



**Machora Motuka & Company Advocates v Kisombe (Miscellaneous Application  
E001 of 2023) [2024] KEHC 2695 (KLR) (12 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2695 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
MISCELLANEOUS APPLICATION E001 OF 2023  
GMA DULU, J  
MARCH 12, 2024**

**BETWEEN**

**MACHORA MOTUKA & COMPANY ADVOCATES ..... APPLICANT**

**AND**

**AGNES MWEMBA KISOMBE ..... RESPONDENT**

**RULING**

1. Before me is a Notice of Motion dated 8<sup>th</sup> February 2023 filed by Agnes Mwemba Kisombe under Order 10 Rule 11, 22, 22(1) and (2) of the [Civil Procedure Rules 2010](#) and Section 3A of the [Civil Procedure Act](#) (Cap.21), and seeks the following orders:-
  1. Spent).
  2. The court be pleased to grant orders of stay of the proceedings and all such other decrees in the matter herein and hence suspend the warrant of attachment of the property imposed on the respondent/applicant on the basis of the taxation.
  3. That the court be pleased to set aside the exparte taxation and all other orders in this suit.
  4. The court be pleased to grant such or further orders it deems fit to grant.
  5. That the costs of this application be in the cause.
2. The application has grounds on the face of the Notice of Motion that the taxation and subsequent attachment of property of the applicant was highly questionable and needs to be ventilated afresh. That the applicant cooperation in the lower court in Children Case No 11 of 2013 and attendances in court, should have raised eye brows whether any service upon the applicant regarding the advocates bill of costs was done; that the alleged service by the process server left a lot to be desired as it was claimed to have been done through mobile phone whatsapp; that the said mode of service was unprocedural; that the applicant is a lay woman; that it was only fair and just that the process server be summoned



to explain why he claimed to have served the applicant while the person from Sure Auctioneers served the applicant's daughter.

3. The application was filed with a supporting affidavit sworn on 8<sup>th</sup> February 2023 by Agnes Mwemba Kisome the applicant, which amplifies the grounds of the application.
4. The applicant also filed a further affidavit she swore on 17<sup>th</sup> March 2023.
5. The application is opposed through a replying affidavit sworn by Brian Machora Motuka advocate on 20<sup>th</sup> March 2023 in which it was deponed that the application is an afterthought meant to delay the fruits of the judgment; that the burden was on the applicant to prove her allegations, that it was interesting that while denying service of the advocate client bill of costs and the taxation notice the applicant says the process server served through whatsapp messenger application; that the process server filed a comprehensive affidavit of service; that the denial of service was done through general denials; that stay of proceedings should not be confused with stay of execution; that stay of proceedings would have been applicable if the applicant would have the intention of filing a reference; that the attachment and sale can only be suspended; that the prayers sought are utterly misplaced, and that the respondent be allowed to enjoy the fruits of the judgment.
6. The respondent Brian Machora Motuka also filed a supplementary affidavit he swore on 23<sup>rd</sup> March 2023 denying that he had agreed to proceed from where Mr. Osoro of Osoro Omwoyo & Company Advocates had left.
7. Agnes Mwemba Kisombe filed yet a further replying affidavit she swore on 2<sup>nd</sup> May 2023 contesting the averments in the further affidavit sworn by Brian Machora Motuka on 23<sup>rd</sup> March 2023.
8. I note that the parties relied only on the affidavits filed, and none of them filed written submissions.
9. This is primarily a contest on the adequacy of service of process in the taxation of advocates client bill of costs herein, resulting in the subsequent proclamation for attachment and sale of the properties of the client Agnes Mwemba Kisombe.
10. I note that the issues raised in the affidavits filed herein are highly evidential in nature, and this court is not able to deal with the said evidential dimensions, as this is an application and not a suit. Secondly, the person who effected the service of the process (the process server), is neither a party herein nor has he been cross-examined.
11. This being an application challenging the process of service, and since the Constitution under Article 25 and 50 confers a right to fair hearing to all litigants which is not a limited, and since courts are enjoined to promote and protect that right to fair hearing, and since the advocate will not ultimately lose his right to costs if I grant the orders sought; I find that this is a matter wherein, the dictates of justice and fair play mean that, I allow the application herein for justice not just to be done, but also to be seen to be done.
12. I thus allow the application dated 8<sup>th</sup> February 2023 and order as follows:-
  1. I grant stay of further proceedings and all other actions in the taxation herein relating to the warrant of attachment and suspend the warrant of attachment of the property imposed on the applicant on the basis of the taxation herein, subject to what the taxation officer will direct after conducting fresh taxation.
  2. I set aside the exparte taxation herein and all other subsequent orders in this suit and grant the applicant Agnes Mwemba Kisombe herein unconditional leave to defend the fresh taxation.



3. The taxing officer will conduct a fresh taxation without delay, and in that regard this matter will be mentioned before a competent taxing officer on 26<sup>th</sup> March 2024 for directions and fixing a date for taxation.
4. Parties will bear their respective costs of the present application.

**DATED, SIGNED AND DELIVERED THIS 12<sup>TH</sup> DAY OF MARCH 2024 AT VOI IN OPEN COURT.**

**GEORGE DULU**

**JUDGE**

In the presence of:-

Alfred/Trizah – Court Assistants

Mr. Mwinzi for Agnes Kisombe

