



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC APPLICATION NO. 41 OF 2014

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

VERSUS

OMARI MBWANA ZONGA.....CLIENT /APPLICANT

RULING

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 dated 18.8.2014 but issued on 02.09.2014 together with 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 transaction upon which the bill of costs was premised was never completed.

2. Those same facts were reiterated in the affidavit in support with an addition that the sale subject of taxation was never completed with registration of a transfer 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 with 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.

3. The application was resisted by the advocate's own Replying Affidavit sworn on the 22.03.2017 whose object and purport was to assert due service and that the client had been her client since 2005 and that instruction were indeed given by the client in the matter of conveyance over **Kwale/Diani Block/1392**. 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 transaction the advocate contended that having given instructions and after all the documents had been prepared and sent to the vendor, the client developed cold feet and abandoned the same but without paying he fees due.

4. On service, the advocate asserted that the client was all aware of the of the judgment against him way back in 2014 when warrants of attachment and sale were issued to Mr Kinyua auctioneer was 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 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 an approach by the client 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 an advocate not a spouse. 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 6.12.2019 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. 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.

8. In their submission the client takes the view that the advocate did not contest the lack of service and that the agreement exhibited to evidence agreement for sale was never executed not witnessed and should not have formed the basis of taxation and the subsequent judgment. A further argument was urged advanced to the effect the exhibited showed that the advocate was to act for both the vendor and the purchaser and it was unjust and unequitable to hold the applicant solely respondent for such fees. It was thus contended that there were triable issues raised in the application meriting setting aside the judgment.

9. For the advocate respondent, submissions were offered to the effect that indeed the court had wide 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.

10. It was then asserted that there are two 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 had not denied that he had intended to buy the subject property.

11. 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 I do consider if there be a triable issue but 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.

12.. 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 16.08.2016 and served on the 08.09.2016, was duly received and acknowledged by the client, before the same came to court on 05.10.2016 when judgment was entered. Thereafter there was service upon t^[2]he 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. None of that was done. 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.

13. 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 or 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^[3]. In his application, the client's position raised as ground **d** was never that he did not give instructions but that the transaction was never completed. That is not the same thing as saying that no instructions were give or no work was done. It does not amount to denial of retainer which would disentitle the advocate to a judgment. Accordingly, I do find that no triable issue has been disclosed and thus no prerequisite of setting aside has been made.

14. 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

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

^[3] Section 51(2), Advocates Act

