



**Maru v Maru; Dosani (Interested Party) (Environment & Land Case
438 of 2013) [2024] KEELC 4628 (KLR) (6 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4628 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 438 OF 2013**

AA OMOLLO, J

JUNE 6, 2024

BETWEEN

BHARAT ISHWARAL MARU PLAINTIFF

AND

DEEPAK ASHWINKUMAR MARU DEFENDANT

AND

RAHEMAT ESSA DOSANI INTERESTED PARTY

RULING

1. The Applicant filed a notice of motion dated 9th February 2024 supported by an affidavit sworn by Rahemat Essa Dosani on the same date and a supplementary affidavit sworn by Mohamed Tariq Khan on 7th March 2024 seeking for the following orders;
 - a. Spent
 - b. That this Honorable Court be pleased to Order that the sum of Kenya Shillings Eight Million (Kshs. 8,000,000/=) held by Majanja & Luseno Advocates be released to the Firm of Tariq Khan & Associates on behalf of the Interested Party/Applicant.
 - c. That this Honorable Court be pleased to Order the sum Kenya Shillings One Million Four Hundred and Seventy-One Thousand Two Hundred and Fifty-Four and Five Cents (Kshs. 1,471,254.05/=) be released to the Firm of Nelson Harun & Co. Advocates once the funds are received by Firm of Tariq Khan & Associates and the Interested Party/Applicant.
 - d. That the Firm of Nelson Harun & Co. Advocates be ordered to pay interest on (2) above from the date of the Order dated 27th July 2022 until the date of release of the monies.
 - e. That the costs of this Application be provided for.



- f. That such other or further relief that this Honorable Court deems fit and just to grant.
2. The motion was based on the grounds inter alia, that on 27th July 2022 this Court directed that the Firm of Nelson Harun & Co. Advocates and Tariq Khan & Associates open a joint interest earning account where the Firm of Majanja & Luseno Advocates would deposit the sum of Kenya Shillings Eight Million (Kshs. 8,000,000/=). However, the escrow account was never opened due to the unreasonable terms of a "reputable Bank" proposed by the firm of Nelson Harun & Co. Advocates and as such, the monies continue to be held by the Firm of Majanja & Luseno Advocates.
 3. The Applicant stated that her Advocates wrote to the firm of Nelson Harun & Co. Advocates asking whether M-Oriental Bank was acceptable to them for purposes of the escrow account but they objected stating that it does not meet the standards of a reputable Bank and when they proposed Standard Chartered Bank which was acceptable to her, they also neglected to send the Account Opening Forms despite receiving her letter requesting for the same.
 4. She further stated that owing to Counsel's delay, on 20th September 2022, her Advocates on record wrote to the said firm again requesting them to forward the Account Opening Forms and on 21st September 2022, they received a response dismissing the request to forward the same. That on 19th July 2023, through her Advocates, forwarded the Account Opening Forms to the firm of Nelson Harun & Co. Advocates but they failed to action on them and on 4th December 2023 they wrote a letter estimating how much they are anticipating to be paid and further stating that her Advocates should instruct Majanja & Luseno Advocates to release the sum of money held by themselves.
 5. That the Bill of Costs in ELC Misc. E228 of 2021, ELC Misc. E230 of 2021 and ELC Misc. E235 of 2021 have all been determined and taxed accordingly to a cumulative amount of Kenya Shillings One Million Four Hundred and Eighty-One Thousand Two Hundred and Fifty Four and Five Cents (Kshs.1,481,254.05/=) while the Bill of Costs in ELC No. E179 of 2021 and ELC Misc. No. E229 of 2021 were struck out on the basis that Counsel had not taken any positive steps on them. Thus there remains no Bill of Cost pending to be taxed.
 6. The Interested Party/Applicant stated that she is desirous to settle the legal fees that is owing to Nelson Harun & Co. Advocates and have the balance released to herself for use in her medical attention, which requires immediate financing. She stated that she shall suffer irreparably if she does not undergo medical treatment as soon as possible noting that she is aged sixty-two (62) years. She also contended that the suit was settled in 2019, yet she is unable to enjoy the fruits of the settlement due to the unreasonable demands of Nelson Harun & Co. Advocates hence the Court Order dated 27th July 2022 is yet to be realized.
 7. The Applicants posited that on 23rd March 2023, the Taxing Master ordered the firm of Nelson Harun & Co. Advocates to pay thrown away costs of Kenya Shillings Five Thousand (Kshs.5,000/=) in ELC Misc. E228 of 2021 and Kenya Shillings Five Thousand (Kshs.5,000/=) ELC Misc. E235 of 2021 which they have failed to pay and also contended that the sum of Kenya Shillings Eight Million (Kshs. 8,000,000/=) is not accruing any interest to the Applicant's detriment.
 8. The Applicant deposed that she undertook to pay the taxed costs being Kenya Shillings One Million Four Hundred and Seventy-One Thousand, Two Hundred and Fifty-Four and Five Cents (Kshs.1,471,254.05) in ELC Misc. E228 of 2021, ELC Misc. E230 of 2021 and ELC Misc. E235 of 2021 and that no prejudice will be occasioned if the difference is released to her.
 9. Counsel for the Applicant stated that the Respondent having presented five Bills, three of which have been taxed and two struck out, any agreement (if any) between the Applicant and Respondent has been



- overtaken by events. He contended that the Advocate should have the bills taxed other than assessing his own Bills to a cumulation of Kshs.5,000,000/= and that he should take what has been assessed as due to him and the rest returned to the Interested Party/Applicant.
10. The Respondent opposed the motion vide replying affidavit sworn by Nelson Harun Muturi on 27th February 2024 stating that the application is misconceived in law because a purported failure to comply with a court order is redressed by contempt proceedings upon personal service of the order not obeyed. He contended that the applicant's advocate is guilty of material non-disclosure and that the factual position is that on 26th August 2022, the Applicant's Advocate wrote to his law firm confirming that he was amenable to opening a joint interest earning account at Standard Chartered Bank. That on 19th July 2023, more than one (1) year after the court order was made, they forwarded account opening forms which were not from Standard Chartered Bank as agreed.
 11. That on 25th July 2023 Mr Muturi replied to the Applicant's Advocate's letter pointing out the earlier understanding that a joint account was to be opened in Standard Chartered Bank, Chiromo Branch and requested for clarity on the unilateral change of Bank. He stated that on 8th August 2023, the Applicant's Advocate replied that he was too busy to find time to avail himself at any Standard Chartered Bank for the purpose of opening a joint interest earning account and further informed him that he secures the account opening forms.
 12. According to mr Muturi, he was admitted to the bar in the year 1998 and that he found it disrespectful of the Applicant's counsels admitted in the year 2004 and 2018 to send him to the bank to obtain account opening forms suggesting that for two months they were unavailable not because of being sick, hospitalized or out of the jurisdiction but because they were busy in their office. That vide a letter date 20th September 2022 they forwarded the bank account opening forms with a 3 days ultimatum that if he failed to avail the Bank Account opening forms from Standard Chartered Bank he would be held liable for the loss of interest. He avers that through his letter dated 21st September 2022, he advised them to cease writing to him vexatious letters.
 13. He posited that the Applicant's advocate by a letter dated 23rd September 2022 forwarded a draft order for approval with or without amendments and which he approved. That he did not hear from them again save for one court appearance during a taxation when the Applicant's counsel informed Hon Isabella Barasa Deputy Registrar that she couldn't trace this file so as to extract the court order and have the same signed. The Respondent stated that he has never been served with an extracted, signed and sealed order for compliance nor has the Applicant's counsel ever invited him to Standard Chartered Bank, Chiromo Branch to open a joint account.
 14. Further, he stated that on 4th December 2023, he wrote to the Applicant's Advocate informing them that two applications had been taxed in excess of Kshs. 1 million and that going by this trend the total costs payable would exceed a sum of Kshs. 4 million which sum the Applicant had agreed to settle as costs. That also in the same letter he requested the Applicant's counsel to instruct M/S Majanja Luseno & Company Advocates to release the amount so far taxed.
 15. He deposed that a party who seeks court orders has a duty to enforce those orders and there is no reciprocal duty against a party to whom court orders are sought to enforce the orders against himself. That failure to comply with court orders is resolved by contempt of court proceedings thus if the Applicant's grievance is that he has failed to cooperate in compliance with the court orders, the legal remedy available is commencement of contempt of court proceedings. He added that the on the issue of ailment of the Applicant, the exhibit dated 25th January 2024 is insufficient and inadmissible evidence. That he had an agreement with the Applicant on legal costs of Kshs. 4 million but the Applicant's



counsel advised the Applicant that he was only entitled to a minimum of Kshs. 1 million in legal costs in the 6 matters in court.

16. That there is a pending bill for taxation in the Succession Court which if taxed in the sum of Kshs. 600,000, the Appeal to the Court Appeal kshs. 1 million, the main suit Kshs. 1 million and the counterclaim Kshs.1 million this totals a minimum of Kshs. 3.6 million plus the already taxed amount of Kshs. 1.4 million will total Kshs. 5 million already exceeding what the Applicant agreed to pay in the sum of Kshs. 4 million thus he will suffer serious prejudice if the same is released while there are three bills pending taxation.

Submissions.

17. The application was heard on 19th March 2024. Counsel for the Applicant submitted that his client needs the funds to attend to a medical procedure and that there are no pending bills to be taxed. That the already taxed amount be released to the Respondent and the balance released to the Applicant. He relied in the ruling on this matter by this court rendered in July 2022 to state that it is pre-judicial to deny the Applicant access to her money and it would be unfair to have the moneys released to the Respondent when the moneys were settlement in favour of the Applicant.
18. Mr. Harun for the respondent submitted that they rely on the replying affidavit dated 21.2.2024 and the supplementary affidavit sworn on 7.3.2024 stating that it is true that they obtained a charging order over the sum of Kshs.8 Million due to the Applicant and that 3 of the bills were taxed and 2 were struck out. That the bills were struck out with leave that compliant bills be filed which have been and have requested for dates.
19. He added that once a suit is filed the judicial process is not in the control of parties, if they have an issue with the delay, the law allows them to apply for dismissal of the application under want of prosecution. He continued that he stands to gain nothing from failing to tax his bills stating that there are pending six bills, five in the Environment and Land Court and one in Succ. Cause No. 3253 of 2007 and which bills was served in April 2022. He contended that the duty to obtain the bank opening account is on the Applicant which duty they have not done thus is disrespectful for them to seek for interest from 27.7.2022.
20. The Respondent argued that there are no contempt proceedings initiated to seek compliance and that they are almost coming to the close of taxation of the pending bills. He submitted that the supplementary affidavit by Ms.Mohammed sworn on 7.3.2024 is very condescending adding that the Applicant had agreed a sum of Kshs.4 Million when they initially met but has not sworn any affidavit in objection of such agreement.
21. In reply, Counsel for Applicant submitted that they have not been served with the fresh bills and nothing has stopped the Respondent from annexing copies to his replying affidavit. He added that they had annexed evidence of the Applicant's illness. Further, on the allegation that there was an agreement between the Applicant and the Respondent, he argued that the court should not be used as a sword/shield on a client who changes counsel and that the letter annexed NH4 is self-explanatory.

Determination:

22. This is a motion by the Interested Party seeking for orders that the sum of Kenya Shillings Eight Million (Kshs. 8,000,000/=) held by Majanja & Luseno Advocates be released to the Firm of Tariq Khan & Associates on her behalf and once that is done, the sum Kenya Shillings One Million Four Hundred and Seventy-One Thousand Two Hundred and Fifty-Four and Five Cents (Kshs. 1,471,254.05/=) be released to the Firm of Nelson Harun & Co. Advocates. Secondly, that the Firm of Nelson Harun &



Co. Advocates be ordered to pay interest from the date of the Order dated 27th July 2022 until the date of release of the monies.

23. This was on the grounds that this court issued orders on 13th July 2023 as follows;
1. That the firm of Nelson Harun and Co Advocates; Tariq Khan and associates shall open a joint interest earning Bank Account on reputable Bank in Nairobi within 21 days from the date hereof.
 2. That the firm of Majanga Luseno and Co Advocates shall forthwith transfer to the said joint Bank account the sum of Kshs. 8,000,000 held by the firm on behalf of the interested party within 7 days of being furnished with the particulars of the said account.
3. That the said sum of Kshs. 8,000,000 shall be held in the said account pending the determination of the costs payable by the interested party to the firm of Nelson Harun and Co. Advocates or further orders by the court.
24. The Respondent in opposition stated that it was the Applicant's duty to ensure that the joint account had been opened having obtained the orders. Further, that there were three more bills that were pending taxation hence it is premature to release the funds before the determination of these bills.
25. From the pleadings filed, it reveals that this court issued orders on 13th July 2022 directing opening of a joint interest earning Bank account where the sum of Kshs.8,000,000 held by the firm of Majanga Luseno would be transferred and held on behalf of the interested party who is the Applicant herein pending the determination of the costs payable by the Interested Party to the firm of Nelson Harun. It is not contested that three bills were taxed to Kshs. 1,471,254.05/= and that there are two bills that were struck out.
26. According to the Respondent, they have filed the struck-out bills afresh which the Applicant assert that she is not aware of them. An interpretation of Section 48(1) of the Advocates Act shows that an Advocate's fees are not due until his Bill of Costs has been served on the client and where it is not settled, until it is taxed by the court.
27. In these circumstances, as was relied by Justice G V Odunga in the case of Republic v Lucas M. Maitha Chairman, Betting Control And Licensing Board & 4 others Ex -parte: Interactive Gaming and Lotteries Limited,
- “it is proper to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See Suleiman v Amboseli Resort Limited [2004] 2 KLR 589.”
28. There exists an order of charge on the sum of Kshs 8,000,000 which the Applicant seeks to be released to her on urgent medical grounds. This court can only revise the order of a charge where the Applicant has demonstrated that the issues of the pending bills have been finalized. The Respondent has deposed to filing fresh bills and gave details of the case in paragraph 21 of the replying affidavit which then did not require the Respondent to annex copies of the bills filed. The Applicant has not deposed to not



being aware of the matter before the Court of Appeal or the succession cause. Thus, this application in my view is brought prematurely in view of the charge order which has not been varied.

29. In regard to the issue of charging of interest, the parties have shared corresponding which demonstrate lack of decorum between them. Be that as it may, the Applicant's counsel had a higher duty to ensure that the joint account is opened for the best interest of their client. The court order was specific to the bank where the account was to be opened and in paragraph 13, the Respondent averred that he has never been served with an extracted order for compliance. Non was also annexed by the Applicant in this application to confirm that indeed they had taken necessary steps to have the account opened.
30. Further, there is no evidence of correspondence from the Applicant's counsel forwarding to the Respondent account opening forms for their signature. In paragraph 8 of the replying affidavit, it is deposed by the Respondent that Counsel for the Applicant wrote to him stating that he was busy. Due the indolence by the Applicant or her counsel, this court cannot award prayer 4 of the application seeking an order to compel the Respondent to pay interest on the charged sum of Kshs Eight Million (Kshs 8,000,000-).
31. On the question of who pays the costs of this application, I find that the Applicant had other options to get the money due to her without filing this application. Consequently, the Respondent merits to be awarded the costs for defending the application.
32. The final orders made by this court is that the application dated 9th February 2024 is dismissed for being premature and without merit. Costs of the application to the Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF JUNE, 2024

A. OMOLLO

JUDGE

