



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CIVIL APPLICATION NO 51 OF 2017

ALI GADDAFI HAMISI..... APPLICANT

VERSUS

FRANCIS M. MUTUNGA..... RESPONDENT

RULING

By a Notice of Motion dated 18th April 2017 filed on 25th April 2017, brought under the Rule 11 (4) of the Advocates (Remuneration) Order and all the enabling Provisions of the law, the applicant seeks orders that:

- 1. This application be certified urgent and heard ex-parte in the first instance***
- 2. There be a temporary stay of execution in WINAM PMCC NO.495 OF 2004 pending the hearing of this application***
- 3. This Honourable Court be pleased to enlarge time to permit the applicant herein to give notice in writing to the taxing master in WINAM PMCC NO.495 OF 2004 to give reasons for the taxing officer's decision dated 20.01.17 on the items that the applicant had objected to***
- 4. That costs of this application be borne by the respondent***

The application is predicated on the grounds among others that:-

- a. The applicant is dissatisfied with the taxation dated 20.01.17
- b. That the applicant was not aware of eth taxation until the same was brought to his attention on 23.2.17 by his advocate when the period to challenge the taxation had long expired
- c. That the delay is not inordinate and not an afterthought and cannot be blamed upon the applicant who had lost contact with his advocate
- d. It is in the interest of justice that the applicant herein be afforded an opportunity of being heard

The application is further supported by the affidavit sworn by the applicant on 18.4.17 in which he reiterates the grounds on the face of the application. Annexed to it is the impugned bill of costs and notice of intention to move to the High Court marked **AGH 1** and **AGH 2** respectively.

The application is opposed on the grounds set out in the grounds of opposition filed on 12.5.17 to the effect that the application herein does not lie since the impugned bill was taxed by consent and further

that the applicant does not disclose when he became aware of the taxed bill.

In the written submission, applicant reiterates the grounds on the notice of motion and averments contained in the supporting affidavit.

The respondent in his submissions submitted that the applicant had not met the principles for setting aside a consent judgment or order. To this end, he relies on the case of *Flora Wasike v Destino Wamboko [1988] eKLR* where the court held; -

1. A consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract, or if certain conditions remain to be fulfilled which are not carried out.

2. The Civil Procedure Act (Cap 21) Section 67 (2) is not an absolute bar to challenging a decree passed with the consent of the parties where a party seeks to prove that the decree is invalid ab initio and should be rescinded or that there exist circumstances to warrant varying the decree.

3. In this case, there were no grounds which would justify the setting aside of the consent judgment.”

He also cited the case of *Kenya Commercial Bank Ltd v. Specialised Engineering Co. Ltd (1982) KLR P. 485* where Harris J. R held that:

1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the Policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement

2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.

I have carefully considered the application in the light of the supporting affidavit, grounds of opposition and submissions on record.

The applicant did not place, before the court, any evidence to show that the impugned consent was obtained by fraud or by an agreement contrary to the Policy of the court or that the consent was given without sufficient material facts or in misapprehension or ignorance of any facts. It has also not been demonstrated that Ms. Masese, the advocate who appeared for the applicant had no authority to enter into the consent that was recorded. The application before the court was filed on 21st April, 2017; way outside the period provided by law for filing of a reference and the delay has not been explained to the satisfaction of the court.

I therefore find that this application is mischievous, it has no merit and it is dismissed with costs to the respondent.

DATED AND DELIVERED THIS 12th DAY OF October 2017

T.W.CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Applicant - Ms. Kyamazima hb for Mr. Odeny

Respondent - N/A