



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISC. CIVIL APPLICATION NO. 235 OF 2018

TROPHY AUCTIONEERS.....APPLICANT

-VERSUS-

PRESBYTERIAN FOUNDATION.....RESPONDENT

RULING

1. This ruling is in respect of sentiments put forward by the counsels of the parties herein on 20/1/2021 as regards the position of this matter. Mr. Ananda appeared on behalf of Trophy Auctioneers (for purposes of this ruling shall be referred as the Applicant) whilst Mr. Mwangi appeared on behalf of Presbyterian Foundation, hereinafter referred as the Respondent.

2. Mr. Mwangi opened the floor by informing the court that the matter was coming up for hearing of an application dated **29/9/2020** seeking for stay of any proceedings touching on the subject matter until the determination of the application. He alleged that the Respondent had been served with a proclamation notwithstanding the pendency of the application and there was need for intervention of the court.

3. Mr. Ananda on the other hand was of a contrary view. He submitted that on 5.10.2020, the court had granted the Respondent 14days to file a response to an application dated 15.7.2020 which application sought the certificate of costs issued in favour of the Applicant to be adopted as the judgment of court. That these directions were not complied with. When the court reconvened on 1.12.2020 the court allowed the application dated 15.7.2020 and by dint of Section 51 of the Advocates Act the Certificate of Costs issued by the Hon. Deputy Registrar on 25.9.2019 was adopted as the judgment of the court so that the application by the Respondent seeking stay of Judgment has been overtaken by events. According to Mr. Ananda, the Respondent had the option of appealing against the court's decision and not seeking to prosecute an application that has been dealt with.

4. In response, to Mr. Ananda's submission, Mr. Mwangi Counsel for the Respondent submitted that the Respondent had instructed the firm of M/S H.N. Njiru & Co. Advocates to act in this matter. Meanwhile, the said firm entered appearance on behalf of the Respondent but never filed any document in the said case.

5. These assertions were vehemently objected to by Mr. Ananda.

He reiterated that Mr. Njiru has always been on record for the Respondent, even during taxation. Mr. Ananda added that Mr. Mwangi has no audience of the court and is improperly on record because no notice of change of advocates has been filed by his firm.

6. I have also gone through the Notice of Motion application dated 29.9.2020 and filed by the firm of M/S Mwangi Kiai on behalf of the Respondent. It substantially seeks the setting aside of the Certificate of Cost dated 25.10.2019 on grounds that the Respondent's erstwhile advocates failed to act as instructed and it stands to suffer the risk of being condemned unheard if the certificate of costs is not set aside.

Analysis and Determination

7. Having set out the parties' respective positions as above, a clear reflection of the current position in this matter can easily be discerned from the court record. A consideration of the chronology of events as per the court record will address the issues raised by the parties and more specifically,

a) Whether the court can set aside the certificate of costs at this stage,

b) Whether the firm of Ms. Mwangi Kiai is properly on record

8. It is clear that the Applicant initiated the suit herein by filing the Auctioneers Bill of Costs dated 3.9.2018 and the same proceeded for hearing on 6.5.2019. A ruling on the taxation was then delivered on 25.9.2019 and

subsequently a certificate of costs issued on 25.10.2019.

9. It is noteworthy that the firm of M/S H.N. Njiru filed the notice of appointment by the Respondent on 29.10.2018 but filed no response to the bill of cost or participated in its hearing until the certificate of costs was issued.

10. The Respondent then unsuccessfully challenged the

certificate of costs vide a Notice of Motion application dated 29.10.2019 taken by the firm of H.N. Njiru. In the said application, the Respondent sought the review of the ruling of the taxing officer delivered on 25.9.2019 on grounds that it was not served with the hearing date. However, this court vide a ruling delivered on the 2.6.2020 disallowed the application and further stated that the Respondent could only challenge the decision of the taxing master by filing a reference. To date, the Respondent has never filed any reference or preferred an appeal against that ruling.

11. The Applicant then filed an application dated the 15.7.2020

seeking a main prayer that the certificate of costs dated 25.10.2019 for Kshs. 1,873,181.79 be deemed as the Judgment and decree of this court. The application was first slated for hearing on 5.10.2020. Mr. Ananda appeared for the Applicant whilst Mr. Ongiri appeared for the Respondent. Both counsel submitted and after hearing both sides of the coin, this court was adamant that to achieve a fair hearing both parties had to be allowed to present their cases and totality of events in support thereof. In that view, Mr. Ongiri counsel for the Respondent was granted 14 days to file a response to the application failure to which the application dated 15.7.2020 would be allowed as prayed.

12. A mention dated for 27.10.2020 was then issued in presence of the counsel for both parties to confirm whether the Respondent had filed a response. However, before the said date, the Respondent filed an application dated 29.9.2020 which I have discussed in the preceding paragraphs. The court then reconvened on 1.12.2020 and only Mr. Ananda appeared before the court. The Respondent was unrepresented. Upon listening to the submissions by Mr. Ananda, counsel for the Applicant, the court confirmed that the Respondent had not complied with the directions of 5.10.2020 and neither was there any explanation put forward by the Respondent. As a result, the court allowed the application dated 15.7.2020 as prayed having deemed it as unopposed.

13. In the upshot, I can summarize the current position in this suit that pursuant to an application dated 15.7.2020 which is unopposed, this court entered Judgment for the Applicant against the Respondent for Kshs. 1,873,181.79 as stipulated in the Certificate of Costs dated 25.10.2019. The Respondent can therefore not seek to set aside the certificate of costs which has already been adopted as the Judgment of this court. I therefore agree with Mr. Ananda's argument that the Respondent can only exercise the option of either seeking a review of the said Judgment or appealing against the same as the prayer seeking to set aside the Certificate of costs has already been overtaken by events. And if the Respondent's erstwhile advocates failed to act as instructed, then I am of the view that the Respondent has a cause of action for negligence as against the said firm of advocates.

14. I will now turn to the second issue which is whether the firm of M/S Mwangi Kiai & Company Advocates is properly on record for the Respondent. Mr. Ananda, counsel for the Applicant argues that the firm of M/S Mwangi Kiai has not shown whether it has sought permission either from court or from the firm of M/S H.N. Njiru before coming on record. In addition, Mr. Ananda told the court that Mr. Mwangi had not filed Notice of appointment and could not rightly represent the Respondent. Mr. Mwangi did not respond on these submissions but only insisted that there was need for the Respondent to be heard since it was a right protected by the Constitution.

15. The answer to the foregoing lies under Order 9 Rule 5 of the Civil Procedure Rules, 2010 which provides for change of Advocates and reads as follows: -

“A Party suing or defending by an Advocate shall be at liberty to change his Advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of Advocate is filed in Court in which such cause or matter is proceedings and served in accordance with Rule 5, the former Advocate shall, subject to rules 12 and 13 be considered the Advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

16. What the above section seems to be saying is that, unless and until a notice of change of Advocate is filed and duly served, an advocate on record for a party remains the Advocate for that party subject to removal from record at the instance of another party under Rule 12 of the same Order or withdrawal of the Advocate under Rule 13 of the same Order.

17. In this particular case, the Respondent's Advocate on Record is M/S H.N. Njiru & Company having filed notice of appointment of advocates on 29.10.2018. I have keenly perused the court record and have not seen any notice of change of advocate filed by the firm of M/S Mwangi Kiai so that they can be said to be properly on record in line with Order 9 Rule 5 of the Civil Procedure Rules.

18. In my view Order 9 does not impede the right of a party to be represented by an Advocate of his choice. It only provides for rules to impose orderliness in civil proceedings. Any change of Advocate should comply with the rules. Otherwise chaos would then reign if parties were allowed to change Advocates at will without notifying the court and the other parties in the matter. I have noted that the firm of M/S Mwangi Kiai and as well as the Respondent did not comply with the provisions of Order 9 Rule 5 of the Civil Procedure Rules as there is no evidence of service upon the former Advocate (M/S H.N. Njiru) of the change of the Advocates or any notice of change of advocates filed in this court.

19. In conclusion, it is my finding that the firm of M/S Mwangi Kiai is not properly on record and any document filed by the said firm is accordingly expunged from the Court record.

It is hereby so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 26th day of January, 2021.

D. O. CHEPKWONY

JUDGE

Order

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

JUSTICE D.O CHEPKWONY