



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

MISC. CIVIL APPLICATION NO. 150 OF 2001

MACHIRA & CO. ADVOCATES.....ADVOCATE/APPLICANT

-VERSUS-

ARTHUR KINYANJUI MAGUGU (DECEASED).....CLIENT/RESPONDENT

MARGARET WAIRIMU MAGUGU..... RESPONDENT

(AS LEGAL REPRESENTATIVE OF THE ESTATE OF THE DECEASED)

RULING

[1] The law firm of **Machira & Co. Advocates**, moved the Court vide the Notice of Motion dated **23 October 2017** pursuant to **Sections 3, 3A, and 94 of the Civil Procedure Act, Chapter 21** of the **Laws of Kenya**, as well as **Order 51 Rule 1 of the Civil Procedure Rules, 2010** for orders that:

[a] Spent

[b] That the Advocate/Applicant be allowed to execute the Decree issued by this Court on **17 October 2017** forthwith and before the Taxation of Costs;

[c] That the costs of the application be provide for;

[d] That such other and/or further relief be granted as the Court may deem fit and just to grant.

[2] The application is premised on the grounds that this is a very old matter, being nearly 17 years old now; and that it related to the Applicant's legal fees whereof a Certificate of Taxation had been issued by the Deputy Registrar of the High Court on **1 August 2001** in the sum of **Kshs. 1.5 million**. The Applicant averred that its Notice of Motion for Entry of Judgment has since been heard and allowed on **18 August 2017** and the Respondent, who is deceased, has also been substituted by his widow, **Margaret Wairimu Magugu**, in her capacity as the Administrator of the Estate of the Deceased Respondent. It was the contention of the Applicant that since it has no control over how the Estate of the Deceased is going to be managed henceforth, it would only be fair and just that execution be allowed forthwith to secure the legal fees which have been pending settlement since **2001**.

[3] In the Supporting Affidavit of **John Patrick Machira**, sworn on **23 October 2017**, evidence was availed to prove that the Applicant acted for the deceased, **Arthur Kinyanjui Magugu**, and that a Certification of Costs was issued by the Deputy Registrar in its favour on **1 August 2001**. It was further averred that though a Reference from the decision of the Taxing Master was allowed by **Mwera, J.** on **7 February 2002**, an appeal therefrom was allowed and the Certificate of Costs was reinstated by the Court of Appeal on **2 March 2012**, on the basis whereof, Judgment was entered on **18 August 2017** and a Decree issued in the sum of **Kshs. 1.5 million**. Copies of the pertinent documents were produced as annexures to the Supporting Affidavit and marked "**JPM-1**" to "**JPM-4**". It was further the averment of **Mr. Machira** that the Applicant has no control as to how the Estate of the Deceased is going to be administered by his widow; and that it would only be fair and just that execution of the Decree herein be allowed; and that no prejudice will be suffered by the Respondent.

[4] The application was duly served and **Mr. Maina** attended Court on behalf of the Respondent on **23 November 2017** when the parties were given time to, inter alia, discuss the matter with a view of reaching an amicable out of Court settlement. It was therefore inexplicable why neither the Respondent nor her Counsel attended Court on **29 November 2017**, which date had been taken in the presence and with the concurrence of Counsel. Accordingly, the application was urged *ex parte* by **Mr. Machira**, who basically reiterated his averments in the Supporting Affidavit. **Mr. Machira** also relied on the following authorities, as set out in his List and Bundle of Authorities:

[a] HCCC No. 299 of 2009: **African Banking Corporation vs. Nestar Limited**;

[b] HCCC No. 4231 of 1992: **Mercedes Sanchez Rau Tussel vs. Samken Ltd & 2 Others (as consolidated with HCCC Nos 4232, 4233 and 4234 of 1992)**;

[c] HCCC No. 112 of 1998: **Belinda Cash vs. Coast Bus Company**;

[d] Mombasa HCCC No. 59 of 2006: **Coquero Limited vs. Bruce Joseph Bockle**.

[5] **Section 94** of the **Civil Procedure Act**, which is the key enabling provision herein, recognizes that:

"Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation."

[6] The rationale for the aforestated provision was well explicated in **Mercedes Sanchez Rau Tussel vs. Samken Limited & 2 Others [2002] eKLR** thus:

"The principle behind this section is not far to search. When awarded costs are not agreed, it often takes a considerable time before the costs are taxed by a taxing officer. In order not to permit a judgment-debtor to hold up execution of a decree for a known sum or a sum to which there can be no sensible contest, section 94 provides that the court may permit the execution of a decree except as to so much thereof as relates to unsettled costs...aspects of the judgments may still be in question on appeal or review application; but it would be wrong to hold as a principle, that once there is an appeal, threatened appeal, or an application for a review ... no part of a judgment is executable until after determination of the review or appeal. Such a view would permit any person desirous of jamming the justice process or merely to postpone the pay-day simply to lodge a notice of appeal or to file an appeal itself, or to pretend anything, and thereby deny a party the whole judgment..."

[7] There is no dispute herein that Applicant's Bill of Costs was taxed as between it and its Client, **Arthur K. Magugu** and a Certificate of Costs issued to that effect dated **1 August 2001** (marked "**JPM-1**" herein); and that a Reference therefrom was litigated up to the Court of Appeal, whose decision, dated **2 March 2012**, affirmed the Taxation. Judgment has since been entered in the Applicant's favour and a Decree issued herein on **17 October 2017**. Clearly therefore, considerable time has gone by since the Applicant's Bill of Costs was taxed and not doubt, the Applicant can relate to the remarks of **Ojwang, J.** (as he then was) in **Belinda Cash vs. Coast Bus Company** (supra) that:

"...It is to be taken, in the circumstances, that the defendant very well knows that judgment has been given in favour of the plaintiff which vests specific rights of enforcement in the plaintiff. The core rights of the plaintiff, in this regard, are in the decree of the court, which, strictly speaking, can be enforced as soon as the same is extracted. Counsel for the plaintiff has submitted that costs-assessment process has proved so circuitous as to compromise the plaintiff's rights issuing from the judgment and decree..."

[8] It is further noteworthy that the Applicant's averments are wholly uncontroverted, being that no Replying Affidavit was filed thereto; and no appearance was made by the Respondent at the hearing to rebut the Applicant's case. Thus, granted the period of time it has taken since **1 August 2001** when the Certificate of Costs was issued, the fact that there is no knowing for sure when the taxation will be concluded, and the fact that the deceased's Client's Estate is now under administration and may be distributed any time, I am convinced that sufficient cause has been shown to warrant the invocation of the Court's discretion under **Section 94** of the **Civil Procedure Act**, to permit execution of the Decree herein before taxation of the costs awarded on account of the Reference. Accordingly, I would allow the Applicant's application dated **23 October 2017** and issue orders as follows:

[a] That the Advocate/Applicant be allowed to execute the Decree issued by this Court on **17 October 2017** forthwith and before the Taxation of Costs;

[b] That the costs of the application be paid by the Respondent from the Estate of the Deceased.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2017

OLGA SEWE

JUDGE