



REPUBLIC OF KENYA



**Madi & 3 others v Madi (Miscellaneous Application 34 of 2020)  
[2023] KEHC 1016 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1016 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
MISCELLANEOUS APPLICATION 34 OF 2020  
SM GITHINJI, J  
FEBRUARY 9, 2023**

**BETWEEN**

**UMMI FAMAU MADI ..... 1<sup>ST</sup> APPLICANT  
MADI FAMAU MADI ..... 2<sup>ND</sup> APPLICANT  
MWANAISHA FAMAU MADI ..... 3<sup>RD</sup> APPLICANT  
MWANAHALIMA FAMAU MADI ..... 4<sup>TH</sup> APPLICANT**

**AND**

**KASSIM FAMAU MADI ..... RESPONDENT**

**RULING**

1. In court for determination is the Applicants' Notice of Motion application dated May 12, 2022 brought under Sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act*, and Order 21 rule 12(2) of the *Civil Procedure Rules*. The orders sought are as follows: -
  - a. Spent.
  - b. Spent.
  - c. That the Bill of Costs taxed on the April 27, 2022 be set off against the judgment or decree in PMCC NO E001 of 2020 at Lamu.
  - d. That the court be at liberty to grant any relief(s), directions to expedite the proceedings in Lamu.
  - e. That the costs of the application be provided for.
2. The application is premised on the grounds listed on the face of the Motion and supported by the affidavit sworn on the even date by Ummi Famau Madi. The gist of the application is that the



Applicants who were also defendants in Lamu SPMCC NO E001 OF 2020, filed this miscellaneous application to have the suit in Lamu transferred to Mombasa. That application was dismissed with costs. The Applicants then filed another application in Lamu SPMCC NO E001 OF 2020 to strike out that suit. That application was allowed with costs.

3. It follows then that the Respondent in this miscellaneous application set in motion the process of recovery of costs and a certificate for taxation issued in that regard. The Applicants now want this court to issue an order that the amount of costs taxed herein be set off in the costs to be determined in Lamu SPMCC NO E001 OF 2020.
4. The Respondent opposed the application in his grounds of opposition dated September 14, 2022. He averred that this court is functus officio; that the orders sought cannot issue as they involve two separate matters in two separate courts; and that the prayers sought have no legal basis.
5. The Application was to be canvassed by way of written submissions which were not filed by either side.
6. The substantive Order 21 rule 12 (2) which the application is brought under reads as follows: -

“After passing of any such judgment or decree, the court may on the application of the judgment-debtor and with the consent of the decree-holder or without the consent of the decree-holder for sufficient cause shown, order that the payment of the amount decreed be postponed or be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor or the taking of security from him, or otherwise, as it thinks fit.”
7. It is trite practice that upon entry of judgment, or decree in a case, the Judgment-Debtor is required to settle the sum immediately unless by consent of parties or order of the court, the mode of payment is varied.
8. A cursory reading of Order 21 Rule 12 of the [Civil Procedure Rules](#) empowers the Court to order settlement of the decretal sum by instalment or postponement thereof. The Court in *Keshvaji Jethabhai & Bros Limited V Saleh Abdulla* [1959] EA 260 laid down the principles that should guide the Court in the exercise of discretion in such matters and states as follows:
  - a. whilst creditors’ rights must be considered each case must be considered on its own merits and discretion exercised accordingly;
  - b. the mere inability of a debtor to pay in full at once is not a sufficient reason for exercise of the discretion;
  - c. the debtor should be required to show his bona fides by arranging prompt payment of a fair proportion;
  - d. Hardship of the debtor might be a factor, but it is a question in each case whether some indulgence can fairly be given to the debtor without prejudicing the creditor.
9. The Applicants in this case have not given any reasons why this Court should exercise its discretion in their favour. They state that the amount of costs be offset against that in the lower court’s ruling dismissing the Respondent’s suit. However, there is no evidence of the costs assessed in the lower court. The Applicant annexed a copy of a decree from the lower court of which I note is not signed therefore making it difficult for this court to ascertain its authenticity.
10. In the circumstances, I find no merit in the application dated May 12, 2022. It is hereby dismissed with costs.



**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**S.M. GITHINJI**

**JUDGE**

In the absence of; -

All the parties. They be notified.

