



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**MISCELLANEOUS APPLICATION NO: 44 OF 2018**

**G.O. OMBACHI & COMPANY ADVOCATES....PLAINTIFF**

**VERSUS**

**MARY WAIRIMU KANGANGI.....DEFENDANT**

**RULING**

1. The applicant has filed a Notice of Motion **Under Section 51 (2)** of the Advocates Act seeking the following orders:

- a. **THAT** judgment be entered in favour of the Applicant for a sum of Kshs; 119,080/= with interest at court rate with effect from 16<sup>th</sup> September 2019 until payment in full.
- b. **THAT** the applicant be at liberty to execute the decree against the respondent.
- c. **THAT** the respondent to bear the costs of this application in any event.

2. The application is based on the following grounds;

- a. The taxing master on 18<sup>th</sup> July, 2019 assessed the Applicant's bill of costs at Kshs; 119,080/=
- b. The certificate of costs was issued on 16<sup>th</sup> September, 2019
- c. The certificate of costs is final as the same has not been set aside and/or altered by the court.
- d. There is no dispute as to retainer
- e. It is therefore imperative that the Honourable court do grant the orders being sought in the interest of justice.

3. The respondent Mary Wairimi Kangangi filed a replying affidavit where she depones that the application dated 4<sup>th</sup> December, 2019 was served upon her under protest. That being dissatisfied with the ruling 18<sup>th</sup> July, 2019 which was heard ex-parte she filed an appeal number 59 of 2019 on 19<sup>th</sup> of August, 2019 and an application of stay of execution under certificate of urgency dated 26<sup>th</sup> August, 2019.

4. The said application has not been heard and determined and that this application is not merited and has been brought in bad faith to mislead the court as there are matters pending in the High Court.

5. That it is in the interest of justice and fairness that the application by the respondent should be denied as there are pending matters in the High Court.

6. That if the orders are granted she will suffer irreparably.

7. When the matter came up for hearing the parties urged the court to decide the application on the affidavits filed, although the respondent applied to be given time contending that she had paid the Advocates and had some receipts. However, the alleged receipts have not been annexed to the replying affidavits.

8. I have considered the application Under Section 51(1) of the Advocates act on general provisions as to taxations it is provided;

**“ Every application for an order for the taxation of an Advocate for an order for the advocate’s bill or for the delivery of such a bill and the delivering app of any deeds, documents, papers by an advocate shall be made in the matter of that advocate.**

**The certificate of the 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 the 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 in dispute an order that Judgment be entered for the sum certified to be due with costs.”**

9. The provision is couched in mandatory terms. In her replying affidavit the respondent has not denied that she had retained the advocate nor has she denied that the bill of costs has been taxed by a taxing officer of this court.

10. It is Trite that an appeal does not operate as a stay of execution and a party must obtain an order from the court staying the execution.

11. The alleged application by the respondent has not been prosecuted and there is no reason why the court should not allow the application by the advocate.

12. The amount claimed by the advocate is a liquated amount which is therefore a money decree and it is trite that a court will normally not order a stay of execution and a party does not render an execution of such decree or order does not render the Appeal nugatory.

13. In the execution of a money decree on a liquated amount, in this case the amount is **Kshs; 119,080/=**, cannot necessary cause irreparable loss to the applicant.

14. There are no good reasons why the application should not be allowed. The application has been brought within the Provision of the law quoted above.

15. In view of the foregoing I find that the application has merits and I allow it as prayed with costs.

**Dated, Signed at Kerugoya this 29<sup>th</sup> day at May 2020**

**L.W. GITARI**

**JUDGE**