

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMM MISC APP NO. E436 OF 2023

IN THE MATTER OF THE ADVOCATES ACT

IN THE MATTER OF THE TAXATION OF COSTS BETWEEN ADVOCATES
& CLIENT

BETWEEN

MIDENGA & COMPANY ADVOCATES.....ADVOCATE/RESPONDENT

-VERSUS-

PAMELA NDUKU MUTUA.....CLIENT/APPLICANT

RULING

1. The client/applicant filed a Notice of Motion application dated 2nd January 2025 pursuant to the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act, Order 9 Rule 9, Order 22 Rule 22 & Order 51 Rule 1 of the Civil Procedure Rules, 2010, and all other enabling provisions of the law. The client prays for orders to set aside the warrants of arrest and committal to civil jail order issued on 7th December 2024, a conditional stay of execution for at least 120 days to enable advertisement and sale of all that property known as Athiriver/Athiriver Block 1/3964 to settle the decree and/or in the alternative, the client be allowed to pay the decretal sum in monthly instalments of Kshs.50,000/=.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Ms Pamela Nduku Mutua, the client herein. Ms Mutua averred that the Advocate filed an Advocate - Client bill of costs of Kshs.9,816,107.92, which was taxed down to

Kshs.2,233,632.50 and adopted as the judgment of the Court, with interest at 14% from 2nd June 2023. She further averred that subsequently, execution proceedings were initiated for Kshs.2,606,742.34 and on 7th November 2024, the Deputy Registrar granted her 45 days to settle the decretal sum failure to which warrants of arrest could issue.

3. Ms Mutua stated that she offered her property known as Athiriver/Athiriver Block 1/3964 valued at over Kshs.3,600,000/= to the Advocate to liquidate the debt, but he declined. She asserted that despite efforts, she has not secured a buyer and her alternative plan to use proceeds from an employment case has been delayed. Additionally, she stated that loan applications have also failed due to her poor credit and unemployment. She contended that she fears imminent arrest which would hinder her ability to sell the aforesaid property and settle the debt. Ms Mutua prayed for more time to dispose of the said property asserting that the application herein has been filed timely, it has been made in good faith and will not prejudice the Advocate in any way.
4. In opposition to the application, the Advocate filed a Notice of Preliminary Objection dated 30th January 2025, raising the following grounds –
 - i) The respondent seeks to challenge the Ruling of the Deputy Registrar (Hon. Maureen Shimenga) dated and delivered on 7th November 2024 without filing an appeal as a mandatory procedure;
 - ii) The respondent did not file a Memorandum of Appeal within seven (7) days of delivery of the Ruling aforesaid as a prerequisite to filing the instant application, hence the application offends the mandatory provisions of Order 49 Rule 7(2) & (3) of the Civil Procedure Rules,

- iii) In the absence of a Memorandum of Appeal the Honourable Court lacks jurisdiction to hear and determine the application;
- iv) The affidavit purportedly sworn by Ms Pamela Nduku Mutua on 2nd January 2025 in support of the application offends the mandatory provisions of Section 5 of the Oaths and Statutory Declarations Act, Chapter 15 of the Laws of Kenya;
- v) As such, the application is unknown in law, *ex-facie* incompetent, fatally defective and inadmissible; and
- vi) On the whole the Notice of Motion application dated 2nd January 2025 is a gross abuse of the Court process.

5. The Advocate also filed a replying affidavit sworn on 30th January 2025 by Charles Midenga, an Advocate of the High Court of Kenya and Counsel for the Advocate. Mr. Midenga averred that the instant application is procedurally defective under Section 5 of the Oaths and Statutory Declarations Act. He deposed that the application seeks to set aside warrants of arrest issued pursuant to the Deputy Registrar's Ruling of 7th November 2024, which had already declined instalment payments and granted the client 45 days to settle the decretal sum, failure to which warrants of arrest would issue. Counsel stated that the client had previously in September 2024 proposed either 24 monthly instalments of Kshs.150,000/= or five months to sell her Athi River property but failed to act within the 11 months since taxation on 30th October 2023.

6. Mr. Midenga dismissed the payment of Kshs.50,000/= made on 24th December 2024 as casual and as being made in bad faith. He rejected the transfer of the Athi River property to the Advocate on grounds that it is of low value, it is undeveloped and it would be contrary to the ethical Rules under the LSK Code which prohibits settlement of legal fees in kind. Mr. Midenga highlighted inconsistencies in the client's proposals now suggesting Kshs.50,000/= monthly

instalments which would take over four (4) years to settle, while ignoring previous Court Rulings, failing to settle prior costs, and evading execution, leading to additional expenses of about Kshs.120,000/=. He asserted that litigation must end, thus the instant application should be dismissed with costs.

7. In a rejoinder, the client filed a further affidavit sworn on 21st February 2025 by Ms Pamela Nduku Mutua, the client herein. She insisted that her affidavit in support of the instant application complies with the provisions of the Oaths and Statutory Declarations Act. She averred that under Order 22 Rule 22 of the Civil Procedure Rules, 2010, this Court has jurisdiction to grant a stay of execution. She denied refusing to settle the Advocates fees and stated that she lost her job in December 2023 due to an unresolved anti-corruption case. Ms Mutua disputed the Advocate's interpretation of Rule 78 of the LSK Code and contended that it does not prohibit using property sale proceeds to settle a decree.
8. The application herein and the Advocate's Notice of Preliminary Objection were canvassed by way of written submissions. The client's submissions were filed on 25th February 2025 by the law firm of Okoth Obera Law Advocates, whereas the Advocate's submissions were filed on 28th February 2025 by the law firm of Midenga & Company Advocates.
9. Mr. Obera, learned Counsel for the client relied on the Court of Appeal case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd** [1969] EA 696, and submitted that the Advocates Preliminary Objection is not merited. He referred to the Supreme Court case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others** [2012] eKLR, and argued that a competent Court has a wide discretion to set aside or vary its orders on just terms, considering all relevant circumstances. He contended that

as the Court of first instance which issued the decree from the Ruling of 7th November 2024, this Court has jurisdiction under Order 22 Rule 22(1) of the Civil Procedure Rules, 2010, to grant stay of execution or any other order related to the decree or its execution.

10. Mr. Obera cited the provisions of Order 21 Rule 12 of the Civil Procedure Rules, 2010, and asserted that this Court has the requisite jurisdiction to hear the instant application and grant the orders being sought. He argued that the affidavit in support of the application herein clearly shows that it was sworn in Nairobi on 2nd January 2025 in compliance with the provisions of Section 5 of the Oaths and Statutory Declarations Act, Chapter 15 of the Laws of Kenya. Counsel relied on the provisions of Order 21 Rule 12 of the Civil Procedure Rules, 2010, and the case of **Freight Forwarders Ltd v Elsek & Elsek (K) Ltd** [2012] eKLR, and asserted that considering the fact that the client lost her job in December 2023, due to her inability to pay the decretal sum in lump sum but willingness to pay by reasonable instalments, her good faith demonstrated by partial payments and efforts to sell her Athi River property and her current financial hardship due to a deteriorated credit score, she has demonstrated sufficient cause to warrant this Court's exercise of discretion in her favour.
11. Mr. Midenga, learned Counsel for the Advocate submitted that the Advocates Notice of Preliminary Objection dated 30th January 2025 is confined to pure points of law without touching on disputed facts, in line with the well-established principles set out in the case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd** (supra). He argued that the instant application improperly challenges the Ruling of the Hon. Deputy Registrar delivered on 7th November 2024, pursuant to the provisions of Order 49 Rule 7(1) of the Civil Procedure Rules, 2010, since the client did not comply with the provisions of Rules 7(2) & (3) thereof. Mr. Midenga referred to the case of the

Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR, and asserted that jurisdiction can only be invoked through a proper appeal and in its absence, this Court lacks authority to entertain the instant application. He contended that failure to comply with the provisions of Order 49 Rules 7(2) & (3) of the Civil Procedure Rules is fatal and cannot be cured under to the provisions of Article 159(2)(d) of the Constitution.

12. Mr. Midenga submitted that the client’s supporting affidavit filed in the Case Tracking System (CTS) is invalid as it was neither signed nor commissioned, contrary to the provisions of Section 5 of the Oaths and Statutory Declarations Act. He cited the case of **Pius Njogu Kathuri v Joseph Kiragu Muthura & 3 others** [2018] eKLR, and argued that the said defect cannot be cured under Article 159(2)(d) of the Constitution. He contended that without a valid affidavit, the instant application is fatally defective, incompetent, and inadmissible. The above notwithstanding, Counsel submitted that there is no basis to interfere with the Deputy Registrar’s decision as the client has not shown any factual or legal error. He stated that the client has deliberately avoided paying the decretal sum for over two years and has not provided any evidence of active efforts to sell the Athi River property. Mr. Midenga asserted that the client is a person of means, who is prioritizing expensive foreign tuition fees over settlement of the debt.

ANALYSIS AND DETERMINATION.

13. Upon consideration of the instant application, the grounds on the face of it, and the affidavits in support thereof as well as the Notice of Preliminary Objection, replying affidavit by the Advocate, and the written submissions by Counsel for the parties, the issues that arise for determination are –

- i) **Whether the Advocate’s Notice of Preliminary Objection is merited;**

- ii) **Whether the warrants of arrest and committal to civil jail order issued on 7th December 2024 should be set aside;**
- iii) **Whether an order for conditional stay of execution for at least 120 days to allow the client sell her property Athiriver/Athiriver Block 1/3964 should issue;**
- iv) **Whether the client should be allowed to pay the decretal sum in monthly instalments of Kshs.50,000/=.**

Whether the Advocate's Notice of Preliminary Objection is merited.

14. In the case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd**. [1969] EA 696, the Court defined what constitutes a valid Preliminary Objection as hereunder –

So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

15. In the said case, Sir Charles Newbold P., stated thus –

..... the first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily

increase costs and, on occasion confuse issues. This improper practice should stop.

(Emphasis added).

16. Upon perusal of the Advocate's Notice of Preliminary Objection dated 30th January 2025, it is clear that it is based on two major grounds. The first ground is that this Court has no jurisdiction to hear and determine the instant application since the client did not first comply with the provisions of Order 49 Rules 7(2) & (3) of the Civil Procedure Rules, 2010, before filing the instant application. The second ground is that the instant application is fatally defective since its supporting affidavit was neither signed nor commissioned, contrary to the provisions of Section 5 of the Oaths and Statutory Declarations Act.
17. On the first issue, the Advocate claims non-compliance with the provisions of Order 49 Rules 7(2) & (3) of the Civil Procedure Rules, 2010. He asserted that the client seeks to challenge the Ruling of the Deputy Registrar delivered on 7th November 2024 without complying with the provisions of Order 49 of the Civil Procedure Rules, 2010. From a review of the aforesaid Ruling, it is evident that it was in respect to a Notice to Show Cause dated 7th August 2024 issued against the client. It is not in contest that such a Notice to Show Cause is provided for under the provisions of Order 22 Rule 18 of the Civil Procedure Rules, 2010.
18. Order 49 Rule 7 of the Civil Procedure Rules, 2010, provides that
 - 1) ***The Registrar may –***
 - a) ***give directions under Order 42 rule 12 and Order 51 rule 8;***
 - b) ***hear and determine an application made under the following Orders and rules –***
 - i) ***Order 1, rules 2, 8, 10, 17 and 22;***

- ii) Order 2, rules 1 and 10;**
- iii) Order 3, 5 and 9;**
- iv) Order 6;**
- v) Order 7, rules 16 and 17(2);**
- vi) Order 8;**
- vii) Order 10, rules 1 and 8;**
- viii) Order 20;**
- ix) Order 21, rule 12;**
- x) Order 22 other than under rules 28, and 75;**
- xi) Order 23, 24, 25, 26, 27, 28, 30, 31 and 33; and**
- xii) Order 42, rule 14.**

2) An appeal from a decision of the registrar under the Orders referred to in sub rule (1) shall be to a judge in chambers.

3) The memorandum of the appeal, setting out the grounds of the appeal shall be filed within seven days of the decision of the registrar.

19. From the above provisions, it is apparent that a Notice to Show Cause is provided for under the provisions of Order 22 Rule 18 of the Civil Procedure Rules, 2010, thus it is one of the applications contemplated for under Order 49 of the Civil Procedure Rules, therefore, in the event that a party is dissatisfied with a decision of the Deputy Registrar in respect to a Notice to Show Cause, the party may challenge it in the manner provided for under Order 49 Rules 7(2) & (3) of the Civil Procedure Rules, 2010.

20. The aforesaid provisions state that an appeal from a decision of the Deputy Registrar, such as from the Ruling delivered on 7th November 2024, shall be to a Judge in Chambers and the dissatisfied party shall within seven (7) days of the decision file a Memorandum of Appeal setting out the grounds of appeal. The

client has neither filed a Memorandum of Appeal against the Deputy Registrar's decision nor sought for extension of time to do so. In the absence of compliance with the provisions under Order 49 Rules 7(2) & (3) of the Civil Procedure Rules, 2010, this Court's jurisdiction to interfere with the Deputy Registrar's Ruling delivered on 7th November 2024 has not been properly invoked.

21. In the case of the **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd** (supra), Nyarangi, JA. held that -

...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

22. In the premise, this Court agrees with the Advocate that it has no jurisdiction to entertain the application filed by the applicant herein.

23. Additionally, in regard to the 2nd issue raised in the Notice of Preliminary Objection of whether the client's affidavit in support of the instant application is defective, this Court notes that the said affidavit is neither signed by the deponent nor commissioned by a Commissioner for Oaths. The Advocate contends that this is contrary to the provisions of Section 5 of the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya, which provides that –

Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.

24. In the case of **In re MWO (Minor)** [2021] eKLR, the Court held as follows-

It is a legal requirement that an affidavit be commissioned by either a Magistrate, a Commissioner of Oaths or by a Notary Public. An affidavit is a sworn statement which contains matters of evidence deponed on oath and as such legal consequences such as perjury would attend if one is found to have sworn a false affidavit. Therefore, an affidavit must be executed on oath by the deponent. An affidavit which has not been properly commissioned is at best a mere signed statement of facts.

It is the commissioning of the affidavit by an authorised officer which elevates the signed statement to the status of an affidavit. Therefore, commissioning of the document is a crucial step without which the statement cannot be deemed to be an affidavit. Failure to commission an affidavit cannot be dismissed as a mere technicality and is an omission which cannot be ignored and/or overlooked by the court.

25. In view of the fact that the client's affidavit in support of the instant application was neither signed by the deponent nor commissioned in the manner provided for under Section 5 of the Oaths and Statutory Declarations Act, and also for the reason that it does not bear the stamp, name and address of a Commissioner for Oaths, I find the said affidavit to be defective. Failure to commission an affidavit reduces it to a mere statement of fact, rendering an application such as the instant one defective for want of evidentiary foundation.
26. This Court finds that the Advocate's Notice of Preliminary Objection is merited. I make the following orders:-
- i) I hereby uphold the Advocates Notice of Preliminary Objection dated 30th January 2025;**

- ii) The client's application dated 2nd January 2025 is hereby struck out; and**
- iii) Costs of the Advocate's Notice of Preliminary Objection and client's application are awarded to the Advocate.**

It is so ordered.

DELIVERED, DATED and SIGNED at NAIROBI on this 31st day of October 2025. Ruling delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Timoso h/b for Mr. Obara for the client

Mr. Midenga for the Advocate

Ms B. Wokabi – Court Assistant.