



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

COUNTY COURT NAME: MAKUENI HIGH COURT

CASE NUMBER: HCCCMISC/E065/2021

B.M MUNG'ATA & COMPANY ADVOCATES VS ESTHER NDETE MBULUI AND ERICK MUSYA KAINDI

RULING

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**CIVIL MISC. APPLICATION NO. E65 OF 2021**

**B.M. MUNGÁTA & COMPANY ADVOCATES.....APPLICANT**

**VERSUS**

**ESTHER NDETE MBULUI.....1ST RESPONDENT**

**ERICK MUSYA KAINDI.....2ND RESPONDENT**

**RULING**

1. The application before me is dated 5/2/2024 and seeks that judgment be entered for the Applicant and decree be issued for the taxed costs of Kshs. 537,570 together with costs and interest from the date of taxation.
2. It is supported by the affidavit of Sofia K. Mutua who depones *inter alia* that Applicant's Bill of



Costs was taxed on 27/9/2024 and a Certificate of Taxation was issued, and since then the Respondents had declined to settle the same.

3. In the Replying Affidavit sworn by the 1<sup>st</sup> Respondent the Respondents depone that the Applicant's firm has been over paid in the sum of Kshs.836,170/= an excess of Kshs.298,600/=. That these payments of Kshs.836,170/= were not considered when the Bill of Costs dated 7/10/2021 was filed leading to an erroneous taxation. Annexed to the Replying Affidavit is a document titled **"Schedule of Payments to M/s B.M. Mung'ata & Company Advocates"**.
4. The Schedule lists of names of payers and amounts paid. Payments of Kshs.400,000/=: 50,000/= and 60,000/= plus *"proceeds of 2 properties sold by B.M. Mung'ata & Co. Advocates - Kshs.1,600,000/="*. The Schedule states that total paid was Kshs.2,110,000/=. Total taxed cash costs were Kshs.1,811,400/=. Overpaid amount is indicated as Kshs.298,600/=.
5. The application is opposed.
6. The application was argued orally.
7. Ms. Mutua for the Applicant submitted that the application emanates from the Advocates/Client, Bill taxed by Hon. Ngetich RM. That the Respondents had filed an application for review of the Ruling of the Taxing Master. That application was dismissed on 3/12/25. That the Respondent had not filed any appeal. She submitted that the issues raised here are the same issues that were raised in that application for review.
8. Mr. Museve for the Respondents submitted that in Misc. Application E065/2021 the matter emanated from H.C. Succession Cause No. 34/2017. That the Bill of Costs was taxed at Kshs. 1,273,830/= and the Respondents instructed their advocate to sell 2 properties at Kshs.1.6 M. That the Respondents position was that the sum of Kshs.1.6 M was not accounted for. He urged the court to rely on the Schedule of payment.
9. Regarding Misc. Application no. E076/2021, Counsel submitted that it arose out of an Application No. E031/2020 in the Court of Appeal which gave rise to a Bill of Costs whose Ruling was delivered on 27/9/2024 and

taxed at Kshs.537,570/=.

10. In a rejoinder Ms. Mutua submitted that there was no proof to the payments set out in the Schedule, no instructions to sell attached, no particulars of the alleged properties. That these issues were raised before the Taxing Master and that she dealt with them in her Ruling. That after taxation, there was an engagement where the Respondents indicated they would pay the costs as taxed . That no payment was made, hence this application.
11. I have carefully considered the submissions by Counsel, the rival affidavits. I have perused the

Ruling of the Taxing Master delivered on 3/12/2025. The issue for determination is whether the Respondents' objection to the application is tenable.

12. The only reason why the Respondents are objecting to the application is that they have overpaid the Applicant. It is their position that the Schedule attached to the Replying Affidavit is proof of the alleged over payment. The Taxing Master had this to say about the Schedule.

*The Applicant introduced a Schedule of Payment listing the monies allegedly paid to the Respondent herein. I have used the word 'allegedly' because there is nothing placed on record as evidence that indeed the money was paid to the Respondent herein. Further the Applicant has not demonstrated or advanced why the evidence that he now wishes to produce was not availed or the challenge that he had in availing the same prior to taxation of the Bill of Costs.*

13. I have anxiously considered the Replying Affidavit and I note that the Schedule lists certain payments by specific persons named therein.

**Pamela Tutui - Kshs.400,000/=**

**Esther Kaindi - Kshs.**

**50,000/= Eric Kaindi - Kshs.**

**60,000/=**

**Proceeds of 2 properties**

**sold by the Applicant - Kshs. 1,600,000/=**

14. None of these alleged payments is supported by evidence of either a receipt, bank transfer or any document to establish that the same was paid as alleged.
15. In addition, the objectors have not placed before the court the particulars of the said properties, e.g., LR numbers/ any documentation e.g. search certificates to show that they exist. There is no evidence of the of any sale agreements or their values or any instructions to sell, evidence of the sale and evidence of receipt of the proceeds by the Applicant. There is nothing placed before the court to support these averments.
16. It is trite that he who alleges must prove. This is the purport of **Section 107 and 109** of the **Evidence Act, Cap 80 Laws of Kenya.**
17. From the foregoing, in this matter, I must find that the Respondents have not established that they made any of the alleged payments to the Applicant.



18. In the circumstances, their objection is without basis and is overruled.

19. Hence , the Application dated 5/2/2024 be and is hereby allowed as prayed.

Dated , signed and delivered virtually this 5th March 2026



Mumbua T  
Matheka Judge

***Ruling HCC.MISC. APPL. NO. E065 of 2021 BM Mungáta Advocates vs  
Esther N. Mbului & Another.***

SIGNED BY/FOR:  
LADY JUSTICE MATHEKA, TERESIA MUMBUA

