REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

MISC. APPLICATIONS NOS. 108 AND 109 OF 2012

CECIL MILLER

T/A MILLER & CO. ADVOCATES.....DECREE HOLDER

VERSUS

PARIN SHARRIF

NAZLIN NIZAR JETHA

YASMIN JANMOHAMMED

ANAR HANALI.....JUDGMENT DEBTORS

RULING

1. On the basis that the decree holder Cecil Miller T/a Miller & Co. Advocates provided legal services to the judgment debtors before instructions were withdrawn, advocate/client bills of costs were filed. The same were opposed. A hearing was conducted by the Deputy Registrar who delivered a ruling on 28th September 2014 who taxed them at Kshs.18,759,474/= and Kshs.18,760,692/= ,respectively. The judgment debtors were represented during the hearing by Mr, Fred Ojiambo (S.C.) of Kaplan & Stratton Advocates. The judgment creditor filed an application dated 7th February 2019 to have the certified costs be adopted as judgment of the court. The application was heard and allowed on 27th June 2019. Mr. Y. Ouma was holding brief for Mr. Ojiambo (S.C.).

2. It should be noted that by the time the application to have certified costs be adopted as judgment, there was on record an application dated 17th July 2015 by the judgment debtors seeking for extension of time to file a reference against the taxed costs. That application had not been prosecuted for all that time.

3. The judgment debtors have filed an application that is the subject of this ruling. This is the application dated 25th July 2019 that seeks that the judgment entered on 27th June 2019 and the resultant decree be reviewed and/or set aside, and that the judgment debtors' application dated 17th July 2015 seeking enlargement of time within which they can file and serve a reference against the decision of the Deputy Registrar be set down for hearing. Then that costs do abide the result of the intended reference. The application was brought under **Orders 9, 45** and **51(1)** of the **Civil Procedure Rules,** and **section 3A** of the **Civil Procedure Act.**

4. On the other hand, the judgment creditor filed an application dated 27th September 2019 seeking that the judgment debtors jointly and severally be ordered to provide security for the decretal amount in the sum of Kshs.58,533,158/69 being the decretal amount together with interest within 30 days, or in the alternative Karim Nizar Jetha be ordered to provide the security. The application was brought under **Order 26** of the **Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act.**

5. I will begin with the application by the judgment debtors. There is no dispute that the impugned taxation was done on 25th September 2014. The Deputy Registrar taxed the costs in a ruling. The judgment debtors state that they instructed their advocates to challenge the taxation by filing a reference. Their advocates informed them that they needed proceedings to be able to file a reference. On 15th October 2014 the advocates wrote to the Deputy Registrar indicating objection to the taxation and seeking reasons for the taxation. First, now that there was a ruling in which the reasons for taxation had been given, there was no need to seek further reasons. The advocates had 14 days from the date of the ruling to file a reference. This is my understanding of **rule 10(1)** and **(2)** of the **Advocates Remuneration Order.** The judgment debtors had 14 days from the date of taxation to file a reference. The Deputy Registrar, however, sent a copy of the ruling to the

advocates of the judgment debtors on 23rd October 2014. 14 days came and went, and nothing happened until the application to extent time was filed on 17th July 2015. The application was under certificate of urgency and was not set down for hearing. The judgment debtors state that their advocates had instructions to file a reference. The last time they inquired about the case was on 27th October 2016. By this time, the judgment creditor had on 26th June 2015 filed an application to turn the certified costs into a judgment. The judgment debtors say they were not aware of this. It was only after the certified costs had been turned into a judgment that their advocates informed them. This was when they changed their advocates to the present ones **(Macharia Mwangi & Njeru Advocates)** who brought the present application.

6. I have stated that proceedings were not required to file a reference, and therefore the advocates' request for them did not make sense.

7. The amount in the taxed bills was over Kshs.36,000,000/=. If the judgment debtors were interested in challenging the same, I find that they did not act prudently or diligently by not finding out from their advocates what was going on. The question of the advocates mistake, if any, not being visited on the clients should, in my view, not apply in this case because the case belonged to the judgment debtors and they did nothing to diligently or prudently pursue it, or even get their advocates to push it **(Savings and Loans Limited – v Susan Wanjiru Muritu, Nairobi (Milimani) HCCC No. 397 of 2002).**

8. In **John Mwangi Muhia & 2 Others –v- Director of Public Prosecutions & 5 Others [2019]eKLR,** it was held that a party who comes to court under certificate of urgency has an obligation to proceed expeditiously. He cannot be allowed to have the matter pend in court forever.

9. This background is important when dealing with the questions whether or not to exercise my discretion to review and/or set aside the judgment that was delivered on 27th June 2019. The judgment debtors urged the court to consider that they were failed by their advocates; that they intended all along to challenge the taxed costs; and that they have the right to be heard, which cannot be taken away lightly. The case of **Kiai Mbaki & 2 Others –v- Gichuhi Macharia & Another [2005]eKLR** was relied on. In it it was held that:-

> **"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard. This court has indeed reiterated that principle on many occasions and we need only cite one for emphasis: Matiba –v- Attorney General [1995-1998]IEA 1992."**

10. It was further emphasised that the rules of justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case is **(Martha Wangari Karua –v- IEBC & 3 Others [2018]eKLR).**

11. It is material to point out that the impugned judgment was as a result of a hearing of a defended application. The application as opposed by the filing of grounds of application. It was therefore not an *exparte* judgment. I wish to point out that decisions in **Wachira Karani –v- Bildada Wachira [2016]eKLR, Adaka Ishmail –v- Equity Bank Ltd [2014]eKLR** and **Lucy Bosire –v- Kehancha Division Land Disputes Tribunal & 2 Others [2013]eKLR** that counsel for the judgment debtors relied on in the written submissions are all in respect of application to set aside an *exparte* ruling and/or judgment. In the instant case there was *interparte* hearing of the application. However, there are useful authorities now that errors and mistakes of counsel have been pleaded, and the value of hearing both sides and deciding cases on merit have been emphasised.

12. Order 45 rule 1 deals with a situation where the applicant is aggrieved by a decree or an order may apply for review if there is a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree or order was passed or the order made; or on account of some mistake or error apparent on the face of record; or for any other sufficient reasons. The application has to be brought without unreasonable delay.

13. The present application for review was brought on the basis that there were 'sufficient reasons' demonstrated. The reasons were that the judgment debtors wanted to challenge the taxed costs but were let down by their advocates, and that they only became aware of the judgment after its delivery. I have stated in the foregoing that the costs were taxed on 25th September 2014 and the judgment was delivered on 27th June 2019, about five years in between. The application for extension of time to file reference was filed on 17th July 2015 and the first time it was mentioned by the judgment debtors' advocates was when the application to have the certificate of costs to be adopted as judgment was heard on 9th May 2019, a period of about 4 years. I have mentioned that the taxed costs were in excess of Kshs.36,000,000/=. This was a large sum by any means. The judgment debtors, if they were interested in protecting that money, ought to have done better. They have the right to be heard, but that has to be looked at proportionately and not aid an indolent party and punish a diligent one. Both have rights that have to be protected.

14. The judgment creditor's application for the payment of security for costs was brought under **Order 26** of the **Civil Procedure Rules**. The general rule is that costs follow the event. In other words, the loser in legal proceedings must pay the legal costs of the successful party. Where, therefore, a defendant has reasonable application that its legal costs will not be paid by the plaintiff if the defendant is successful, the defendant can apply to the court for the order that the plaintiff provide security for costs. Under **Order 26**, the security for costs is applied for before the suit is heard and determined. As was stated in **Europa Holdings Limited –v- Circle Industries (UK) BCLC 320 AC** and in **Bakari Ali Ogada & 245 Others –v- Unilever Kenya Ltd [2008]eKLR,** it must be proved that the plaintiff would not be able to pay the costs at the end of the case. Secondly, the court must satisfy itself that it will be just to make the order for costs on the facts and circumstances of the case. The court must balance the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security of costs against the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds herself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim **(Keary Developments Limited –v- Tarmac Construction Limited & Another [1995] 3 ALL ER 534).**

15. Ideally, the judgment debtors' application dated 25th July 2019 has no merits and should be dismissed. However, in the wider interests of justice and since the judgment creditor would have no problem if there is security for his costs as a condition for re-opening of the matter, I direct as follows:-

a. the judgment entered against the judgment debtors on 27th June 2019 adopting the two certificates of costs is hereby reviewed and set aside if, within 14 days from today, the sum of Kshs.58,553,158/= is deposited into court by the judgment debtors;

b. if the deposit is made, the application by the judgment debtors dated 17th June 2016 seeking leave for enlargement of time to file a reference shall be set down for hearing;

c. if the deposit is not made, the judgment debtors' application dated 25th July 2019 shall be deemed to have been dismissed with costs; and

d. in any event, the judgment creditor's application dated 25th July 2019 is deemed to be allowed with costs.

DATED and DELIVERED electronically, following consent of the parties, at NAIROBI this 7th day of MAY 2020

A.O. MUCHELULE

JUDGE