



**Ransley Mcvicker & Shaw Advocates v Holroyd & 2 others (Administratrixes
of the Estate of Dipa Pulling - Deceased) (Application 129 of 2009)
[2023] KEHC 24115 (KLR) (Judicial Review) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24115 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION 129 OF 2009
J NGAAH, J
OCTOBER 27, 2023**

BETWEEN

RANSLEY MCVICKER & SHAW ADVOCATES APPLICANT

AND

MINAR KATHERINE HOLROYD 1ST RESPONDENT

SUNEINA LEONORA OULLING 2ND RESPONDENT

LAIRA SUSHILA PULLING 3RD RESPONDENT

ADMINISTRATRIXES OF THE ESTATE OF DIPRA PULLING - DECEASED

RULING

1. The application before court is a motion dated 31 July 2023 filed under section 52 of the *Advocates Act*, cap. 16 and order 51 rule 1 of the *Civil Procedure Rules*. The orders for which the application is made have been framed as follows:

- “ 1. That this matter is certified as urgent and heard ex party in the first instance.
2. That a charging order be issued ex party pending inter-parties hearing over proceeds of sale for the 2nd Interested Party's share in the suit property i.e LR No. 209/1916/6
3. That an order do (*sic*) issue ex-parte pending inter-parties maintaining the money held in court escrow account amounting to Kshs. 23,467,460/= as part of the charging order issued by this court on the 9th February 2023.



4. That pending the intended appeal of the ruling by Hon Justice Jairus Ngaah delivered 26 July 2023 in JR Misc E1 98 of 2021 the court do (*sic*) issue a charging order against proceeds of the sale for the 2nd Interested Party's share in the suit property i.e LR No. 209/1916/6.
 5. That an injunction be issued restraining the 2nd Interested Party's legal representatives from dealing with the 2nd Interested Party's share in LR No. 209/1916/6 in a manner likely to defeat the charging order pending final settlement of the fees owed to the Applicant.
 6. That an order do (*sic*) issue maintaining the money held in court escrow account amounting to Kshs. 23,467,460/= as part of the charging order issued by this court on the 9th February 2023.
 7. That the costs of this Application be provided for.”
2. The application is based on the affidavit of Dennis Kioko who swears that he is an advocate of this Honourable Court and that he represented Dipa Pulling in Civil Appeal No. 46 of 2012 (*Suchan Investments Limited v Ministry of National Heritage & Culture & 3 Others*) and ELC Cause No. 200 of 2008 (*Dipa Pulling v. Suchan Investments Limited*).
 3. Dipa Pulling is said to have died on 25 December, 2018 without settling the Applicant's fees and that her estate is yet to be wound up. The applicant's advocate-client bill of costs in this suit was taxed at Kshs. 23,467,460/=. The bill of costs in the advocate-client bill in *ELC 200 of 2008* was taxed at Kshs. 4,757,963.45/-.
 4. The deceased's only known property is her share in the property known as LR No. 209/1916/6 which has been sold by private treaty pursuant to the court's judgment in *ELC cause No. 200 of 2008*. The proceeds of the sale have been shared among the beneficiaries of Dipa Pulling estate who reside in the United Kingdom. The applicant firm of advocates, according to Mr. Kioko, ought to be protected by this Honourable Court on account of section 52 of the *Advocates Act* and secure its fees for services rendered.
 5. The respondents, it is urged, have no known assets in Kenya and are not residents in this country and that the only security for payment is the money held in escrow. Again, the applicant is legally entitled to a charge over the assets of the Interested Party as lien for the fees owed by the deceased's estate. If the money held in court is released, the applicant will have no means of recovering as the beneficiaries of Dipa Pulling's estate are all residing in the United Kingdom and have no known assets in Kenya.
 4. The applicant has taken steps to file an appeal against the ruling delivered by this Honourable Court on 28 July 2023.
 5. Ms. Pearlyne Omamo, the learned counsel for the respondents swore a replying affidavit opposing the application. According to the learned counsel, parties entered into a consent to the effect that an interim Charging Order would be issued pending the outcome of the Respondent's Reference in Nairobi JR Misc. No. E198 of 2021. The implication was that if the reference succeeded, the funds would be released to the respondent. Once the court determined the reference, it was rendered *functus officio* as far as the charging order is concerned.
 6. Counsel has urged that the appropriate forum for any interim order is the Court of Appeal, considering that the applicant has filed a notice of appeal.



7. As far as the respondent's fees in Nairobi ELCC No. 200 of 2008 is concerned, counsel has urged that it has been fully settled by the deceased's estate and it is a matter that is distinct from these proceedings.
8. The learned counsel for the respondent has also urged that since the applicant has not appealed against the ruling setting aside the certificate of costs, there is no basis for appeal. In the absence of a valid certificate of costs, the applicant has no justification to claim an interest in and seek to charge the entire sum of Kshs. 23, 467, 460/=
9. Ms. Omamo also contends further that the quantum of Advocate/Client fees payable to the Applicant is Kshs 2,550,000/= exclusive of VAT and Disbursements. VAT is said not to be applicable since the late Dipa Pulling did not reside in Kenya. The amount of Kshs. 2,550,000/= is in accordance with a consent dated 3 March 2023 that was entered between the applicant and the respondents. The said consent was recorded as an Order of this Honourable Court on 22 May 2023. In the said consent, the ex parte applicant agreed with the respondent to pay party and party costs of Kshs. 1,700,000/= in full and final settlement of its liability to the ex parte applicant. The consent has not been set aside and, therefore, it is still in force.
10. Counsel understood the consent to mean that any intended party and party taxation proceedings instituted by the ex parte applicant pursuant to the ruling of this Honourable Court of 4 August 2023 shall not in any way involve nor have any bearing on the estate which fully discharged itself upon settling the said party and party costs of Kshs. 1,700,000/= and that any intended advocate/client taxation proceedings that the Applicant intended to institute would be restricted to the amount of Kshs. 1,700,000/=.
11. It is further urged on behalf of the respondents that the applicant only has a legal and enforceable interest in Kshs. 2,550,000 in accordance with the consent order. The balance of Kshs. 20,917,460 held in court ought to be released to the respondent as it is entitled to the fruits of the ruling given in its favour in the reference.
12. If the application is allowed, it is urged, the applicant would be prejudiced. Kshs. 23,467,460 constitutes the property of the estate of the late Dipa Pulling which interest is duly protected under Article 40 (Right to Property) of the *Constitution of Kenya* 2010. The Kshs. 23,467,460 remains deposited in court and continues to rapidly lose value by the day due to the weakening shilling yet the funds are meant to be converted into foreign currency and remitted abroad. Any further delay in releasing the said funds to the Respondent is prejudicial to the interests of the beneficiaries of the estate of the late Dipa Pulling. It has also been urged that litigation must come to an end.
13. The learned counsel have, in their submissions, generally rehashed what they have deposed in their respective affidavits and pleadings.
14. The record shows that this Honourable Court made an order on 13 June 2022 with respect to hearing of the applications that were then before court. At the instance of Ms. Shaw, the learned counsel for the applicant, which is a firm of advocates in which she is either the managing partner or sole practitioner, the court also granted an interim charging order in respect of property known as LR No. 209/1916/6. The proceedings on the material date were recorded as follows:

Ms. Wangui: we seek directions on the motion dated 30 May 2022

Ms. Omamo: we were served with the application. We want our reference in Miscellaneous E198/2021 heard first.

Ms. Wangui: We have no problem save that we shall need an interim charging order.



Court: 1) the reference in High Court miscellaneous no. E198/2021 shall be disposed of first before the hearing of the application dated 30 May 2022.

Meanwhile, an interim charging order is issued in terms of prayer 3 pending the hearing of the reference in miscellaneous application E 198/2021 and the motion dated 24 November 2021 and amended on 30 May 2022.”

15. The reference in E198/2021 was eventually heard and a ruling rendered on 20 July 2023. In the wake of this decision and following the directions of the court on 13 June 2022, it was incumbent upon the applicant to pursue its application whose disposal, as noted, had been held in abeyance pending determination of the reference in E198/2021.
16. Instead, the applicant has filed the present application whose prayers are, more or less, similar to those sought in the application that was put on hold. The prayers in that previous application were expressed as follows:
 - “ 1. That this matter is certified as urgent and heard ex parte in the 1st instance.
 2. That an order be issued charging the 2nd interested party’s share in the suit property i.e. LR No. 209/1916/6 pending the inter-parties hearing of this application.
 3. That a charging order be issued charging the 2nd interested party’s share in the property i.e. LR No. 209/1916/6 pending settlement of legal fees owed by the 2nd interested party to the applicant in this suit to secure taxed costs of 17,400,000. Kshs. 24, 467, 460/= (*sic*).
 4. That an injunction be issued restraining the 2nd interested party’s legal representatives from dealing with the 2nd interested party’s share in LR No. 209/1916/6 in a manner likely to defeat the charging order pending final settlement of the fees owed to the applicant.
 5. That the costs of this application be provided for.”
17. All these prayers are covered in the instant application. The only addition is the prayer that the charging order be issued pending the hearing of the appeal. This sounds more like an order for stay pending appeal but I note that the applicant has not invoked the provisions of Order 42 of the [Civil Procedure Rules](#) under which an application for such an order would, ordinarily, be sought.
18. For the avoidance of doubt, like in the instant application, the previous application was by way of a motion expressed to be brought under section 52 of the [Advocates Act](#) and order 51 rule 1 of the [Civil Procedure Rules](#).
19. If, for whatever reason, the applicant was compelled to file a fresh application, it certainly could not do so without first withdrawing its previous application if it felt that the application was no longer of any value. If anything, the court had ordered that the previous application would be disposed of after the determination of the reference in E198 of 2021. That order still subsists; it has neither been varied nor set aside. In these circumstances, the least the applicant was expected to do was to comply with the order of the court given on 13 June 2021. To the extent that the instant application has been filed without reference to this order, the application is an abuse of the due process of this Honourable Court and it should fall on that account.



20. I also note that the applicant did not participate in the application and proceedings that culminated in the ruling of 28 July 2023 which the applicant is now appealing against. It neither filed any response to the application nor attended court when the application came up for hearing.
21. The applicant in that ruling was Sandeep Desai whose property had been attached following certificate of costs obtained in favour of the ex parte applicant. For reasons I gave in that ruling, I held that there was no valid certificate of costs capable of execution.
23. Having chosen not to participate in the application, it is rather intriguing that the applicant would be appealing against the resultant decision setting aside the certificate of costs. The applicant's conduct appeals to me to be mala fides.
24. For reasons I have given, I hold that the applicant's application is bad in law, it is misconceived and an abuse of the due process of this Honourable Court. It is hereby dismissed with costs.

SIGNED, DATED AND DELIVERED AT WAJIR ON 27TH OCTOBER 2023

NGAAH JAIRUS

JUDGE

