



**Kitany v Tripple A Law LLP & another (Miscellaneous Application 1094 of 2020)
[2024] KEHC 2685 (KLR) (Commercial and Tax) (15 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2685 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 1094 OF 2020**

**A MABEYA, J
MARCH 15, 2024**

BETWEEN

MARIANNE JEBET KITANY APPLICANT

AND

TRIPPLE A LAW LLP 1ST RESPONDENT

KIRIIYU MERCHANTS AUCTIONEERS 2ND RESPONDENT

RULING

1. This ruling determines the application dated 16/6/2023. The same was brought under ER articles 22 and 35(1)(b) of the *Constitution of Kenya* 2010, section 22 and 23 of the *Civil Procedure Act* cap 21.
2. Orders 1 and 2 are spent. The applicant seeks that the Manager of Credit Bank Limited be ordered to file an affidavit stating whether, cheques no xxx dated 23/09/2020 and cheques no xxx dated 29/09/2020 had been drawn on bank account number xxx and whether the two cheques had been cleared by the bank in favour of Ongoya and Wambola Advocates.
3. It also sought an order directing the Director for Criminal Investigations to investigate the affidavit of the judgment debtor sworn on 30/05/2023 to ascertain whether she committed perjury with respect to the two cheques.
4. In support of the application, the applicant relied on the grounds on the face of it and the supporting affidavit of Elisha Zebedee Ongoya sworn on 16/6/2023. The applicant's contention was that on 30/5/2023, the judgment debtor made an application for stay of execution. The orders upon which the stay had been sought had dismissed an application dated 24/09/2020 for want of prosecution.
5. That in the application for stay, the judgment debtor was guilty of misrepresentation of facts in that she deposed that the client had been paid Kshs 517,567/- through the firm of Ongoya & Wambola



Advocates. It was contended that the judgment debtor had tainted the reputation of the advocates in the said law firm where their client had been made to believe that the advocates had received the said sums.

6. It was further contended that the cheques stated therein were not paid to the firm of Ongoya & Wambola Advocates as the law firm only operates three bank accounts all domiciled at Cooperative Bank. That the respondent had lied that the cheques were drawn and delivered to the law firm. It was averred that the judgment debtor's status as a Member of National Assembly would make her allegation more convincing and therefore in order to clear the names of the advocates in the firm of Ongoya & Wambola Advocates, the orders sought should be granted.
7. The application was opposed by the judgment debtor vide her replying affidavit sworn on 2/8/2023. She confirmed that in an application dated 30/5/2023, she had deposed that she paid the 1st respondent through the firm of Ongoya & Wambola Advocates a sum of Kshs. 517,567.64 and the same ought to have been deducted from the amount claimed by the 1st respondent.
8. She further deposed that the issue before the Court was based on a mistake where the judgment debtor issued bankers cheques in the name of Ongoya & Wambola Advocates instead of Ongoya and Wambola Company. That the mistake was an honest and inadvertent one as it related to a variance in the names. That the issuance of the bankers' cheques was done in good faith and the judgment debtor's intention was never to cause prejudice.
9. The application was canvassed by way of written submissions which I have considered. The applicant submitted that, under section 22 and 23 of the *Civil Procedure Act* is empowered to summon the bank manager to file an affidavit in Court to explain the cheques. That the applicant sought the orders in order to protect the reputation and dignity of the advocates for the decree holder.
10. On her part, the judgment debtor submitted that she had provided evidence to show that the cheques were indeed issued in the name of Ongoya & Wambola Advocates. That the judgment debtor presumed that the cheques had been issued in favour of the applicant since the names therein were similar. That the judgment debtor had not been notified as to whether the cheques had been dishonored and the applicants failed to advise the judgment debtor to write a different cheques
11. I have considered the pleadings and the submissions on record. The main issue for determination is whether the applicant has made out a case for the orders sought. The applicant seeks to have the bank manager of Credit Bank Limited to file and affidavit and explain whether two cheques drawn by the judgment debtor were cleared in the name of Ongoya and Wambola Advocates.
12. The applicant was of the position that the judgment debtor tarnished the reputation of the advocates of the law firm in the eyes of the client and the public by making it seem that there was an amount of money received by them.
13. On her part, the judgment debtor confirmed that in her affidavit dated 30/5/2023 she had deposed that the two cheques were issued in favour of Ongoya and Wambola Advocates. She however stated that it was a mistake on her part since the two names Ongoya and Wambola advocates and Ongoya and Wangola Company were similar.
14. The application before court is premised under section 22 and 23 of the *Civil Procedure Act* which provides: -

“22. Power to order discovery and the like Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party—



- (a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;
- (b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid; (c) order any fact to be proved by affidavit.”

15. The above provision is meant to aid the Court in obtaining evidence to assist it in determining the dispute before it. That is, the dispute between the litigants in the case.

16. The term perjury is defined in the *Black's Law Dictionary*, 9th as -

The act or an instance of a person's deliberate making material false or misleading statements while under oath.”

17. I have considered the evidence on record and it confirms that there are two cheques in favour of Ongoya and Wambola Advocates and a bank statement to that effect. The decree holder admitted to making an error in the names of the Law firm. I do not find the error to be deliberate since the cheques have been produced and the names therein are similar.

18. The Court sympathizes with the applicant and notes that the reputation of Counsel is of paramount importance as it gives the client the assurance in the dealings with the advocate. The client's perception is based on the integrity of the Advocates. However, that being said, the court finds that on the face of the record, the judgment debtor made an honest mistake and the same is admitted. Further, the orders will not aid in determining the dispute between the applicant's client and the judgment-debtor.

19. Accordingly, I find no merit in the application and the same is dismissed with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MARCH, 2024.

A. MABEYA, FCI Arb

JUDGE

