REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC APPLICATION NO. 47 OF 2014

M S SHARIFF & CO ADVOCATES.................................ADVOCATE/RESPONDENT

VERSUS

OMARI MBWANA ZONGA...CLIENT/APPLICANT

R U L I N G

1. Before the court for determination is the Notice of Motion by the Client/applicant dated the 14. 03.207 seeking an order that the Certificate of Costs issued on 05.9.2014 and the judgment on costs entered on the 05.10.2016 be set aside. The basis of seeking those orders was disclosed to be the lack of service of all the bill of costs, Notice of Taxation and Notice of Motion for judgment upon the client with the consequence that all the proceedings were taken ex-parte thus denying him the right to be heard. The applicant maintained that he was all the time unaware of the proceedings until he was served with warrants of attachment and sale were served upon him and that the applicant was not the accused in the criminal case the advocate represented to be responsible for the legal costs.

2. Those same facts were reiterated in the affidavit in support with an addition that the applicant was denied the right to be heard it being stressed that the two parties had a love affair, cohabited in the same house for over three years which ended in a bitter brake-up. It is on account of such relationship the advocate, the client contends, the advocate became acquainted with his employees and that would be the basis founding the fact put forth to prove the service. It was additionally contended that the signatures appended on the reverse of the documents alleged to be his were not his and appear to have been forged by being photocopied and pasted at the back.

3. The application was resisted by the advocate's own Replying Affidavit sworn on the 22.03.2017 and another sworn by one Mbwana Mwinyi Bramu, who swore to have been the driver to the client, from the days he was a councillor to the days he served as the Member of Parliament for Msambweni Constituency. The object and purport of the Advocates affidavit was to assert due service and that the client had been her client since 2005 and that instruction were indeed given by the client to represent one, Salim Rashid, a witchdoctor to the client in Kwale RMCCR no. 983 of 2007. It was then added that at the time the client was a councillor and would thereafter give instructions for the advocate to offer various legal services to his constituents and pay for such services. For the subject instructions the advocate contended that having given instructions the accused was duly represented in court but ignored, failed and refused to pay the fees due hence a bill was presented served and taxed and a certificate of costs served upon the client, who signed in acknowledgment of receipt, by one kinyua auctioneers.

4. On service, the advocate asserted that the client was all aware of the of the judgment against him way back on 8.12 2014 when one Mr Kinyua auctioneer served the said certificate of costs upon the client but the said auctioneer got compromised by the applicant and the applicant instead of seeking the setting aside then waited till 2017. Any intimate relationship and alleged cohabitation between the two was strenuously denied with the advocate asserting that her gender was being invoked against her and seeking clarity on the period and address of aboard it being maintained that this was not a family dispute but a dispute on fees due to an advocate for professional services. In conclusion the advocate adverts to approaches by the client when the two bumped onto each other in Mombasa and the client would promise payment after sale of a property but did not make any payment. Such approaches climaxed during the month of February 2017 by which the clients proposed to settle the advocates fees by transfer of a parcel of land registered in his son's name but the advocate rejected the offer on the basis that the client had a land case before the anti-corruption court and that the current application was only conceived after the offer was declined. It was also asserted that it became necessary to file the bill of costs after the client's Constituency Office Manager and the Constituency Fund Development manager both declined to settle the due fees on allegations that both institutions did not have budgets for legal fees.

5. There was also filed an affidavit by one Mbwana Mwinyi Bramu, a former personal driver to the client whose position was that the client introduced him and the client's son as an advocate for the client and that subsequent to such introduction, all constituents who needed legal services were sent to the advocate on account of the client and that the advocate was to his knowledge. To him he knew the client's wives and mistresses and the advocate is not one of them. The deponent then takes the course to demonstrate that the client is known to him as one who never pays debts and that the client confided in him to have compromised Mr Kinyua Auctioneer not to pursue the decretal sum owed to the advocate.

6. Notwithstanding the strenuous opposition to the application and many facts alleged against the applicant, no further affidavit was filed to controvert the same and even in the submissions subsequently filed no much effort was availed to challenge such allegations.

7. The application was canvassed by way of written submission with the applicant's/ client's submissions being filed on the 9.12.2019 while those by the advocate coming in on the 27.5.2020. Both counsel attended court on 27.5,2020 to highlight the submissions when Mr Asige informed the court that he had not been served with the advocate's submissions. On that account the matter was stood over to the 29.5.2020 for the parties to highlight the submissions filed- the proceedings were recorded in Misc App No. 42 of 2014.

8. However, on the date set only Ms Shariff logged in and told the court that she did receive the invitation sent and called r Asige who also confirmed having received the link but did not log in. Ms Shariff then the court that she did not wish to highlight her submission and urged the court to decide the matter based on the submissions filed.

9. In their submission the client takes the view that the advocate did not contest the lack of service, that the legal services were not offered to the applicant and should not have formed the basis of taxation and the subsequent judgment against him. A further argument was urged and advanced to the effect that there was nothing exhibited to show that the advocate had invoked the provisions of section 45 as a proof of an agreement to provide legal services. It was for that reason contended that there were triable issues raised in the application meriting setting aside the judgment because no service was demonstrated to have been offered to the applicant/client.

10. For the advocate respondent, submissions were offered to the effect that indeed the court had wide and unfettered discretion to set aside judgment, that discretion is exercised on established principles among them being whether there is a regular judgment, whether there is disclosed a triable issue and if there would be a prejudice visited upon the holder of the judgment. The power to set aside was intended to avoid hardship or injustice resulting from accident, inadvertence or excusable mistake but not intended to assist a litigant who has deliberately sought to obstruct or delay the course of justice. The decisions in **Mohammed vs Shoka (1990) KLR 463** and **Shah vs Mbogo (1967) EA 116** were cited to court for such propositions of the law. The advocate underscored the fact even though the applicant became aware of the proceedings way back in 2014, when he filed a notice of appointment, he did nothing till 2017 when the current application was filed.

11. It was then asserted that there are affidavits filed in the court file to show that the applicant was served not only with the Bill of costs and notice of taxation but equally the application for judgment, the decree and the certificate of taxation which document were personally received by the applicant. It was equally highlighted that the applicant was the instructing client and that the services were offered to the witchdoctor on the account of the client.

12. Even though the application adverts to a certificate of costs dated 5.9.2014 and a judgment entered on the 5. 10.2016, my reading of the file reveal that the ruling on taxation was delivered on the 18. 8.2014 and the judgment was entered on 6.10.2016. I will deal with application and deem it to challenge the decisions of those dates.

13. Being an application to set aside a default judgment, I do appreciate the law to be that if there be on record a regular judgment, then the court must consider if there be a triable issue and only then can the judgment be set aside. However, if the judgment is irregular, on account of no service of defective service, then the court has no discretion to exercise but must set aside as of right [1]. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. He has had the rules of natural justice affronted to his disadvantage and such a judgment flies on the face of every attribute of a justice system. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. That I hold to be the law even in a dispute like this one being a dispute on costs between an advocate and a client. It would not, to me, be the law that taxation conducted and a certificate issued without due service of a notice of taxation will stand merely because no reference was lodged within the time prescribed by the Advocate Remuneration Order.

14. In this matter, I have perused the record of the file, and confirmed that the Bill of costs and the notice of taxation thereof was served on the 17.4.2014 before the same was taxed on the 6.6.2014. The application for judgment was filed on 16.08.2016and served on the 08.09.2016, was duly received and acknowledged by the client, before the same came to court on 06.10.2016 when judgment was entered. Thereafter there was service upon the client of the decree on the 22.10.2016 which service was once again, in person and, duly acknowledged. Those facts are on oath by the affidavits of service which I consider well-articulated. It required the applicant to prove that on the date alleged he was elsewhere and not at the places stated or just proved that his signature was forged. Having asserted that the signatures were forged, the applicant needed to have taken the matter further to show that the signatures were indeed not his. This was easily possible by seeking the opinion of a document examiner. None of that was done and I note that the applicant had the period beginning March 2017 and March 2020, a period of three years to pursue that. It was his allegation and therefore it was equally his burden to prove it. Accordingly, I do find that the certificate of taxation and the ensuing judgment were regularly made after due service and are not open to challenge on account of lack of service. The judgment on record is therefore regular and the next question is whether or not there is a triable issue to necessitate setting aside.

15. The principle of law that even where there is a regular and validly entered judgment the applicant is still entitled to an order for setting aside, whenever a triable issue is disclosed, is founded on the principle of law that where a judgment or determination has been made not on the merits but on account of some explicable of justifiable default, the court reserves the right to revisit the matter, not for anything else but to establish the truth in the dispute by allowing the litigants to agitate their respective position. In ordinary litigation a triable issue can be shown in a draft defence or some other evidence to that effect. Here the dispute is about costs due to an advocate and the only consideration is whether there is demonstrated a material that would have disentitled the advocate to a judgment had the client participated at the hearing of the notice of motion dated the 25.07.2016. I understand the law to be that once a certificate of costs has become final on account of lack of challenge, the advocate is entitled to judgment unless there be a dispute as to retainer[2]. In his application, the client's position raised as ground **d** was that he did not give instructions to the advocate to represent the accused and that he cannot be responsible for services rendered to a third party. That is the same thing as saying that no instructions were given for the work done. It does amount to denial of retainer which would disentitle the advocate to a judgment if the court finds it a true position. Here however, there are two affidavits all stating, without rebuttal, that the services were offered at the request and on account of the client. Having been given the details of the accused and the court

case number, it was not impossible, but ever easy for the applicant to go back to his former constituency, and procure an affidavit, or just another document by that accused to controvert the advocates position. Even that was never done. Accordingly, I do find that no triable issue has been disclosed and thus no prerequisite of setting aside has been met.

16. The upshot is that the application dated 14.03.2017 lacks merits and the same is hereby dismissed with costs.

Dated, **signed** and **delivered** at **Mombasa** this **25th** day of **September 2020**

P. J. O. OTIENO

JUDGE

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[1] **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR**

[2] Section 51(2), Advocates Act