



**Malombo t/a OM Robinson & Co Advocates v Brenda & another (Miscellaneous Civil Application E018 of 2022) [2024] KEHC 8142 (KLR) (2 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8142 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS CIVIL APPLICATION E018 OF 2022**

**G MUTAI, J**

**JULY 2, 2024**

**BETWEEN**

**ROBINSON ONYANGO MALOMBO T/A OM ROBINSON & CO  
ADVOCATES ..... APPLICANT**

**AND**

**OTIENO RACQUEL BRENDA ..... 1<sup>ST</sup> RESPONDENT**

**CARREN ANYANGO OPIYO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before the Court is a Notice to Show Cause dated 7<sup>th</sup> February 2024, vide which the Applicant seeks to commit the Respondents to civil jail to compel them to pay the sum of Kes.855,913.42, which sum is outstanding in respect of the Applicant's legal fees.
2. The Notice to Show Cause is opposed. The 1<sup>st</sup> Respondent deposed to a Replying Affidavit on 13<sup>th</sup> February 2024. In the said affidavit, she averred that she never instructed the Applicant to represent her and that the instructions emanated from her mother, Carren Anyango Opiyo (the 2<sup>nd</sup> Respondent herein). She averred that she is a mere beneficiary of the deceased's estate, not the instructing client, and, therefore, cannot be compelled to pay the judgment debt. She further deposed that the Applicant obtained Kes.103,251.58 through garnishee proceedings and that the balance was to have been paid through the sale of Title No MN/VI/4014 (CR 32162) situated in Changamwe.
3. The deponent stated that the debt due to the Applicant had always been settled out of the estate of the deceased person. She averred that her arrest wouldn't resolve the matter, defeat the ends of justice, and be contrary to Articles 50 and 159 of *the Constitution* of Kenya, 2010.
4. Mr. Robinson Malombo filed a Supplementary Affidavit sworn on 6<sup>th</sup> March 2024 in response to the Replying Affidavit sworn on 13<sup>th</sup> February 2024 filed by the 1<sup>st</sup> Applicant. In the said affidavit, he stated that although he had attempted to sell Title No MN/VI/4014 (CR 32162), the auctioneers he had



instructed were unable to proceed with the proposed sale, and the warrants thus expired. He urged that the failure to do so did not deprive him of the option to procure the payment of what was owed to him by other means.

5. The Applicant deposed that issues regarding instructions ought to have been raised during taxation and cannot be the basis for an objection to the Notice to Show Cause. He argued that no payment plan had been provided by the Respondents. In the circumstances, he submitted that the Respondents had no intention to pay the decretal sum and were “hellbent on doing whatever it takes to ensure that she does not settle the same.” In his view, issuance of the warrants of arrest was the only way payment could be procured.
6. To determine this matter, I must first set out the brief history of this matter. This cause was commenced on 7<sup>th</sup> June 2022 when the Applicant filed the Advocate/Client Bill of costs seeking to be paid Kes.2,876.082.40 as fees for representing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in a succession cause in respect of the estate of the estate of Joseph Otieno Oonga (deceased).
7. The Bill of Costs was taxed at Kes.940,945.00 on 1<sup>st</sup> December 2022. Consequently, the certificate of Taxation was issued on 30<sup>th</sup> December 2022.
8. Vide a Notice of Motion dated 2<sup>nd</sup> February 2023, the Applicant applied to have a judgment entered in favour of the Applicant and against the Respondents for the sum of Kes.940,945.00 plus interest from the date of the ruling by the Taxing Master. He averred that the Respondents had refused to pay the decretal amount hence necessitating the application.
9. Being satisfied that service was affected and that the application had merit, I allowed the application on 14<sup>th</sup> March 2023 and entered judgment for the sum of Kes.940,945.00 plus interest from the ruling date.
10. It is common ground that the Applicant was only able to procure Kes.103,251.58 through garnished proceedings and that the issuance of a warrant for the sale of the immovable property did not procure payment of the balance of the decretal sum as the auctioneer instructed to sell the immovable property did not obtain a purchaser of the advertised property.
11. The Respondents filed an application dated 25<sup>th</sup> September 2023 seeking, inter alia, to “set aside or revoke the certificate of taxation issued to the Decree Holder/Respondent on 30th December 2022.” Upon considering the same, I dismissed the application on 6<sup>th</sup> January 2024.
12. That being the case, this Court's judgment has not been set aside or reviewed. No Court exercising appellate jurisdiction has set aside this Court's finding. In the circumstances, the certificate of Taxation issued on 30<sup>th</sup> December 2022 and the judgment of this Court dated 14th March 2023 are valid, regular, and binding. The decision of the Taxing Master and of this Court require the Respondents to pay the Applicant his fees as assessed by the Court, subject any payment made.
13. The 1<sup>st</sup> Respondent, Otieno Recquel Brenda, avers that the amount owed to the Applicant ought to be paid from the estate of the deceased and not from them. In support of this averment, reliance was placed on the decision of George Dulu J in *In re Estate of the late Kipsiele arap Chumo alias Kipsiele (deceased)* [2019]eKLR where the Court stated as follows:-

- “ 13. On whether the legal fees is payable from the estate, I have been referred to many Court cases. In my view, after the deceased person dies, and in the course of succession proceedings, only the administrator, to some extent and subject to the directions of the Court, can commit the estate of the deceased person to



new debts, other beneficiaries can consent only to the extent of their property entitlement, or anticipated portion from the estate.”

14. Whereas I agree with what the learned judge held, it is my view that his holding is inapplicable in the circumstances of this case. In this case, there is a regular judgment that requires the Respondents to pay the Applicant. By dint of the said regular judgment the Respondents are legally obliged to pay the Applicant. They haven't made any payment save for what was attached from the bank.
15. When the Notice to Show Cause came up for hearing the Respondents made no tangible offer to settle the amount outstanding. The 1<sup>st</sup> Respondent made thinly veiled accusations against the Applicant, her former employer. Without a payment proposal there is very little that this Court can do. In the circumstances, I find and hold that the Notice to show cause has merit. I further find and hold that no cause has been shown why the Respondents should not be committed to civil jail.
16. As the Respondents are unlikely to pay without being compelled, I commit each of them to civil jail for 2 months. However, in the interest of justice, the sentence will be suspended for 1 month to give them a final opportunity to pay. The matter will be mentioned before me on 2<sup>nd</sup> August 2024 in open court at 11 am. I order that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be personally present in Court on the said date at the said time.
17. I make no orders as to costs.
18. Orders accordingly.

**DATED AND SIGNED THIS 2ND DAY OF JULY 2024 AT MOMBASA. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

**In the presence of: -**

**Ms Maitai, for the Judgment Creditor;**

**Mr Kori, for the Judgment Debtor; and**

**Arthur – Court Assistant**

