MS Advocates LLP formerly Triple A Law LLP v Marianne Jebet Kitany (Commercial Miscellaneous Application E096 of 2019) [2025] KEHC 83 (KLR) (Commercial and Tax) (16 January 2025) (Ruling)

Neutral citation: [2025] KEHC 83 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL MISCELLANEOUS APPLICATION E096 OF 2019

A MABEYA, J

JANUARY 16, 2025

BETWEEN

MS ADVOCATES LLP FORMERLY TRIPLE A LAW LLP ..... RESPONDENT

AND

MARIANNE JEBET KITANY ..... APPLICANT

RULING

1. This ruling determines two applications filed by the applicant. They are dated 15/1/2024 and 6/2/2024, respectively.

Application dated 6/2/2024

2. The application was brought pursuant to section 80 of the *Civil Procedure Act*, Order 45 rule 1, Order 45 rule 2, sections 1A, 1B of the *Civil Procedure Act*, Order 42 rule 6, Order 50 rule 5, Order 51 rules 1 and 3, Order 22 rule 22 of the Civil Procedure rules, Article 159(1)(d) of *the Constitution* of Kenya.

3. It sought the review of the orders dated 18/1/2024 by discharging the conditions for stay which required the applicant to deposit the decretal sum in Court. That in place of the conditions for stay, that the Court do order expeditious disposal of the matter.

4. The application was supported by the grounds set out on the face of the Motion and the supporting affidavit of MARIANNE JEBET KITANY sworn on 6/2/2024. It was contended that the applicant sought an order for stay of execution of the ruling of 19/12/2023. That the orders were granted on condition that the applicant deposits the decretal sum in Court within 30 days from the date of the ruling.

5. The applicant's position was that she was unable to raise the decretal sum of Kshs 565,277/= within the duration of 30 days. That she had a strong case in the re-taxation of the bill of costs which proceeded ex-parte. It was contended that unless the orders were varied or discharged, there was an imminent risk of execution of the Certificate of taxation during the pendency of the application.

The second application dated 15/1/2024

6. The second application was brought under sections 1A, 1B(1)(a), 3A&80 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, Chapter 80 of the Laws of Kenya and order 9 rule 9, order 12 rule c, 7 and order 51 of the Civil Procedure Rules 2010.

7. It sought the setting aside of the order of this Court made on 19/12/2023 and the subsequent decree issued on 21/12/2023. The application was premised on the grounds set out on its the face and the supporting affidavit of Mariannee Jebet Kitany sworn on 15/1/2024.

8. She stated that she had instructed the firm of Musyoki Mogaka & Co Advocates to come on record for the applicant in the taxation of several bill of costs. That the said advocates failed to attend Court and thus the bill of cost was uncontested.

9. Further, that the said advocates did not communicate to her the status of the pending files and therefore hey were personally liable since they did not file an application to cease acting. She deposed that it was not her intention to in any way pervert the course of justice however the fault was attributed to the mistake of the advocates which should not be visited upon the applicant.

10. She deponed that she was willing to deposit adequate security in terms of a bank guarantee. That the court had the discretionary power to allow the orders sought as there was an imminent risk of execution.

11. The respondent opposed the two applications vide a replying affidavit sworn on 15/2/2024 by Neddie Eve Akello. She deponed that the applicant had not given full material disclosure of the facts of the matter. That the applicant had neglected to pay the advocate fees for 5 years which necessitated the advocate to tax the bill their costs.

12. That the applicant ought to acknowledge that she has a responsibility in prosecuting her case. That the applicant in the application dated 15/1/2024 did not show any mistake or error on the part of its advocate to invoke the discretionary powers of the Court. That the applicant was evading paying the respondents fees that had accrued for services rendered for its benefit.

13. Parties filed their respective submissions with respect to the two applications. The applicant submitted that the application was brought pursuant to order 45 of the Civil Procedure rules on any other sufficient reason. That it had been brought timeously and unless the orders sought were granted, there was an imminent risk of execution of the certificate of taxation. That it was in the interests of justice to grant the orders sought.

14. The respondent submitted that the applicant had failed to give sufficient reasons to warrant the review of the Orders. That the reasons given by the applicant ought to be clearly enumerated and be justifiably satisfactory. It was submitted that the orders for stay of execution were unmerited since they did not meet the threshold of Order 42 of the Civil Procedure Rules. That no evidence had been produced to show that the applicant was unable to meet the sum of the decree. Counsel submitted that the court in its exercise of its jurisdiction should balance the interests of both parties in favour of the respondent who stands highly prejudiced.

15. I have considered the rival contestations of the parties. The issues for determination are; whether the applicant has met the threshold for the review of the orders of 18/1/2024 and secondly, whether the ruling of 19/12/2023 should be vacated.

16. On the first issue, the applicant sought that the order of 18/1/2024 be reviewed on the ground of sufficient cause. That the court had granted the stay on an onerous condition that the decretal amount be deposited in Court and yet the applicant did not have that kind of money. That it would impede its right to a fair trial or right to be heard.

17. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides that: -

> "Any person considering himself aggrieved-
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> (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay."

18. In an application for stay of execution, it is trite law that an order for security for the due performance of a decree or order is a matter entirely at the discretion of the Court. However, the Court must exercise that discretion judiciously, balancing the interests of the parties involved.

19. In the present case, the applicant has not proposed any alternative form of security but only termed the condition as punitive. In applications for stay of execution, the Court must balance competing interests of the parties before it. On the one hand, the decree-holder is entitled to enjoy the fruits of its judgment without undue delay. On the other hand, a judgment-debtor has the undaunted right to challenge the subject order being challenged, either on appeal or by reference such as in this case.

20. Here I am alive to the fact that the applicant is not appealing but only sought to challenge the taxation of the respondent's bills of costs. The Court is mindful of the need to ensure that the applicant is not unduly burdened, particularly where there is still an opportunity for some measure of accommodation without prejudicing the decree-holder.

Whether the ruling of 19/12/2023 should be vacated.

21. On this application, the applicant seeks to set aside the ruling delivered on 19/12/2023 which entered judgment against the respondent as per the Certificate of taxation. The applicant argued that it was unable to attend to the hearing because its former advocate, despite being served with the hearing notices, failed to communicate the same to the applicant. The respondent on its part contended that the application was a waste of courts time and resources and was meant to drive it from enjoying the fruits of its judgment.

22. I have considered the rival contestations. It is clear that the applicant did not participate in the proceedings as a consequence of which, the court entered judgment against the applicant as per the

Certificate of taxation. In the Case of Lucy Bosire v Kehancha Div Land Dispute Tribunal, Resident Magistrate Court Kehancha & Martha Jacob Matara [2013] KEHC 681 (KLR) Odunga J held that: -

> "It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits. See Philip Keipto Chemwolo & Another -vs- Augustine Kubende [1986] KLR 492; [1982-88] 1 KAR 1036 at 1042; [1986-1989] EA 74."

23. In Savings and Loans Limited -vs- Susan Wanjiru Muritu Nairobi (Milimani) HCCS No.397 of 2002 Kimaru, J gave a different perspective when he expressed himself as follows: -

> "Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a Case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her Case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate's failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present Case, it is apparent that if the Defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff's determination to execute the decree issued in its favour, is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant."

24. From the foregoing, it is clear that it is not in all instances that a litigant is to be excused for a mistake of Counsel. It must be shown that the litigant was not indolent either. In the present case, it is clear that the applicant did not wait until attempted execution of the decree. She moved the Court soon after discovering that judgment had been entered against her. She cannot therefore be said to have been indolent in the circumstance.

25. I find that the respondent will not suffer much prejudice if the applicant is given an opportunity of being heard. It can be compensated by an award of costs. The respondent retains its right to recover what is lawfully due and, the delay occasioned by allowing the applicant to challenge the Certificate of taxation is not so significant as to undermine the fairness of the process.

26. The justice of the case leans in favor of granting the applicant the opportunity to challenge the certificate of taxation. This will ensure that any grievances raised by the applicant are addressed with respect to the taxation.

27. Accordingly, I find the applications to be merited and allow them as prayed but the applicant to pay the respondent costs of Kshs. 20,000/- for both applications.

It is so ordered.

SIGNED AT NAIROBI THIS 3RD DAY OF JANUARY, 2025.

A. MABEYA, FCI Arb

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JANUARY, 2025.

F. GIKONYO

JUDGE