



**Taj Mall Limited v Cobra Security Limited (Civil Appeal  
725 of 2019) [2025] KEHC 5258 (KLR) (Civ) (1 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5258 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 725 OF 2019**

**SN MUTUKU, J**

**APRIL 1, 2025**

**BETWEEN**

**TAJ MALL LIMITED ..... APPLICANT**

**AND**

**COBRA SECURITY LIMITED ..... RESPONDENT**

**RULING**

1. The subject of this ruling is the Notice of Motion dated 4.12.2024 (the Application) brought by Taj Mall Limited (the Applicant) seeking an order to set aside the Warrants of Attachment, Warrants of Sale and the Proclamation Notice issued against the Applicant's assets by Bemac Auctioneers (the Auctioneers) cited as the 3<sup>rd</sup> Respondent in the Motion pending the hearing and determination of this application; an order to declare that the Auctioneers together with Cobra Security Limited (the Respondent) and David Kamau Githinji t/a D.K. Githinji & Co. Advocates (hereafter the Respondent's advocate) cited as the 2<sup>nd</sup> Respondent in the Motion, have acted unlawfully and irregularly in seeking to enforce the taxed costs without first obtaining and serving the requisite Certificate of Costs arising from the taxation proceedings.
2. The Motion is brought under Articles 50, 47 and 159(2) (d) of *the Constitution*; Sections 1A, 1B & 3A of the *Civil Procedure Act* (CPA); Order 22, Rules 6, 18 and 22, and Order 51, Rule 1 of the Civil Procedure Rules (CPR); and Section 51(2) of the *Advocates Act*.
3. The Motion is supported by the grounds found on the face of it and in the Supporting Affidavit sworn by the Applicant's Managing Director, Rameshchandra Govind Gorasia. It is deposed that the Taxing Master delivered a taxation ruling on 21.11.2024 in respect of the Party and Party Bill of Costs, whereby the Bill was taxed at a sum of Kshs. 171,993.68. The deponent states that thereafter, the Respondent and his counterparts purported to execute the taxed amount without following



procedure for execution. He avers that while the Auctioneers served the Applicant with the Warrants of Attachment and Warrants of Sale (both dated 28.11.2024) as well as the Proclamation Notice (dated 3.12.2024) on 3.12.2024, the Respondent's advocate failed to obtain and/or serve a demand notice as a prerequisite for execution. That the said advocate equally failed to obtain a Certificate of Taxation as required under Section 51(2) of the Advocates Act, while the 3<sup>rd</sup> Respondent proceeded to act on the Proclamation Notice in the absence of the requisite legal authorization.

4. The deponent further avers that the 1<sup>st</sup> Respondent is purporting to treat the taxed costs and the decretal sum as one and the same, yet the two (2) constitute distinct and unrelated amounts. That the decretal sum is the subject of an appeal currently before the Court of Appeal while the taxed costs are in respect of the Party and Party Bill of Costs, and in no way concern the decretal amount. The deponent further faults the 1<sup>st</sup> Respondent for failing to obtain a court order authorizing execution, under Order 22, Rule 18 of the CPR.
5. It is further stated by the deponent that owing to the irregular execution process, the Applicant runs the risk of losing its business assets and that the Applicant's constitutional right to fair administrative action has been infringed upon, as a result. Further that the Applicant remains keen on settling the taxed costs but maintains that the proper legal process ought to be adhered to.

### **Replying Affidavits.**

6. The application is opposed by the 1<sup>st</sup> Respondent through a Replying Affidavit sworn by its advocate, David Kamau Githinji, on 3.02.2025 in which it is deposed that no such requirement exists to have a demand letter served as a condition for execution; that given the nature of the Bill of Costs, the same is not subject to Section 51(2) of the Advocates Act; that execution is being sought on the taxed costs and not the decretal sum, with the relevant application for execution having been made available in the court file and that contrary to the averments made in the Motion, there is no appeal pending before the Court of Appeal by virtue of the fact that the Applicant's application seeking an extension of time within which to lodge an appeal was dismissed by the Court of Appeal vide the ruling rendered on 24.05.2024. Further that Order 22, Rule 18 of the CPR as cited in the Motion, is irrelevant, terming the Motion as being fatally defective and an abuse of the court process.
7. The Applicant's Managing Director, Rameshchandra Govind Gorasia, swore a Supplementary Affidavit on 14.02.2025 in rejoinder in which he deposed that the Respondents have misrepresented the facts pertaining to the execution process, while echoing his earlier averment that no certificate of costs was ever served upon the Applicant.

### **Oral Submissions**

8. The Motion was argued through oral submissions. Mr. Wekesa, counsel for the Applicant, submitted that the execution process being undertaken by the Respondent is premature in the absence of issuance of a certificate of costs pursuant to Section 51(2) of the Advocates Act. Counsel further faulted the Respondent for failing to serve upon the Applicant the proper notice for payment, before commencing the execution process, thereby denying the latter an opportunity to settle the taxed amount. Counsel has equally faulted the Respondent and the Auctioneers for treating the taxed amount as a decretal sum in the matter, adding that the amount featuring in the application for execution is erroneous.
9. Mr. Wekesa cited *Machira & Co Advocates v Arthur Magugu & another* [2013] eKLR ; *Gatimu Farmers Co. Ltd v Geoffrey Kagiri Kamotho* [2016] eKLR and *Kipkalya Kones v Hezron K. Polot & another* [2006] eKLR to support his submissions.



10. Mr. Githinji, advocate for the Respondent submitted that this court ought not to rely on the authorities cited by counsel for the Applicant, upon his failure to adduce copies thereof for this court's reference. The advocate thereafter proceeded to submit that the ruling by the taxing master was delivered in the presence of the respective counsels, and that the purpose of a certificate of costs is to alert the opposing party of the ruling in question. The advocate has further submitted that Section 51(2) (*supra*) is irrelevant here, since the same relates to advocate-client Bills of Costs and in no way concerns Party to Party costs. That despite being aware of the costs taxed, the Applicant made no attempts at settling the same. The advocate has equally restated the averments earlier made in his replying affidavit, regarding the absence of any law requiring issuance of a demand letter/ notice preceding the execution process; and the absence of any existing or pending appeal against the judgment delivered in the present matter. He further maintains that the Proclamation Notice is regular. Counsel therefore urges the court to dismiss the Motion with costs.
11. In rejoinder, Mr. Wekesa contended, *inter alia*, that this court has discretion to consider the authorities being relied upon, notwithstanding the absence of the relevant copies and that notwithstanding the fact that the taxed costs are not contested, the Respondent nevertheless ought to have obtained a certificate of costs to that effect. He submitted that the Proclamation Notice issued by the Auctioneers contains additional expenses, in comparison to the taxed costs.
12. On the issue of an appeal, counsel contended that his firm has since filed an application seeking an order for review the decision by the Court of Appeal, dismissing their earlier application for leave to file an appeal out of time and that the subject of a second appeal has no bearing on the instant Motion.

#### **Analysis and Determination.**

13. I have considered the Motion; the Supporting Affidavit, the Replying Affidavit in opposition and the oral submissions made by both parties through their legal representatives. The record of the court shows that the Applicant filed the present appeal to challenge the judgment delivered by the trial court on 7.12.2018 in Milimani CMCC No. 3181 of 2014 (the suit), allowing the Respondent's suit and awarding the Respondent a sum of Kshs. 1,657,184/- being outstanding payment for security services rendered, whilst dismissing the Applicant's counterclaim. The Appeal was dismissed with costs *vide* the judgment delivered on 1.03.2024.
14. The Respondent proceeded to file a Party and Party Bill of Costs dated 3.10.2023 seeking a sum of Kshs. 758,300/-. The same was opposed by the Applicant. Upon hearing the parties, Taxing Master, through a ruling delivered on 18.11.2024, taxed the Bill at a sum of Kshs. 171,993.68. The record shows that the Respondent subsequently commenced the execution process, hence the instant Motion.
15. The Applicant cited the Auctioneers and the Respondent's advocates as parties in the proceedings, namely, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. However, upon a perusal of the record, this court did not come across any material to indicate that leave was either sought or granted to have them enjoined as parties. As such, the court will refer to them in the appropriate manner and not as parties herein.
16. The Application is brought under various statutory provisions, including Order 22, Rules 6, Rule 18, and Rule 22, on a stay of execution.
17. Order 22 Rule 18, provides that:
  - (1) Where an application for execution is made—
    - (a) more than one year after the date of the decree;
    - (b) against the legal representative of a party to the decree; or



- (c) for attachment of salary or allowance of any person under rule 43, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:

...

- (2) Nothing in subrule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.
- (3) Except as provided in rule 6 and in this rule, no notice is required to be served on a judgment debtor before execution is issued against him.
18. In the present instance, it is apparent from the record that while the decree emanating from the High Court judgment on appeal was issued on 7.05.2024, the application for execution was made sometime on or about 19.11.2024 which falls within the one (1) year period set out in Rule 22 (1) (a) above. Following the said application, the Deputy Registrar issued warrants of attachment and sale of movable property to the Auctioneers, on 28.11.2024. That being the case, the Respondent was not mandated to serve upon the Applicant a notice to show cause or other prior demand notice for that matter, as purported in the Motion. In any event, Rule 22(3) reads that it is not mandatory for service to be effected, save under Rule 6. Consequently, the court finds the above-cited Rule 22 to be inapplicable herein.
19. The Applicant has also come under Section 3A of the CPA, which reserves the inherent power of the court “to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court.” The Court of Appeal in *Rose Njoki King’au & Another v Shaba Trustees Limited & Another* [2018] eKLR stated thus:
- “Also cited was Section 3A of the *Civil Procedure Act* which enshrines the inherent power of the Court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court. In *Equity Bank Ltd versus West Link Mbo Limited* [2013], eKLR, Musinga, JA stated inter alia, that, by “inherent power” it means that
- “Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from *the Constitution* or statute. Such power enables the judiciary to deliver on their constitutional mandate.....inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion.”
20. As earlier set out, the Applicant is primarily challenging the validity and regularity of the execution process on the ground that the said process is premature, in the absence of a certificate of taxation/ costs upon taxation; as well as on the ground that the Auctioneers lacked the requisite authority to issue the Proclamation Notice; and on the basis of inclusion of figures which are in variance with the taxed amount. The Applicant likewise purports that the decretal amount awarded by the High Court is the subject of an appeal before the Court of Appeal. Resultantly, the Applicant urges this court to set aside the respective Warrants as well as the Proclamation Notice.



21. On its part, the Respondent maintains that the execution process is lawful and regular, adding that it was not required to obtain a certificate of taxation before commencing the execution process.
22. On the subject of the purported appeal before the Court of Appeal, it is apparent from the record that following the High Court judgment in the present appeal, the Applicant filed an application before the Court of Appeal, seeking an extension of time within which to lodge an appeal against the aforesaid judgment. Upon hearing thereof, the Court of Appeal found no merit in the application and therefore dismissed it with costs. There is nothing to indicate that the said decision has been varied or otherwise set aside.
23. Regarding the question whether the Auctioneers had the requisite authority to issue the Proclamation Notice, from the record, it is apparent that the Warrants of Attachment and Sale of Movable Property were issued in the name of the Auctioneers, upon the Applicant's request made sometime on or about 19.11.2024. It is apparent that the same paved way for issuance of the Proclamation Notice dated 3.12.2024. From the foregoing, it is clear that overall, the Auctioneers had the requisite authority with respect to the aforesaid Proclamation.
24. In my considered view, the crux of the matter lies in whether the Warrants of Attachment and Sale, coupled with the Proclamation of Attachment, ought to be set aside for having been irregularly and unprocedurally issued. In this respect, the court is being called upon to firstly determine whether the execution process commenced by the Respondent is premature, pursuant to Section 51(2) of the Advocates Act, Cap. 16 Laws of Kenya, which provides as follows:

The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs
25. The above provision was applied by the Court of Appeal in the case of Otieno, Ragot & Company Advocates v Kenya Airports Authority [2021] KECA 587 (KLR) where the Court appreciated the issuance of a certificate of costs upon taxation of a Party and Party Bill of Costs. The court proceeded to reason thus:

“...in the case of Lubulellah & Associates Advocates v N. K. Brothers Limited [2014] eKLR the court observed that;

“The law is very clear that once a taxing master has taxed the costs, issued a Certificate of costs and there is no reference against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment. An applicant is not required to file suit for the recovery of costs.”
26. From a clear reading and interpretation of the foregoing legal and judicial authorities, it is apparent that upon taxation, a certificate of taxation/costs ought to be issued. It is a matter of general principle that upon issuance thereof, a party applies to have judgment entered on the same, thereby resulting in issuance of a decree on the taxed amount.
27. In the present instance, there is nothing on the record to indicate that following the taxation ruling here, a certificate of costs/taxation was consequently issued or otherwise obtained by the Respondent. There is equally nothing on the record to show that the Respondent therefore sought to have judgment formally entered on the taxed amounts. In the circumstances, the court is persuaded that the execution process to recover the taxed costs commenced prematurely and irregularly.



28. On the question whether the Warrants issued thereafter contain the accurate amounts taxed, upon perusal of the said Warrants of Sale of Movable property and Warrants of Attachment both dated 28.11.2024 it is apparent that the same are seeking a sum of Kshs. 174,993.68 constituting the taxed costs as well as additional costs sought in the Applicant's application for execution, whereas the amount taxed vide the Party and Party Bill of Costs was Kshs. 171,993.68. Upon consideration thereof, the court is not convinced that the sums contained in the Warrants are irregular and excessive, since the same are indicated as accounting for the taxed costs as well collection and further costs, hence the sum of Kshs. 174,993.68.
29. Regarding whether the inclusion of additional items to the Proclamation Notice would render it fatal in any event, the court is of the view that nothing would necessarily preclude an auctioneer from listing various properties to the Proclamation, as long as the said auctioneer proceeds to attach only those items that are necessary for satisfaction of the decree in question.
30. Be that as it may, upon its finding above that the execution process was commenced in the absence of a certificate of costs/taxation giving rise to a judgment and decree on the taxed costs, the court is satisfied that the Warrants of Attachment and Sale both dated 28.11.2024, as well as the Proclamation Notice dated 3.12.2024 are irregular and therefore ought to be set aside on those grounds.
31. Consequently, the Notice of Motion dated 4.12.2024 is hereby allowed on merit. The costs of this application shall be borne by the Respondent.
32. Orders to issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 1<sup>ST</sup> DAY OF APRIL 2025.**

**S. N. MUTUKU**

**JUDGE**

In the presence of:

Mr. Githinji for the Respondent

Mr. Wekesa for the Applicant (Absent)

