



**Odhiambo v Odhoch & another (Civil Miscellaneous Application
E335 of 2023) [2024] KEHC 17079 (KLR) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 17079 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL MISCELLANEOUS APPLICATION E335 OF 2023**

DKN MAGARE, J

MAY 13, 2024

BETWEEN

GEORGE OUMA ODHIAMBO APPLICANT

AND

FRED O. ODHOCH & ANOTHER RESPONDENT

JUDGMENT

1. This is a Judgment over an Originating Summons for enforcement of Advocate client obligations. The respondent represented the Applicant in Mombasa CMCC 474 of 2023 which the Applicant indicates was between himself and Monarch Insurance.
2. The Applicant went ahead a sued Fred O. Odhoch T/A Ameli Inyangu & Partners. The Originating Summons were brought under Section 37 (b), 2 and 3. He state that the advocates failed to deliver Ksh. 403,658. He prayed that the money be paid within 14 days failing which judgment be the applicant.
3. In the supporting affidavit he stated that Judgment as delivered for 277,530. He got information that the advocates were paid in full. He annexed an instruction letter dated 7/7/2023 from the said advocates to the Defendant in primary suit with a copy to Ndutumi auctioneers to execute within 10 days unless he heard from the advocate.
4. I have not seen any evidence so far that the said defendant made payment. No inquiry was made as to the payment. An advocate duty ends in representation. No duty lies to execute. The plaintiff did not instruct and pay the advocate to execute.
5. From the plethora of Advocates in the firm including Ameli Inyangu, as shown in the letterhead, the main partner, there is no indication as to why Fred O. Adhoch was sued. There is no evidence that the decretal sum has been paid so far.



6. A Replying Affidavit was filed by Fred O. Adhoch Advocate. He gave a longer story. He were retained in Voi SRMCC 099/21 George Ouma Odhiambo -vs- Leonard Ngetich Kimilai. This was conceded on 26/1/2023. The amount awarded was Ksh. 202,000 and costs. He were unable to recover hence filed a declaratory suit Mombasa SRMCC E474of 2023. He filed a garnishee and only Ksh. 44,0000/- = was found.
7. The said sum of Ksh. 403,698. The sum awarded was on 202,000. The Applicant had never paid fees.
8. He stated that money cannot be paid to the Applicant unless received from the decree holder. He annexed an order where essentially only a sum of 40,000/= was recovered. The same went into the costs of execution. The applicant having not paid execution fees cannot benefit from the practice of Law.
9. In essence, money has not been received. It is a parent that the Applicant sued some of those brief case insurance companies whose existence is a blight to the soul and an indictment of the insurance Regulating authority.
10. On the basis of the old rule, memo dat quod non habet, man cannot give that which he does not have. It is only biblical Jesus that gave all. He still gave that which he had. The Applicant was adamant that he was relying on the decree as evidence of payment. In the circumstances, he had a burden to show that the amount of Ksh. 403,658 was paid to the Respondent. He failed to do so.
11. Section 107 – 109 of the Evidence Act provides as follows: -

“ 107.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

12. The burden of proof is on the Applicant. He was relying on rumours, conjecture, subterfuge and hyperbole to found a claim. It is not based on any concrete evidence. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”



13. In *Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another* (2015) eKLR, the judges of Appeal held that:

“Denning J. in *Miller Vs Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”

14. There is nothing showing payment for Ksh. 403,658. The applicant has soiled his bed. Let him lie on it. Without evidence, the court is enjoined to dismiss the claim.

15. As regards costs, the same follow the event. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

16. The event herein is the dismissal of the suit against the respondent. Consequently, the Respondent is entitled to costs. A sum of Ksh. 78,000/= will be sufficient.

Determination

17. The upshot of the foregoing I make the following orders: -

- a. The originating summons dated 6/12/2023 lacks merit and is accordingly dismissed with cost of Ksh. 78,000/= payable within 30 days, in default execution do issue.
- b. The file is closed.
- c. Right of appeal 14 days.



**DELIVERED, DATED AND SIGNED VIRTUALLY ON THIS 13TH DAY OF MAY, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

M/s Okello Kinyanjui & Company LLP Advocates for the Plaintiff

M/s Munyao, Muthama and Kashindi Advocates

M/s Miller and Company Advocates

