



**Vincent Mogaka t/a Mogaka Bwongki & Co. Advocates v Yunus B
Maimoon t/a Maimoon Medical Center (Miscellaneous Application
E063 of 2022) [2024] KEHC 10787 (KLR) (16 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10787 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS APPLICATION E063 OF 2022
SM GITHINJI, J
SEPTEMBER 16, 2024**

BETWEEN

**VINCENT MOGAKA T/A MOGAKA BWONGKI & CO.
ADVOCATES APPLICANT**

AND

YUNUS B MAIMOON T/A MAIMOON MEDICAL CENTER RESPONDENT

RULING

Representation:-

Mr Onyinkwa for the Appellant

Mr Mogaka for the Respondent

1. Following this Court's ruling delivered on 21/11/2023 dismissing the Applicant's reference, the Applicant has again moved the court vide a notice of motion dated 16/7/2024 praying: -
 1. Spent.
 2. That pending the hearing and determination of this application, the honourable court be pleased to issue an ex-parte temporary stay of execution of its ruling dated 21st November 2023.
 3. That pending the hearing and determination of this application, this honourable court be pleased to set aside its ruling dated 21st November 2023.
 4. That pending the hearing and determination of this application, the honourable court be pleased to direct parties to set-off costs issued in favour of the Respondent vide the ruling dated 21st November 2023 with the amount already paid to the Respondent by the Applicant.
 5. That costs of this application be in the cause.



2. The application is based on the grounds set out therein and those in the supporting affidavit sworn by Dr. Yunus Maimoon. The basis of the application is that the Applicant has already paid the Respondent a sum of Kshs. 935, 165/-, out of which Kshs. 758,187.95 will be used to settle costs in another suit, Miscellaneous Application No. 67 of 2022. That the excess of Kshs. 177,000/- be thus utilized to set off the costs owing in this matter; and this matter be marked as settled having deposited the sum of Kshs. 112,615.85 to the Respondent's bank account held at Cooperative Bank on 25/6/2024. For perspective, the costs in this matter were taxed at Kshs. 289,116.66.
3. In response, the Respondent filed a replying affidavit sworn on 23/7/2024 by Mr. Vincent Mogaka, the Respondent and an advocate of the high court of Kenya, stating that the application is an afterthought of issues that ought to have been canvassed at taxation. That the amounts said to have been paid to him were for other services rendered to the Applicant as detailed therein.

Analysis and Determination

4. On 30/7/2024, I directed parties to put in their respective written submission within 7 days. They however failed to do so.
5. A cursory glance at the face of the application, the prayers sought are all pending inter - partes hearing and determination of the application and thus can be said to be spent.
6. Be that as it may I have this to say regarding whether this court would have granted orders to set off costs issued to the Respondent with the amount allegedly paid to the Respondent by the Applicant. The law is that he who alleges must prove. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that: -

“Whoever desires any Court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”

7. Similarly, Sections 109 therein provides: -

“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 the fact shall lie on any particular person.”

8. In this case, the Applicant only made averments without attaching any documents to prove that the amounts paid as per the table in his supporting affidavit were indeed for legal services rendered in the primary suit leading to the dispute herein. In any event, I am hesitant to believe the Applicant's narrative that he began payment to the Respondent on 8/5/2019 in relation to High Court Misc. Application No. 67 of 2022, as the primary suit therein Malindi CMCC No. 43 of 2022 was filed in the year 2022. It is more probable that the amounts paid by the Applicant were for other services rendered as alleged by the Respondent.
9. In the circumstances, I find that the application dated 16/7/2024 is devoid of merit. It is hereby dismissed with costs to the Respondent.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 16TH DAY OF SEPTEMBER, 2024.

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S.M. GITHINJI



JUDGE

In the Presence of; -

1. Mr Ogeto holding brief for Mr Mogaka for the Applicant
2. Mr Towett for the Applicant

Mr Towett;-I pray for 30 days' stay pending appeal.

Court;- 30 days' stay is granted.

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S.M. GITHINJI

JUDGE

16/9/2023

