Limited* [2021] KEHC 295 (KLR), respectively.

10. Secondly, learned counsel for the Applicant has submitted that the monies which are sought to be released were deposited in the Escrow account pending the hearing and determination of the appeal before this court and not otherwise. In any event, learned counsel has added that the appeal beforehand has since been heard and determined and hence the order of stay stands discharged.

11. Other than the foregoing, learned counsel for the Applicant has also submitted that the order of stay which was conditional upon the deposit of the security in the escrow account was not to subsist pending any other appeal save for the subject appeal.

12. Arising from the foregoing, learned counsel for the Applicant has implored the court to find and hold that the Application before the court is meritorious and hence same ought to be allowed.

Appellants/ Respondents' Submissions:

13. The Respondents herein filed written submissions dated 3rd June 2024 and wherein same have reiterated the contents of the Replying Affidavit and thereafter highlighted two[2] salient issues for consideration and determination by the court.

14. First and foremost, learned counsel for the Respondents has submitted that the Supporting Affidavit is incurably defective and illegal insofar as same [Supporting Affidavit] has been sworn by Learned counsel for the Applicant.

15. Additionally, learned counsel for the Respondents has submitted that it was not appropriate for learned counsel for the Applicant to descend into the arena of controversy by swearing an affidavit in a matter where same [counsel] is not a party.

16. Based on the foregoing, learned counsel for the Respondents has therefore invited the court to find and hold that the said Affidavit is vitiated and thus ought to be expunged from the record. Besides, counsel has pointed out that once the Supporting Affidavit is expunged from the record of the Court, then the Application is rendered deficient and thus becomes bad in law.

17. Secondly, learned counsel for the Respondents has submitted that even though the appeal before this court has since been heard and determined, the Appellants/Respondents herein proceeded to and filed an appeal before the Court of Appeal and which appeal is pending herein and determination.

18. According to learned counsel for the Respondents, the pendency of the appeal before the Court of Appeal should suffice to enable the court to decline the Application beforehand. In any event, learned counsel has contended that the release of the monies in question should await the hearing and determination of the appeal before the Court of Appeal.

19. Premised on the foregoing, learned counsel for the Respondents has therefore invited the court to find and hold that the Application beforehand is premature and misconceived and hence same [Application] ought to be dismissed with costs.

Issues for Determination:

20. Having reviewed the Application beforehand and upon consideration of the written submissions filed by and on behalf of the respective parties, the following issues do emerge [crystalize] and are thus worthy of determination:

    i. Whether the Supporting Affidavit sworn by counsel for the Applicant is defective and thus invalid.

    ii. Whether the monies which were deposited in the Escrow account ought to be released or otherwise.

Analysis and Determination:

Issue Number One (1)

Whether the Supporting Affidavit sworn by counsel for the Applicant is defective and thus invalid.

21. It is common ground that the Affidavit in Support of the subject Application has been sworn by one Guandaru Thuita, who is the advocate on record for and on behalf of the Applicant.

22. Arising from the fact that the Supporting Affidavit has been sworn by the learned cousel acting for the Applicant, the Learned counsel for the Respondents herein has contended that the said Supporting Affidavit which is sworn by counsel and note the party, is defective and thus invalid.

23. Furthermore, learned counsel for the Respondents has contended that it was incumbent upon the counsel for the Applicant to allow the Applicant himself to swear the Affidavit and not otherwise. Consequently, and in this regard, learned counsel for the Respondents has invited the court to expunge the impugned Supporting Affidavit.

24. On the other hand, learned counsel for the Applicant has posited that the issues and matters which have been adverted to and averred in the Supporting Affidavit are matters that are within his [Deponent's] knowledge. Further and in addition, learned counsel for the Applicant has submitted that where the averment is positively within the knowledge of counsel then such counsel can swear the Affidavit.

25. Having reviewed the submissions by the Applicant and the Respondents, respectively, I beg to take the following position:

26. Firstly, there is no law that bars an advocate who is privy to and conversant with the facts in a particular case from swearing an affidavit. However, it is imperative to underscore that whenever an advocate swears an affidavit in respect of a matter wherein same [Advocate] is acting for either of the parties, the contents of the affidavit must relate to facts which are positively within the knowledge of the advocate and not otherwise.

27. Additionally, it is also acceptable for an advocate to swear an affidavit in a matter wherein same [Advocate] is acting for either of the parties, where the facts adverted to are borne out of the record of the court. In this regard, the advocate would merely be rehashing the factual position underpinned by the record of the court.

28. Nevertheless, it is not lost on this court that an advocate who is engaged in a matter for either party, ought not to swear an affidavit pertaining to and concerning evidential issues and/or facts; or matters which are in controversy and thus pending determination by the court.

29. Suffice it to underscore, that where an advocate swears an affidavit pertaining to evidentiary issues of factual disputes, which are still in controversy, then such an advocate [Deponent] runs the risk of being invited to step down from the privileged position of a counsel and thereafter to face cross-examination which will portend [create] an absurd situation and embarrassment to the named advocate.

30. Arising from the foregoing, the clear and undisputed position of the law is that an advocate is at liberty to swear an affidavit in a matter where same has been retained, provided that the averments adverted to are within his/her knowledge and that same [Advocate] can positively vindicate the veracity thereof. [See Order 19 Rule 3 of the *Civil Procedure Rules*, 2010]

31. On the contrary, an advocate ought not to swear an affidavit in respect of contentious or evidentiary issues, which remain in controversy awaiting/pending determination; or whose veracity the advocate [Deponent] cannot attest to of his/her own knowledge.

32. To this end, it is instructive to adopt and reiterate the holding of the Supreme Court of Kenya [the apex court] in the case of *Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae)* (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 54 (KLR) (Election Petitions) (5 September 2022) (Judgment) where the court held thus:

136. This court cannot countenance this type of conduct on the part of counsel who are officers of the court. Though it is elementary learning, it bears repeating that affidavits filed in court must deal only with facts which a deponent can prove of his own knowledge and as a general rule, counsel are not permitted to swear affidavits on behalf of their clients in contentious matters, like the one before us, because they run the risk of unknowingly swearing to falsehoods and may also be liable to cross-examination to prove the matters deponed to.

137. In stating so, we echo the words of Ringera, J in *Kisya Investment Limited & others v Kenya Finance Corporation Ltd* HCCC No 3504 of 1993 (Unreported) that:"It is not competent for a party's advocate to depone to evidentiary facts at any stage of the suit. By deponing to such matters, the advocate courts an adversarial invitation to step (down) from his privileged position at the Bar, into the witness box. He is liable to be cross-examined on his depositions. It is impossible and unseemly for an advocate to discharge his duty to the court and his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case.Besides that, the counsel's affidavit is defective for the reason that it offends the proviso (to) order XVIII rule 3 (1) (now order 19 rule 3 of the *Civil Procedure Rules* failing to disclose who the sources of his information are and the grounds of his belief."

33. Consequently and to my mind, the blanket contention by and on behalf of learned counsel for the Respondents that an advocate cannot swear an affidavit in a matter where same [Advocate] has been instructed, is erroneous and founded on misconception of the law. For good measure, a proper reading and appreciation of Order 19 Rule 3 of the *Civil Procedure Rules* 2010, would show and/or demonstrate that the only limitation/ restriction to swearing an affidavit relates to whether the facts are within the knowledge of the deponent or otherwise.

34. Other than the foregoing, it is also appropriate to highlight that even the provisions of Rule 9 of the *Advocates [Practice] Rules* do not prohibit an advocate from swearing an affidavit in a matter where same is acting provided that such matters are neither contentious nor evidentiary facts which may occasion the deponent to undergo cross-examination.

35. Having pointed out the foregoing, it is now appropriate to revert to this matter and to discern whether Mr. Guandaru Thuita, Advocate has adverted to and deponed to issues which are contentious and/or in dispute. Besides, it will also be imperative to appraise the Affidavit and discern whether the contents thereof are anchored on the record of the court or otherwise.

36. To start with, there is no gainsaying that following the delivery of the Judgement of the trial court, the Appellants herein felt aggrieved and thereafter filed/mounted the instant appeal. Besides, the Appellants also filed an application for stay of execution and in respect of which same [Appellants] sought an order of stay of execution pending the hearing and determination of the subject appeal.

37. Notably, the Application for stay of execution [details in terms of the preceding paragraph] was heard and disposed of culminating into this court granting an order of stay of execution subject to deposit of the sum of KShs. 300,000/- in an Escrow account as security for the due performance of the decree that may ultimately arise.

38. It is the said deposit, which now forms the basis of the current Application and in respect of which the counsel for the 2nd Respondent/Applicant is seeking to have released in so far as the appeal before hand has since been determined.

39. In my humble view, the averments adverted to and contained in the body of the Supporting Affidavit sworn by Mr. Guandaru Thuita, Advocate, relates to facts which are obtaining and underpinned by

the record of the court. For good measure, there is no contentious issue and/or facts that have been adverted to and in any event, none has been highlighted by learned counsel for the Respondents.

40. Premised on the forgoing, it is my finding and holding that the Affidavit by Mr. Guandaru Thuita, Advocate and which is the subject of contention beforehand, accords with the dictates of Order 19 Rule 3 of the *Civil Procedure Rules* 2010. [See also the holding of the court in *Regina Waithera Mwangi Gitau vs Boniface Nthenga* [2015] eKLR]

Issue Number Two:

Whether the monies which were deposited in the escrow account ought to be released or otherwise.

41. Having disposed of the procedural matter, which related to the validity or otherwise of the Supporting Affidavit that was sworn by learned counsel for the Applicant, it is now appropriate to venture forward and address the substantive issue, namely, whether the monies in the Escrow account ought to be released or otherwise.

42. Instructively, it is worth recalling that the monies which were deposited in the Escrow account were deposited pending the hearing and determination of the instant appeal. For good measure, the monies constituted security for the due performance of the decree that was likely to arise and/or emanate from the appeal. [See Order 42 Rule 6 (2) of the *Civil Procedure Rules* 2010].

43. To my mind, the deposit in question was to be held in the Escrow account pending the hearing and determination of the appeal. Consequently, upon the determination of the instant appeal, the order of stay which was underpinned by the security [deposit in the Escrow account] lapsed and the monies in the Escrow account became available to be released to the Judgement creditor.

44. Furthermore, it is common ground that the Judgement Creditor [Decree Holder] has since procured a Certificate of Taxation relating to both the instant appeal as well as the original proceedings before the Magistrate's Court.

45. Other than the foregoing, there is no contest as pertains to the Certificate of Taxation. In this respect, the question that remains outstanding and thus begging for an answer is whether there is any legal obstacle to bar and/or prohibit the release of the monies that were deposited in the Escrow account.

46. Nevertheless, and to my mind, I beg to state and underscore that there is no legal bar and/or obstacle. Furthermore, the pendency of an appeal before the Court of Appeal does not operate as an automatic order of stay to negate the release of the monies that were deposited in the Escrow account. [See Order 42 Rule 6 (1) of the *Civil Procedure Rules* 2010.

47. Arising from the foregoing, my answer to issue number two (2) is threefold. Firstly, the order of stay which was issued by this court and which was underpinned by the deposit in the Escrow account, stood extinguished upon the delivery of the Judgement by this court and wherein the appeal was dismissed.

48. Secondly, following the dismissal of the Appeal, the monies which were deposited in the Escrow account became available and are thus amenable to be released to and in favour of the Judgement Creditor [Decree Holder].

49. Thirdly, the pendency of an appeal before the Court of Appeal, which was not part of the order of stay granted by this court, does not ipso facto operate as a stay to negate the release of the monies in the Escrow account, either as contended by the Respondents or at all.

Final Disposition:

50. From the foregoing discussion, there is no gainsaying that the Applicant herein has been able to demonstrate that the Application beforehand is meritorious and thus worthy of being granted. In any event, the order of stay which was underpinned by the deposit in the Escrow account lapsed and stood extinguished upon the rendition of the Judgement herein.

51. Premised on the foregoing, I proceed to and do hereby make the following Final orders:

    i. The monies, namely, Kshs. 300,000/- only together with interest held at Sidian Bank in account number 01052150024589 and account name: Muchangi Nduati & Co. & Guandaru Thuita & Co. Advocates; be and are hereby ordered to be released to the firm of Guandaru Thuita & Co. Advocates for onward transmission to the Applicant.

    ii. For the avoidance of doubt, the manager in charge of Sidian Bank Limited wherein the designated account is held is hereby directed to facilitate the release of the said monies in compliance with and obedience to the directions in terms of clause one (i) hereof.

    iii. Costs of the Application be and are hereby awarded to the 2nd Respondent/Applicant.

    iv. To avert the filing of a Supplementary Bill of Costs, the costs in terms of clause three (iii) be and are hereby assessed and certified in the sum of KShs. 25,000/- only.

52. It is so ordered.

DATED, SIGNED AND DELIVERED ON THE 18TH DAY OF JULY 2024

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – Court assistant

Ms. Gikonyo h/b for Mr. Guandaru Thuita for the 2nd Respondent/Applicant

Mr. Muchangi Nduati for the Respondents.