



Mwake v District Commissioner Mwingi District & 7 others (Environment and Land Miscellaneous Application 317 of 2007) [2024] KEELC 5699 (KLR) (24 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5699 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 317 OF 2007**

A NYUKURI, J

JULY 24, 2024

BETWEEN

JUSTUS MUTHINI MWAKE APPLICANT

AND

THE DISTRICT COMMISSIONER MWINGI DISTRICT 1ST RESPONDENT

MINISTER OF LANDS AND SETTLEMENT 2ND RESPONDENT

THE DIRECTOR OF LANDS ADJUDICATION 3RD RESPONDENT

THE CHIEF LAND REGISTRAR 4TH RESPONDENT

THE LAND REGISTRAR KITUI DISTRICT 5TH RESPONDENT

THE LAND ADJUDICATION MWINGI DISTRICT 6TH RESPONDENT

JOSEPH MUTIO KINYAMBU 7TH RESPONDENT

THE ATTORNEY GENERAL 8TH RESPONDENT

RULING

1. Before court is the application dated 16th March 2023, filed by the applicant seeking the following orders;
 - a. That the 7th respondent Joseph Mutio Kinyambu be and is hereby ordered to pay back/refund a sum of Kshs. 63,670/= being overpayment made in respect of the costs in these proceedings.
 - b. That the costs of this application be paid by the 7th respondent.
2. The application is based on grounds on the face of it and supported by the affidavit of Justus Muthini Mwake, the applicant. The applicant’s case is that, the party and party bill of costs between the applicant and the 7th respondent was taxed at Kshs. 188,655/=. He averred that the said 7th respondent



had applied for warrants of arrest against the applicant, for Kshs. 191,655/= and that he was arrested on 18th December 2022 and committed to civil jail for one month, whereof his friends sent Kshs. 253,825/= to the 7th respondent's advocates M/s B. M. Musyoki & Co. Advocates, in settlement of the costs. According to him, there was an overpayment of Kshs. 63,670/=. He did attach payment messages to the said firm. To the tune of Kshs. 253,825/=.

3. The application was opposed. Joseph Mutio Kinyambu, the 7th respondent swore an affidavit dated 22nd May 2023. He deposed that its trite that costs of execution of warrants are borne by the judgment debtor and that when the applicant was presented to court, the applicant's advocates made an application for ascertainment of execution costs of Kshs. 60,000/=:, which was allowed and the applicant committed for Kshs. 253,825/= including statutory sum of one month's subsistence in civil jail. Further that this position was brought to the attention of one Karanja Advocate, who informed the respondent's advocates that he had been retained by the judgment debtor to oversee his release from a civil jail. It was also his contention that when the matter came up for mention on 18th January 2023, the judgment debtor did not raise the issue of overpayment, since the same would have been explained to him by the advocates or the court. He concluded by stating that the application was frivolous, vexatious and a waste of the court's time.

Analysis and determination

4. I have considered the application and the response thereto and the only issue that arise for determination is whether there was an overpayment to the decree holder of Kshs. 63,670/=. The record shows that when the applicant was in court on 19th December 2022, the advocate for the respondent explained how the sum of Kshs. 253,755/= was arrived as it included the cost of executing the warrants of arrest, investigating the judgment debtor's whereabouts, together with attendance costs.
5. It is clear from the warrants of arrest that the cost of execution of the warrants are borne by the judgment debtor. In addition, the attendance costs of the respondent's counsel were payable by the applicant. The applicant has not challenged the amount stated for execution of the warrants of arrest. The amount sought to be refunded includes the amount incurred for executing warrants of arrest, as well as attendance fees for counsel of the decree holder. It is the judgment debtor who failed to settle the decree necessitating his arrest and counsel's attendance for his committal to civil jail, and therefore he cannot escape bearing the cost of his arrest and counsel's attendance. Therefore, there is no justification for refund of the sum of Kshs. 63,670/=:.
6. In the premises, I find no merit in the application dated 16th March 2023 and the same is hereby dismissed with costs to the decree holder.
7. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 24TH DAY OF JULY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Keyonzo for exparte Applicant

Mr. Muli holding brief for Kasimu for 7th respondent

No appearance for other respondents



Court assistant – Josephine

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