



**Bittock v KTK Advocate (Miscellaneous Application E448 of 2019)
[2023] KEHC 27410 (KLR) (Commercial and Tax) (14 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 27410 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E448 OF 2019
DO CHEPKWONY, J
AUGUST 14, 2023**

BETWEEN

EDWARD BITTOCK APPLICANT

AND

KTK ADVOCATE RESPONDENT

RULING

1. Before this court is an Application dated 26th April, 2022 seeking for orders that;
 - a. Spent;
 - b. Spent;
 - c. This Honourable Court be pleased to set aside its judgment and the Decree dated 12th June, 2021 given in Misc. Application E448 of 2019;
 - d. Spent;
 - e. Spent;
 - f. This Honourable Court be pleased to set aside and/ or quash the warrants of attachment and warrants for sale of property both dated 12th April, 2022;
 - g. The Honourable Court be pleased to issue an injunction to permanently restrain the Respondent, its agents and or servants from further attempts to execute against the Applicant;
 - h. The Honourable Court be pleased to issue an injunction to permanently restrain Nairobi Connections Services Auctioneers, its servants or agents from purporting to attach and / or sell by public auction or otherwise of the Applicant's property; and



- i. Costs of this suit be provided for.

The Applicant's Case

2. It is premised on the grounds on the face of it and the dispositions in the annexed Supporting Affidavit of Edward Kipkemoi Bitok sworn on 26th April, 2022. It is stated that the Respondent through the Nairobi Connections Services Auctioneers commenced attachment of the Applicant's assets through Warrants of Attachment of Moveable property and Warrants of Sale of Property in Execution of decree for money both dated 12th April, 2022 which execution process came as a shock to the Applicant who had never, in any manner whatsoever been involved in this suit that led to the Decree of the court being issued. It is also averred that the Applicant has since learnt that this Honourable Court erroneously condemned him to pay the Respondent Kshs 1,760,370 by a decree of this court dated 9th June, 2021 and which decree was never served upon him.
3. That, at all material times, the Applicant was never aware of the proceedings in this matter, had not taken part in the suit resulting in the decree, was not served with any document on the court resulting in the decree and neither was he given an opportunity to respond to any allegation in the case, as the Respondent obtained a Judgment against him through an opaque process that was veiled in secrecy, half-truths and material non-disclosure by the Respondent purporting to represent the Applicant in a transaction. According to the Applicant, the Respondent denied this Court the opportunity to hear him and as such, the Judgment giving rise to this execution was obtained irregularly. That since July, 2021, the Respondent then sat on the impugned Decree and now seeks to erroneously recover both the decretal amount and interest totaling to a sum of Kshs 2,224,635. 16.
4. That the Respondent has resorted to underhand methods including but not limited to calling the Applicant at ungodly hours of the night, harassing the Applicant's children and other family members, berating the Applicant and generally acting untowardly against the Applicant.
5. It is contended that if this Court does not act to stop this illegality, the Applicant stands to suffer a miscarriage of justice since he has been condemned unheard. It is the Applicant's prayer that it would be in the interest of justice and fairness that the Respondent be restrained from harassing the Applicant further in a veiled attempt to execute an erroneous decree. And so as to meet the ends of justice, it is of utmost importance that the instant Application be allowed.

The Respondent's Case

6. The Application has been opposed vide the Replying Affidavit of Donald B. Kipkorir sworn on 17th May, 2022 wherein it is stated that the same is fatally defective and not maintainable in law because Rule 11 of The Advocates (Remuneration) Order is the exclusive law relating to Advocate/Client Bill of Costs, so that the *Civil Procedure Act* and *Rules* are ousted. Further, it is clear that the Client (the Applicant herein) was duly served as set out in the Affidavit of Service filed in Court on 14th November, 2019.
7. The Advocate/Client Bill of Costs is supported by the Affidavit of Support filed on 27th November, 2019 that has 85 Pages of Supporting Documents. According to the Respondent, the instant Application has no legal or factual Substratum as that it is solely intended to deny the Advocate from earning his fees. Further, the Respondent has urged the court to find that the instant Application is an extreme abuse of the Court process.
8. On 30th May, 2022, this court gave directions that this matter be canvassed by way of written submissions which parties complied with. The Applicant filed its submissions dated 6th June, 2022



whereas the Respondent's are dated 14th June, 2022. I have read through both sets of submissions and find they replicate what is deponed in the affidavits sworn by the parties.

9. To determine the application dated 26th April, 2022, I have read through the rival affidavits, the submissions filed by both parties and taken into consideration the cited statute and case law. I find three issues arise for determination being:-
 - a. Has the Applicant established a case to warrant the stay of execution of the Judgment and decree dated 12th June, 2021 issued in Misc. Application No E448 of 2019.
 - b. Whether the warrants of attachment and warrants of sale of property both dated 12th April, 2022 can be set aside and or quashed?
10. With regard to the issue of whether or not the Applicant has established a case to warrant stay of execution of Judgment and decree dated 12th June, 2021 issued vide Miscellaneous Application No E448 of 2019, it is the Applicant's case that the execution process commenced by the Respondent through the Nairobi Connection Services Auctioneers came as a shock to him as he was never involved or aware of the proceedings of the suit that led to the Judgment and decree being issued. hear the Applicant to be saying he was not party to the taxation proceedings for want of service, as such, he was condemned unheard. He claims that he was never served with any document in the court process and hence was not given an opportunity to respond or be heard in Miscellaneous Application No E448 of 2021, KTK Advocates v Edward K. Bittok. He was therefore erroneously condemned to pay the Respondent a sum of Kshs 1,760,370.00 in proceedings that clearly violate his right to be heard in violation of the principle of natural justice "audi alteram partem" (hear the other party). On the other hand, the Respondent has stated that the Applicant was duly served by Registered Post as set out in the affidavit of Service filed in court on 14th November, 2019.
11. I have perused the record and find two Affidavits of Service both sworn by Kipng'eno Alexander. The first Affidavit was sworn on 14th November, 2019 to the effect that on 11th November, 2019, the Applicant was served with the Taxation Notice dated 25th October, 2019 together with the Advocate - Client Bill of Costs dated 30th September, 2019 by registered post to his known address being P.O Box. 2886-00100 and which address the Applicant has confirmed in his Supporting Affidavit in support of the Application. The second Affidavit was sworn on 30TH April, 2021 to the effect that the Applicant was served with the Notice of Motion application dated 18th November, 2022 via his known email address which is edkip@live.com and which email address has not been disputed by the Applicant.
12. This court is thus satisfied that the Applicant was sufficiently served with both the Bill of Costs and the Application for entry of judgment, to the extend that the claim that the Applicant was condemned unheard cannot stand as he chose not to participate in the proceedings. As the adage goes, one cannot have his cake and eat it!
13. As rightly put by the Respondents, the Applicant is not sure what he is seeking from this court, that is whether it is a reference or an appeal or even a review? Clearly, he has approached this court under the wrong provision of law and is seeking orders that cannot be granted in a reference. It is also noteworthy that it is quite strange that the Applicant has no problem with the taxation of the Taxing Master as his complaint is with regard to service.
14. Having established that the Applicant was duly and sufficiently served and he chose to sleep on his rights, this court finds the instant Application is without merit and the same is dismissed with costs to the Respondent.

It is so ordered.



**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 14TH DAY OF
AUGUST, 2023.**

D.O CHEPKWONY

JUDGE

