



**Miyare t/a Miyare & Company Advocates v Elsek & Elsek
Construction Company & another (Miscellaneous Cause 175 of 2019)
[2023] KEHC 2420 (KLR) (Commercial and Tax) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2420 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CAUSE 175 OF 2019
A MABEYA, J
MARCH 23, 2023**

BETWEEN

GEORGE MIYARE T/A MIYARE & COMPANY ADVOCATES ADVOCATE

AND

ELSEK & ELSEK CONSTRUCTION COMPANY 1ST RESPONDENT

BEMUDA HOLDINGS LIMITED 2ND RESPONDENT

RULING

1. Before Court is the applicant's Notice of Motion dated October 7, 2022. It was brought inter-alia under Order 10 Rule 11 & Order 51 Rule 1 of the [Civil Procedure Rules 2010](#).
2. The prayers in the application are spent save for a prayer to compel the 1st respondent to settle the part balance of the decretal sum.
3. The grounds for the application were that; a decree dated May 20, 2021 was issued against the 1st respondent and 2nd respondent/applicant jointly with both parties expected to settle the decretal sum of Kshs 11,958,715.51 equally; that the 2nd respondent paid the advocate the sum of Kshs 5,600,000/- in settlement of the decretal sum.
4. That despite receiving the money, the advocate instructed auctioneers to commence execution against the applicant and the said auctioneers had served them with a proclamation and warrants of attachment of property.
5. In opposition, the advocate filed a replying affidavit sworn by Esther Mwikali, an advocate practicing in the firm.



6. She averred that the application was meant to deceive the Court and ought to be dismissed in limine. That the advocate got a favourable judgment and a consequential decree against both the 1st respondent and 2nd respondent/applicant which remains unsettled to date.
7. That where liability is found against two or more parties, the parties are jointly and severally liable for the judgment/decree and the decree holder may collect the decretal sum from any one or all of them. That the 2nd respondent is estopped from claiming that the unpaid balance of the decretal sum can only be claimed against the 1st respondent.
8. It was averred that the advocate only received a total of Kshs 4,700,000/- from both the 2nd respondent and its previous advocates Messrs Muturi Mwangi & Co Advocates and the applicant's allegations that it had paid a total sum of Kshs 5,600,000/- was intended to deceive and mislead the court into granting the interim stay of execution. That after the settlement of the decretal amount in full, the applicant could claim reimbursement from the 1st respondent who is its business partner.
9. I have considered the record in its totality. This Court issued a decree on May 21, 2021 ordering the respondents to pay the advocate the sum of Kshs 8,103,239.60 together with interest at 14% per annum from May 10, 2019 until payment in full.
10. As the decretal sum remained outstanding, the advocate obtained warrants of attachment of movable property and a proclamation of attachment was issued.
11. The applicant argues that it has paid its share of the decretal sum and the 1st respondent should bear the balance.
12. In *[Kenyariri & Associates Advocates v Hans Juergen Langer \[2017\] eKLR](#)*, it was held: -

“Once the court had entered judgement against all the Judgment debtors, jointly and severally, that settled the question. In other words, there is one decretal amount. The Decree-Holder is entitled to recover the said Decretal amount from any one or more of the Judgment-debtors. Once the decretal amount was paid to the Judgment-Creditor, that is the end of the matter, as far as the Decree-Holder was concerned. If the Judgment-debtors choose to make separate contributions, they may do so. However, the fact that the judgement-debtors had, between themselves, resolved how to apportion liability for the decretal amount, cannot be binding on the Decree-Holder. He can still choose one or another of the Judgment debtors, as the persons against whom to levy execution.”
13. I concur with the rendition as the correct position in law. Once judgment is entered against defendants jointly and severally, a decree holder is entitled to recover the entire sum from any and either of them. All that the co-defendants can do in such a case is to recover any amount paid by him/her from the co-defendant.
14. In this regard, the advocate has every right to execute the judgment against any or both of the respondents as the judgment was entered ‘jointly and severally’ against the respondents. The applicant's only recourse may be to personally seek reimbursement from the 1st respondent.
15. There is no justifiable reason to interfere with the advocate's pursuit to enjoy the fruits of a favourable judgment in his favour.
16. In the premises, I find no merit in the application and I dismiss the same with costs. The interim stay of execution ordered is hereby revoked and costs awarded to the advocate.

It is so ordered.



DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MARCH, 2023.

A MABEYA, FCIArb

JUDGE

