



Malombo t/a O M Robinson & Co Advocates v Brenda & another (Miscellaneous Application E018 of 2022) [2024] KEHC 6906 (KLR) (26 January 2024) (Ruling)

Neutral citation: [2024] KEHC 6906 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION E018 OF 2022
G MUTAI, J
JANUARY 26, 2024**

BETWEEN

**ROBINSON ONYANGO MALOMBO T/A O M ROBINSON & CO
ADVOCATES DECREE HOLDER**

AND

**OTIENO RACQUEL BRENDA 1ST JUDGMENT DEBTOR
CARREN ANYANGO OPIYO 2ND JUDGMENT DEBTOR**

RULING

1. The application before the Court is dated 25th September 2023. Vide the said application, the judgment debtors/applicants seek the following orders: -
 1. Spent;
 2. Spent;
 3. That pending determination of this application, this honourable Court issues a temporary injunction against the Respondent/Decree holder from executing, implementing or enforcing the certificate of taxation issued on 30th December 2022;
 4. That this honourable Court hereby do set aside or revoke the certificate of taxation issued to the Decree holder/Respondent on the 30th December 2022; and
 5. That costs be provided for in favour of the Applicants.
2. The applicants averred that the Notice of taxation, vide which the sum of Kes 855 913.42 was claimed, was served via an email addressed to [Particulars Withheld], which email address they stated didn't belong to K Mberia & Partners Advocates, the applicants' advocates. Pursuant to the impugned service, the Respondent taxed his costs on 30th December 2022, with a certificate of taxation being issued on



- 30th December 2022. The applicants state that they have since been prejudiced and illegally swindled off their inheritance.
3. The application was supported by the annexed affidavit of the 1st applicant, to which was attached the Advocate/client Bill of Costs dated 7th June 2022, email by the decree-holder/respondent to [Particulars Withheld]; the affidavit of service, the certificate of taxation dated 1st December 2022 and issued on 30th December 2022 and an extract of bank account statement.
 4. The application was opposed by Mr Robinson Onyango Malombo, who filed his replying affidavit sworn on 17th October 2023. In his affidavit, Mr Malombo accused the applicants of having taken too long to file the application and of failing to explain the reason for the delay. He deposed that the delay was inordinate and inexcusable. He stated that the application failed to address the fact that judgment was entered on 14th March 2023, and a decree was issued on 15th March 2023. Prior to the entry of judgment, the two applicants were served in person, and an affidavit of service to that effect was filed.
 5. The respondent/decree holder deposed that he had not swindled the applicants of their inheritance as the amount he could recover was made pursuant to the issuance of the garnishee absolute by this honourable in the execution of the decree. The respondent attached the decree, affidavits of service sworn on 6th November 2023 and the Notice of Motion dated 2nd February 2023.
 6. The application was canvassed through written submissions pursuant to my directions of 4th October 2023. The counsel for the judgment debtors/applicants stated that as the matters in issue were factual in nature, he didn't wish to file written submissions. The Respondent, however, did file Written Submissions dated 7th November, 2023.
 7. In his Submissions, the decree-holder/respondent identified the following as issues requiring determination: -
 1. whether the application is incompetent;
 2. Whether the applicants were fully served;
 3. Whether the applicants had adduced any proper grounds to set aside the certificate of taxation;
 4. Whether the application had been made without inordinate delay?
 5. Whether the application was made in bad faith; and
 6. Who should pay the costs of the application?
 8. The respondent submitted that once the Court entered the judgment, the certificate of taxation ceased being a certificate but an actual judgment of the Court. In the circumstances, the recourse available to the applicants was to set aside the existing judgment. He submitted that a certificate of taxation could only be set aside by way of a reference, which hadn't been filed in this case.
 9. On service, he submitted that the applicants hadn't denied being served; rather, they claimed that the service was effected through an incorrect email. He averred that the applicants had been served previously and were aware of the proceedings. Regarding the impugned email address, counsel submitted that it hadn't been demonstrated that the email address used didn't belong to K Mberia & Partners Advocates.
 10. It was submitted on Mr. Malombo's behalf that there were no proper grounds for setting aside a certificate of taxation. I was referred to the decision of the Court in *Elijah Njuguna Njoki versus Peter Muriu Njuguna & 4 others*[2021]eKLR, where the Court identified the applicable principles as being:-



- a. Whether there was an error of principles;
 - b. Whether the fee awarded was manifestly excessive or so high as to confine access to the Court to the wealthy;
 - c. Whether a successful litigant would be fairly reimbursed for the costs he had incurred; and
 - d. The need, so far as is practicable, for consistency in the award of costs.
11. The decree-holder submitted that the application was made after an inordinate delay. It was urged that no explanation had been given for the delay.
 12. Regarding bad faith, it was submitted that the 1st judgment debtor had acted dishonestly and with malice against the decree-holder.
 13. On costs, I was referred to section 27 of the *Civil Procedure Act*, which states that the award of costs is at the discretion of the Court. It was submitted that the Court awards costs to the decree-holder.
 14. I am in agreement with what the decree-holder has identified as issues coming for determination in this matter. I shall look at each of them in turns.

Is the application incompetent?

15. The certificate of taxation dated 1st December 2022 was issued on 30th December 2022. Pursuant to the said certificate, the decree-holder filed suit. This Court entered judgment in his favour in the sum of Kes 940,945.00, plus interest from the date of the ruling.
16. It does appear to me that once judgment was entered, the applicants lost the opportunity to challenge the certificate of taxation. They could only be able to do so by way of reference once they had reviewed it and set aside the judgment. The Court in *Tom Ojienda & Associates Advocates versus Nairobi City County*[2018]eKLR stated as follows:-
 - “33. It is my view in this regard that the order granted by Odunga, J in *Judicial Review Misc Case No. 123 of 2017* were final as regards the issue of enforceability and execution of the judgment and decree on the certificate of costs issued herein...
 34. I also reiterate, as noted by Odunga, J, in the aforementioned ruling, that the client will only be able to challenge the said ruling and certificate of costs upon review and or appeal of both the orders and decree herein granting judgment and the said certificate of costs and the orders and decree of Odunga, J in *Judicial Review Misc Case No 123 of 2017...*”
17. I agree that the applicants can't ignore the judgment of this Court. Having not applied to have the judgment set aside or reviewed the application before me is incompetent and is for dismissal.

Was the application filed after an inordinate delay?

18. The foregoing is enough to dispose of this application. That notwithstanding, I note that the certificate of taxation was issued on 30th December 2022. Prior to the entry of judgment, the applicants were served personally. Although the judgment was entered into on March 2023 it was only on 25th September 2023 that they deemed it fit to challenge the taxation. I have not seen an explanation for what is, to me, a very glaring example of indolence.



Where the applicants served?

- 19. I agree with the decree holder’s submissions that no proof that [Particulars Withheld] does not belong to the firm of K Mberia & Associates was provided. I also agree that the applicants who aren’t partners in the said firm cannot be in a position to assert that the said email address does not belong to the said firm. Their evidence to that effect is hearsay.

Did the applicants adduce sufficient grounds to set already the certificate of taxation?

- 20. I have already shown that the application is incompetent. Even if it was competent, the applicants failed to adduce grounds justifying the setting aside of the certificate of taxation. There was no error of principles, the fee awarded does not look to me to be manifestly excessive, it doesn’t constitute an unfair reimbursement of costs, nor is it inconsistent with awards in matters of similar nature.

Was the application made in bad faith?

- 21. The decree-holder would appear to have delivered the services contracted. That being the case, it was reasonable for him to expect payment. If payment wasn’t forthcoming, taxation was a lawful option available to him. I agree that to accuse a counsel procuring payment of his fees, of swindling his clients, as was done in the application, does suggest that the said application was made in bad faith.

Costs

- 22. Costs are at the discretion of the Court. The Family Court rarely awards costs. I see no reason to depart from the said practice in this matter.
- 23. The upshot of the foregoing is that the application dated 25th September 2023 is without merit. The same is dismissed. Each party shall bear its own costs.

Orders accordingly.

DELIVERED, DATED, AND SIGNED THIS 26TH DAY OF JANUARY 2024 AT MOMBASA VIA MICROSOFT TEAMS.

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GREGORY MUTAI

JUDGE

In the presence of: -

Mr. Kori for the Judgment-debtors/Applicants;

Ms. Maitai for the Decree-holder/Respondent; and

Arthur – Court Assistant.

