REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL MISC. APPLICATION NO. 71 OF 2018

(FORMERLY KAJIADO ELC NO. 19 OF 2017)

PARMAT OLOISHURUA KORE.....APPLICANT

-VERSUS-

ERIC NTABO & CO ADVOCATES.....RESPONDENT

RULING

1. By a motion on Notice dated 15th July 2019, the applicant sought orders restraining the respondent, a firm of Advocates, from attaching and selling various properties that had been advertised for sale on 19th July 2019. The motion is supported by the grounds on its face and depositions in the supporting affidavit by the applicant sworn on the same day, 15th July 2019.

2. From the depositions and the grounds of opposition, the intended sale arose from the advocate-client bill of costs which had been taxed by the taxing officer of this court at Kshs. 5,000,000/= and a certificate of costs issued for that effect. The certificate of costs was subsequently adopted as a judgment of the court and a decree issued.

3. The respondent sought to execute that decree but the applicant applied for a stay of execution and extension of time to file a reference which was granted by this court, **Nyakundi**, **J,** on 27th February 2019. The Court further ordered that the decretal sum be deposited in a joint interest earning account in the names of the advocates for the parties within 45 days from that date.

4. The applicant deposes that despite efforts made, he could not raise the decretal sum within the time set which forced him to enter into an out of court negotiation with the respondent. He states that he wanted to transfer to the respondent **Parcel No. Kajiado/Olchoro Onyore/4282,** whose value was equivalent to the decretal sum, thus abandoned the issue of pursuing the reference.

5. The applicant states that he later realized that the respondent had abandoned the negotiations and advertised to sale 5 prime family properties thereby forcing him to file the present application to stop sell of the properties to recover **Kshs. 5 million.** He contends that the intended sale is irregular and outright theft; that the advertisement does not show where the sale will take place; that the intended sale targets properties other than those that were in the initial warrants; that there was no reserve price as required by section 15 of the Auctioneers Act and that the warrants of attachment and sale were not served on him. It is the applicant's contention that his family will be rendered destitute if all its land is sold just to recover **Kshs. 5 million.**

6. The respondent filed a replying affidavit by Eric Ntabo, sworn on 19th July 2019 opposing the application. He contends that the application is frivolous, vexatious, incompetent and an abuse of the court process; that the applicant is the registered of all the targeted parcels of land; that the applicant had filed another application which was allowed on condition that he deposits the entire decretal sum in a joint interest earning account but which was not done and that the warrants of attachment were a re-issue.

7. According to the respondent, notification of sale was served to the applicant by the auctioneers together with the warrants of attachment and advertised to sell the land on 19th July 2019. He denied engaging in out of court negotiation for settlements of their costs. He argued that the intended sale is regular and lawful as the warrants were a re-issue and not an extension; that the intended sale met the requirements under the Auctioneers Act and in his view, the application is malicious and the applicant wants to hide under the family to avoid paying their taxed costs.

8. During the hearing, Mr. Musyoki moved the motion and urged the Court to grant the orders sought and stop the intended sale of the applicant's property. Counsel submitted that the Advocate-client bill of costs was taxed on 20th February 2018 and a Certificate of costs issued to that effect on 7th March 2018. He submitted that the certificate of costs was adopted as a judgment of the court on 20th June 2018 and a decree issued on 27th June 2018 for **Kshs. 6,055,997/=**.

9. Counsel submitted that warrants of attachment were issued on 3rd September 2018 but were stayed by the court's ruling of 27th February 2019. According to counsel, the court allowed the applicant to file a reference but also ordered him to deposit the decretal sum in a joint interest earning account in the names of the two advocates within 45 days which the applicant was, however, unable to comply with.

10. Mr. Musyoki submitted that the warrants and advertisement targeted a different set of properties from that which was to be sold earlier; that the new warrants were not served on the applicant and targeted several properties unlike the earlier warrants.

11. Mr. Musyoki submitted that the reason why the applicant did not deposit the money was because they entered into an out of court settlement negotiations and therefore he could not sell the property to raise the amount. He argued that the respondent took further steps to sell the property without the knowledge of the applicant; that the applicant had a challenge raising the money and when he came to know about the advertisement to sell the properties, he filed the present application promptly without delay.

12. Mr. Ntabo on his part submitted that the applicant's affidavit is full of falsehoods; that the court order for depositing money in a joint interest earning account was not complied with and therefore it left the respondent with no option but to proceed with execution. He submitted that the warrants and notifications of sale were served on the applicant by the auctioneers.

13. He contended that there were no negotiations to settle the matter out of court and that; in any case, the property that was being offered was not in the applicant's name. According to Mr. Ntabo, the application simply seeks stay and nothing more and, if granted, it will prejudice the respondent. He argued that the warrants issued on 24th April 2019 captured the details of properties to be sold and, therefore, there is no illegality on those warrants.

14. I have considered the application, the response and submissions by counsel for the parties. This application seeks to restrain the respondent from selling the properties mentioned in the warrants of sale issued by this court on 24th April 2019. The applicant argues that the intended sale is illegal and should not be allowed to proceed. The respondent on their part argue that there is no illegality in the process of executing the warrants and that the applicant did not, in any case, comply with the orders of the court to deposit the decretal amount in a joint interest account within the period set by the court.

15. The facts of this matter as can be seen from the record are straight forward. The applicant and respondent were client and advocates respectively. Their relationship took a turn leading to the respondent filing their advocate-client bill of costs which was taxed and allowed at **Kshs. 5 million** and a certificate of costs issued to that effect. The certificate of costs was adopted as a judgment of the Court giving way to the execution process.

16. The respondent commenced execution proceedings but by an application by the applicant, the court, ***(Nyakundi J),*** stayed the execution; allowed the applicant to file a reference against the taxed costs and ordered the applicant to deposit the decretal sum into a joint interest earning account in the names of the advocates within 45 day from 27th February 2019.

17. The applicant did not comply with the orders on grounds that; first, he could not raise the money and, second, had entered into an out of court negotiation to give land to the respondent. The respondent however denies this. The respondent applied for re issue of the warrants to sell some 5 properties named in the notification of sale. That sale was due on 19th July 2019 prompting the present application.

18. I have carefully considered this matter and perused the record. From the record, the advocate-client bill of costs dated 27th February 2017 was taxed on 20th February 2018 and allowed at **Ksh. 5,843,070/=**. Thereafter, the advocate filed an application dated 27th April 2018 under section 51(2) of Advocates Act seeking an order of the court adopting the amount in the certificate of costs as a judgment of the Court. That application was filed on 3rd May 019. The application was placed before Hon. E. Mulochi, the Deputy Registrar of this court on 20th June 2018. Mr. Ouko who held brief for Mr. Ntabo, moved the application in the absence of the applicant's advocate who had however been served. The Deputy Registrar then stated:

> ***"It is true that the application dated 27/4/2018 was served on the respondents and return of service (sic) filed. It was received by the respondent on 4/5/2018 but no response has been filed more than a month thereafter. Prayer one, three and four of the application are allowed."***

19. Prayer one sought to have the amount in the certificate of costs adopted as a judgment of the court, prayer three was for issuance of a decree with respect to the certificate of taxation dated 7th March 2018 while prayer four was for costs of the application.

20. It is therefore clear from the record, that the judgment adopting the certificate of costs was entered by the Deputy Registrar. A deputy Registrar does not have jurisdiction to hear an application under section 51(2) of the Advocates Act and to adopt a certificate of costs as a judgment of the Court.

21. Section 51(2) of the Advocates Act provides that:

> ***"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 disputed, an order that judgment be entered for the sum certified to be due with costs."***

22. The court may also make an order that judgment be entered in terms of the amount in the certificate of costs in the case of advocate client bill of costs like in the present case. Only the "court" envisaged under the Advocates Act can enter judgment in terms of the amount in the certificate of costs. Section 2 of the Advocates Act defines "Court" to mean the "High Court." That means only the High Court has jurisdiction to adopt the amount in the certificate of costs as judgment of the court.

23. This is supported by the fact that Order 49 rules (2) and (7) state circumstances under which a Deputy Registrar may enter judgment and the applications he/she can hear. Such applications do not include those brought under section 51(2) of the Advocates Act.

24. For avoidance of doubt, Order 49 rule 2 provides:

> ***"Judgment may, on application in writing, be entered by the registrar or, in a subordinate court, by an executive officer generally or specially thereunto empowered by the Chief Justice by writing under his hand, in the following cases:***
>
> ***(a) under Order 10: (consequence of non-appearance, default of defence and failure to serve);***
>
> ***(b) in all other cases in which the parties consent to judgment being entered in agreed terms; or***
>
> ***(c) under Order 25, rule 3 (costs, where suit withdrawn or discontinued)."***

25. Rule 7(1) of Order 42 provides for the applications Deputy Registrars may hear. It states:

> ***(1) The Registrar may—***
>
> ***(a) give directions under Order 42 rule 12 and Order 51 rule8;***
>
> ***(b) hear and determine an application made under the following Orders and rules —***
>
> ***(i) Order 1, rules 2, 8, 10, 17 and 22;***
>
> ***(ii) Order 2, rules 1 and 10;***
>
> ***(iii) Order 3,5 and 9;***
>
> ***(iv) Order 6;***
>
> ***(v) Order 7, rules 16 and 17 (2);***
>
> ***(vi) Order 8;***
>
> ***(vii) Order 10, rules 1 and 8;***
>
> ***(viii) Order 20;***
>
> ***(ix) Order 21, rule 12;***
>
> ***(x) Order 22 other than under rules 28, and 75;***
>
> ***(xi) Order 23, 24, 25, 26, 27, 28, 30,31 and 33; and***
>
> ***(xii) Order 42, rule 14***.

26. The applications listed above are routine; where the Registrars are required to give administrative directions and are not substantive in effect and, therefore, Deputy Registrars may hear them and give directions as appropriate. The rules do not give Deputy Registrars power or jurisdiction to hear any other applications, including those brought under section 51(2) of the Advocates Act.

27. Although both parties in the present application were referring to a judgment entered by ***Nyakundi J***, the fact of the matter is that that judgment was entered by the Deputy Registrar who had no jurisdiction, rendering the judgment a nullity and of no legal effect. That being the fact of the matter, any subsequent proceedings, including the decree and warrants of attachment and sale, were a nullity.

28. When parties appeared before ***Nyakundi J,*** in the earlier application, they did not bring to his attention the fact that the judgment, the basis of the execution proceedings, had been entered by the Deputy Registrar who as already seen had no jurisdiction to hear the application. Had they done so, the decision would obviously have been different given that the judgment had been entered without jurisdiction and was therefore a nullity.

29. That being my view of the matter, the orders that commend themselves to the court are to set aside the decision of the Deputy Registrar entering judgment in terms of the certificate of costs given that the decision was made without jurisdiction and is therefore a nullity. Once that is done, ther would be no basis for the subsequent orders made by this Court.

30. Consequently and for the above reasons, the final order is that the judgment entered herein by the Deputy Registrar, the subsequent decree and all consequential orders are hereby set aside. For avoidance of doubt, the warrants of attachment and sale issued herein on 24th

April 2019 are hereby recalled and cancelled and the advertised sale voided. Each party will however bear their own costs.

Dated Signed and Delivered at Kajiado this 25th Day of October 2019.

E C MWITA

JUDGE