



REPUBLIC OF KENYA



**Mwandaa & 4 others v Mwandaa & another (Civil Appeal
E060 of 2021) [2025] KEHC 2047 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2047 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E060 OF 2021
AN ONGERI, J
FEBRUARY 7, 2025**

BETWEEN

**BENJAMIN MWANDAA 1ST APPELLANT
ANDERSON MWAUMBA 2ND APPELLANT
HAMISI KALELA 3RD APPELLANT
PETER MAGHANGA 4TH APPELLANT
ABDALLA KIKO 5TH APPELLANT**

AND

**ELIJAH MWANDAA 1ST RESPONDENT
SULEIMAN MWAMBOGHA 2ND RESPONDENT**

*(Being an appeal from the Ruling of Hon. C. K. Kithinji (PM)
in Voi CMCC No. 161 of 2018 delivered on 13th October 2021)*

JUDGMENT

1. The trial court dismissed an application dated 23rd July 2021 on 13th October 2021 which was seeking for review of the certificate of costs and an order to allow the Appellants herein liquidate the decretal sum by instalments.
2. The Appellants were aggrieved by the dismissal of the application dated 23rd July 2021 and they have appealed to this court on the following grounds:-
 - i. ThatT the learned trial Magistrate erred in both law and in fact by concluding that the certificate of costs is correct and not exaggerated.



- ii. That the learned trial Magistrate erred both in law and fact by failing to find the certificate of costs as drawn is far much beyond what is provided in the remuneration order.
 - iii. That the learned trial Magistrate erred in both law and fact when she dismissed the appellant's application dated 23rd July 2021 as a whole.
 - iv. That the learned Magistrate erred in both law and fact when she held that the Appellants had not proved they were unable to raise the decretal sum in lump sum.
 - v. That the learned Magistrate erred in both law and fact when she took into account extraneous matter to arrive at her decision.
 - vi. That the learned Magistrate erred in both law and fact by failing to consider, review and/or revise the certificate of costs dated 12th May, 2021.
 - vii. That the learned magistrate erred in both law and fact by raising and determining issues that were not raised by the parties.
 - viii. That the learned Magistrate erred in both law and fact by applying high court procedures in the subordinate court.
 - ix. That the learned trial Magistrate erred in both law and fact when he failed to take into account the defendant's submissions.
3. The parties filed written submissions as follows:- the appellants submitted that Item 1 Party and Party Costs in the Certificate of Costs dated 12th May 2021, is set at Kshs. 500,000/- on the lower scale which is a clear exaggeration as per Schedule 7 of the Advocates (Remuneration) (Amendment) Order, 2014.
 4. That the respondents prayers in their plaint dated 8/6/2018 was neither specific in the sum sued nor was there any specific sum awarded in the judgement dated 18th July 2019.
 5. The appellants relied on the Advocates (Remuneration) (Amendment) Order, 2014; Schedule 7, Part A – Party and Party Costs, Paragraph 2, which states that;

“In any suit or appeal by the nature of which no specific sum is sued for, claimed for, or awarded in the judgement (other than proceedings falling under paragraph 3 below); such costs as the court in its discretion but not less than Kshs. 20,000/- if undefended or unopposed and (subject to any special order for good reason connected with the nature and importance or the difficulty or the urgency of the matter) not to exceed Kshs. 50,000/-.
 6. The appellants submitted that the Remuneration Order sets the maximum charges of claims with no specific sum pleaded, and no specific sum awarded, at Kshs. 20,000/- being the lowest and at Kshs. 50,000/- being the maximum.
 7. That the said Certificate of Costs having item 1 Party and Party Costs set at Kshs. 500,000/-, is ten times of what is provided as the maximum charges for such a claim, which is unfair and exaggerated.
 8. The appellants further submitted that the Appellants contracted the debt as a result of costs being awarded to the Plaintiffs/Respondents in the case Voi Civil Suit No. 161 of 2018.
 9. The Certificate of Costs and the Decree were then issued. When the Respondents wanted to satisfy their Decree, a problem arose because firstly, the Decree and the Certificate of Costs were drawn and issued without the involvement of the Appellants' previous Advocates. This was also at a time when



- the Appellants had problems with their Advocates who never notified them of any progress of the case until, they were served with Notice to Show Cause why they should not be committed to jail.
10. Secondly, the Certificate of Costs was exaggerated and not in accordance with the Advocates (Remuneration) (Amendment) Order, 2014. The Appellants seek to have the Certificate of Costs be revised and/or amended hence this Appeal.
 11. The respondent alternatively submitted that the Learned Magistrate's refusal to review the Certificate of costs as invited by the Appellants was that the issues raised in the application are issues for consideration on a reference and that it was not in her place to make any findings on the issues raised for consideration in the application as that would amount to sitting on a reference or appeal on the decision.
 12. The respondent argued that the Advocates Remuneration Order provides a complete code which does not provide for appeals from the decisions of Taxing officers, but for references to a Judge in case of any further grievances.
 13. The respondent argued consequently any party who is aggrieved by the decision of a magistrate while sitting as a taxing officer must follow the procedure laid down under paragraph 11 of the Advocates Remuneration Order as opposed to filing an appeal or review.
 14. The respondent contended that the issue of whether or not to grant an order for payment by instalments according to Order 21 rule 12 is purely a matter of discretion.
 15. That in the matter herein the appellants did not attach any material to prove their inability to pay nor did they give any offer for settling the decretal sum.
 16. Base on the foregoing the respondent submitted that the Learned Magistrate correctly exercised her discretion in declining to grant the order for payment by installments.
 17. The issues for determination in the appeal are as follows:-
 - i. Whether the trial court was right in dismissing the application for review of the certificate of costs.
 - ii. Whether the trial court should have allowed payment of the decretal sum by instalments of Kshs. 10,000/= per month until payment in full.
 18. On the issue as to whether the trial court was right in dismissing the application seeking review of the certificate of costs, I find that the right procedure was to file a reference from the ruling of the Taxing Officer to the High Court.
 19. The trial court was right in dismissing the prayer for review of the certificate of costs.
 20. On the issue of payment of the decretal sum in instalments, the trial court has a discretion to grant orders allowing payment of the decretal sum by instalments.
 21. In the case of Bernadette Namajanja v Nick Owuor t/a Lake Motors Garage [2020] eKLR, the court held as follows;

“It would appear that the trial court misconstrued the discretion that Order 21 Rule 12(1)(2) grants it.....Order 21 Rule 12(1)(2) is not about interest, but settlement of the decree, that is the principal sum and any interest ordered with respect to it. The same may be paid or settled in installments, should the court so order, in which case it would mean the court may give directions on whether the principal sum is to be settled through that



mode of payment together with or separately from the interest ordered in terms of section 26, or payment of interest may be post poned, not waived”.

22. The Trial Court said that the Appellants did not show bona fides by arranging for payment proposals to liquidate the decretal sum.

23. The said Order 21 Rule 12(1)(2) of the Civil Procedure Rules, states as follows;

“(1) Where and so far as the decree is for payment of money, the court may for any sufficient reason at the time of passing the decree order payment of the amount decreed shall be postponed or shall be made in installments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

(2) After passing of any decree, the court may on the application of the judgement-debtor and with the consent of the decree-holder for sufficient cause shown order that the payment of the amount decreed be postponed or be made by installments on such terms as to the payment of interests, the attachment of the property of the judgment debtor or the taking of security from him, or otherwise, as it thinks fit.”

24. In the case of Bernadette Namajanja (supra), the court also held as follows;

“The principles for exercise of discretion on whether to order payment in installments or not were set out in Keshavji Jethabhai & Bros Limited vs. Saleh Abdullah [1959] EA 260, as follows: (a) each case to be considered on its own merits, (b) mere inability to pay in full at once is not sufficient reason for exercising the discretion, (c) the debtor should show bona fides by arranging prompt payment and (d) though hardship may be a factor, the court should consider whether the indulgence should be given to the debtor without prejudice to the decree holder. Similar principles were stated in A. Rajabali Alidina vs. Rehimtulla Alidina and another [1961] EA 565, where the court stated the conditions to be considered to be (a) the circumstances under which the debt was incurred, (b) the conduct of the debtor, (c) the debtor’s financial position, and (d) his bona fides in offering to pay a fair proportion of the debt at once”.

25. I have considered the circumstances under which the debt was incurred and I find that the appellants did not know that the taxation was going on.

26. The decretal sum is not a civil debt but arose out of costs awarded to the respondents.

27. It is not clear why the appellants filed the application instead of filing a reference, the application dated 23rd July 2021 was dismissed and the impugned ruling is the subject of this appeal.

28. The Trial court ought to have allowed the appellants to settle the decretal sum by reasonable instalments since the decretal sum arose out of costs taxed by the Taxing Master and the same was not a civil debt.

29. I allow the appeal partially and I allow the appellants to settle the costs in five equal instalments w.e.f 28th February 2024 and thereafter on the 30th of each succeeding month until payment in full.

30. Each party to bear its own costs of this suit.



DATED, SIGNED AND DELIVERED THIS 7TH DAY OF FEBRUARY 2025 AT VOI HIGH COURT VIRTUALLY.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Maina

No appearance for the Respondents (they are present in person)

Mrs. Isika for the Appellants

