



REPUBLIC OF KENYA



**KENYA LAW**  
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**J.M. Makau & Company Advocates v Muthusi & 6 others (Miscellaneous Application 38 of 2019) [2022] KEELRC 12855 (KLR) (6 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12855 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
MISCELLANEOUS APPLICATION 38 OF 2019**

**AK NZEI, J**

**OCTOBER 6, 2022**

**BETWEEN**

**J.M. MAKAU & COMPANY ADVOCATES ..... APPLICANT**

**AND**

**JAMES MUTHUSI ..... 1<sup>ST</sup> RESPONDENT**

**HAMISI A. MWASAREYE ..... 2<sup>ND</sup> RESPONDENT**

**EPHAS S MUNYALA ..... 3<sup>RD</sup> RESPONDENT**

**GEOFFREY N. NGAO ..... 4<sup>TH</sup> RESPONDENT**

**BAILE FAMAU ..... 5<sup>TH</sup> RESPONDENT**

**SAMSON M. KIMULI ..... 6<sup>TH</sup> RESPONDENT**

**JARIM ONDEGO ..... 7<sup>TH</sup> RESPONDENT**

**RULING**

1. Vide its Ruling dated 11<sup>th</sup> November 2021, this Court entered judgment in the sum of ksh. 2,472,295 pursuant to Section 51(2) of the [Advocates Act](#). The Court stated as follows:-

- “7. The taxing officer’s certificate dated 27<sup>th</sup> August 2021 has neither been altered nor set aside by this Court, and has not been shown to be the subject of any dispute.
8. Consequently, Judgment is hereby entered in the sum of ksh. 2,472,295 being the Applicant’s costs certified by the taxing officer vide the Certificate of Costs dated 27<sup>th</sup> August 2021 and issued on 16<sup>th</sup> September.



9. Interest on the sum decreed shall be at Court rates, and shall be calculated from the date of this Ruling until payment in full.”
2. Section 51(2), of the [Advocates Act](#), pursuant to which judgment was entered as aforesaid, states as follows:-

“the Certificate of a taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”
3. On 16<sup>th</sup> February 2022, the Respondents filed the Notice of Motion, dated 16<sup>th</sup> February 2022; seeking orders:-
  - a. that the Honourable Court be pleased to grant stay of execution of the judgment delivered on 11<sup>th</sup> November 2021 and the subsequent decree extracted on 8<sup>th</sup> December 2021 pending inter-partes hearing and determination for the application.
  - b. that the Honourable Court be pleased to set aside the Judgment entered on 11<sup>th</sup> November 2021 and the Notice to Show Cause issued on 24<sup>th</sup> November 2021 against the Respondents, and the application dated 21<sup>st</sup> September 2021 be heard on merits.
  - c. that costs of the application be in the cause.
4. The application is supported by the affidavit of Hamisi A. Mwasereye (the 2<sup>nd</sup> Respondent) sworn on 16<sup>th</sup> February 2022, and a supplementary affidavit sworn by the said person on 11<sup>th</sup> March 2022. It is deponed in the said affidavits, inter-alia:-
  - a. that it is true that the Applicant acted for the Respondents in ELRC case No. 480 of 2015, but the Respondents were not aware of the Applicant’s bill of costs filed in Court on 9<sup>th</sup> December 2019 and which came up for taxation before the Deputy Registrar.
  - b. that the Respondents were not served with a hearing notice in respect of the Applicant’s bill of costs.
  - c. that the Respondents were not served with any Court documents relating to the application dated 21<sup>st</sup> September 2021, and were never informed of the hearing of and Ruling on the Application as their Advocate then did not inform them.
5. The application is opposed by the Applicant/Respondent vide a Replying Affidavit sworn on 22<sup>nd</sup> February 2022 and a Supplementary Replying Affidavit sworn on 23<sup>rd</sup> March 2022. It is deponed in the said affidavits, inter-alia:-
  - a. that the Respondent/Applicants were all along aware of the proceedings herein as they were represented by the law firm of Michael Gitonga Advocates, upon whom all correspondences and services were effected.
  - b. that this Court was satisfied with the service effected on the Respondent/Applicants’ aforesaid Advocates and stated so in the Ruling.
  - c. that the draft decree was presented to the Respondents’ Advocate for his approval.
  - d. that the Respondent/Applicants’ Advocates (Ananda & Company Advocates) filed a Notice of change of Advocates dated 16<sup>th</sup> February 2022.



6. The single issue that falls for determination by this Court, and which is within the province of the Court based on the Notice of Motion dated 16<sup>th</sup> February 2022, is whether the Notice of Motion dated 21<sup>st</sup> September 2021; pursuant to which judgment was entered by this Court vide the Ruling delivered on 11<sup>th</sup> November 2021, was served on the Respondent/Applicants.
7. On the issue of service of the said application, I stated as follows in the aforesaid Ruling: -
  - “ 4. An Affidavit of Service sworn by one Alex Nzuki (a Court process server) on 7<sup>th</sup> October 2021 and filed in this Court on 13<sup>th</sup> October 2021 states that the said Notice of Motion, scheduled for hearing on 14<sup>th</sup> October 2021, was served on the Respondents’ Advocates on 23<sup>rd</sup> September 2021. A copy of the served application, endorsed with the date of its scheduled hearing, was filed together with the said Affidavit.”
8. The Court’s record shows that the Respondent/Applicants’ Advocates as at 14<sup>th</sup> October 2021 when the application dated 21<sup>st</sup> September 2021 came up for hearing, and on whom the application was served, MICHAEL GITONGA ADVOCATES, came on record on 21<sup>st</sup> November 2019 and remained on record until 16<sup>th</sup> February 2022 when the Respondent/Applicant’s current Advocates came on record. Indeed, record further shows that a Ruling Notice, on the Ruling scheduled for 11<sup>th</sup> November 2021, was served on the said Advocates on 27<sup>th</sup> October 2021. There is on record an affidavit of service in that regard filed in Court on 2<sup>nd</sup> November 2021.
9. I am satisfied, as I was on 14<sup>th</sup> October 2021 that the Notice of Motion dated 21<sup>st</sup> September 2021, was duly served on the Respondent/Applicants’ Advocates then on record, and that failure by the Respondent/Applicants and/or their said Advocates to attend Court has not been explained to the Court’s satisfaction.
10. I find no merit in the Notice of Motion dated 16<sup>th</sup> February 2022. The same is hereby dismissed with costs. The order of interim stay of execution dated 17<sup>th</sup> February 2022 is hereby vacated.
11. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 6<sup>TH</sup> DAY OF OCTOBER 2022**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

Mr. Makau for Applicant/Respondent

Mr. Ananda for Respondent/Applicant

