



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**MISC. APPEAL NO. 100 OF 2013**

**LAWRENCE MWANGI T/A MWANGI & CO. ADVOCATES.....APPLICANT**

**VERSUS**

**JOHN MATHIAKA KIMUNDU.....RESPONDENT**

**RULING**

1. The Applicant **John Mathiaka Kimundu** brought an application dated 16<sup>th</sup> March 2015 under **Section 48 and 49 of the Advocates Act and Orders 22 Rule 25, 51 Rule 1, 3 of the Civil Procedure Rules.**

In his **Prayer No. 4**, he seeks an order to set aside the Warrants of Attachment issued on the 24<sup>th</sup> February 2015 to Sanjomu Auctioneers and the subsequent proclamation of attachment of 12<sup>th</sup> March 2015. The Application is based on grounds that under **Section 48 and 49 of the Advocates Act**, an advocate ought to file a recovery suit from which a judgment is issued and a decree drawn for execution. It is stated that there is no decree in this matter capable of being executed but a certificate of costs that cannot be executed hence the warrants of attachment issued pursuant to the certificate of costs ought to be set aside. The application is supported by the applicant's affidavit filed on the 17<sup>th</sup> March 2015. Annexed to the affidavit is a proclamation by Sanjomu Auctioneers taken on the 12<sup>th</sup> March 2015 and reasons for the taxation of the Advocate-client bill of costs dated 8<sup>th</sup> February 2013.

2. In submissions, the applicant by his advocate Mr. Ambayi argued that upon taxation of the Advocate-client bill of costs, a certificate of costs was issued and that ended the Taxing Master's jurisdiction, that any other matter arising from the taxation ought to have been referred to the High Court by way of a Reference. It is his submission that a certificate of costs is not a decree capable of being executed, that judgment ought to be obtained making the certificate of costs a judgment of the court. He urged the court to allow the application as there was no decree issued by the court on the 17<sup>th</sup> October 2014. He sought guidance from the case **Lubullelah and Associates Advocates -vs- Nasser Ahmed T/A Airtime Business Solutions (2010) KLR and Sankale Ole Kantai -vs- KBS Ltd (2006) KLR** among other cases where it is stated that the general procedure in recovery of advocates costs after certificate of costs is issued is to seek entry of judgment based on the certificate of costs after which a decree is issued for execution purposes.

3. The Respondent **Lawrence Mwangi & Company Advocates** filed a Notice of Preliminary Objection on the 30<sup>th</sup> April 2014 on various grounds that there was a valid and competent attachment in the form of a certificate of costs capable of being executed, and that certificate of costs being final the court lacks jurisdiction to reverse or interfere with it in terms of **Section 48 and 49 of the Advocates Act.**

At the beginning of hearing of the main application, by consent of parties, it was directed that the preliminary objection be argued together with the main application.

In further objection to the application dated 16<sup>th</sup> March 2015, the respondent filed a Replying Affidavit sworn by Lawrence Ngugi Mwangi Advocate on the 29<sup>th</sup> April 2015. He deposed that by this **Misc. Civil Application No. 100 2013** a valid taxation was done and a certificate of costs issued together with all other subsequent orders including the order of attachment.

4. I was referred to my earlier judgment dated 5<sup>th</sup> March 2015 concerning the matter in issue being **HCCC No.65 of 2014**. I struck out the said suit as it sought to challenge the certificate of costs issued by the Taxing Master against the applicant. I held that a certificate of costs can only be challenged through a Reference to a Judge of the High Court, but not by filing a fresh suit. See **HC Misc. Civil Appl. No.162 of 2006 – Orbit Chemicals Industries -vs- Otieno-Odek & Company Advocate (Supra)**. It was noted that the applicant had filed multiple applications which were an abuse of the court process.

5. I have considered the application and affidavit evidence together with the preliminary objection and the replying affidavits and oral submissions by both advocates.

There is no dispute that there exists a certificate of costs issued by the Taxing Master in favour of the Respondent Advocates – in this application. The respondent has not demonstrated existence of a judgment or decree arising capable of being executed. The holder of the certificate of taxation ought to apply for judgment in the High Court in terms of **Section 48, 49 and 51(2) of the Advocates Act** to be entered based on the certificate of costs. Only after that would a decree issue and execution proceedings be undertaken. There having been no judgment and decree from the certificate of costs, the proclamation against the applicants property was procedurally irregular and illegal. The degree purportedly issued by the court on the 17<sup>th</sup> October 2014 has not been exhibited for the courts consideration.

Notice of one month to the Applicant by the Advocates of entry of judgment has also not been served. It therefore follows that the warrant of attachment and the subsequent proclamation taken on the 12<sup>th</sup> March 2015 are irregular and must be set aside. The proclamation is lifted.

6. However, the certificate of costs as certified by Taxing Master in favour of the Respondent Advocates remain valid and unchallenged unless there is in force a reference to this court.

It then behoves upon the Respondent to apply for judgment and decree in the correct procedure as provided in the Advocates Act.

The Advocates have urged the court to direct deposit of the certified costs into court by the applicant should the court order filing of another suit.

This court finds no necessity of filing another recovery suit. The envisaged application for summary judgment based on the certificate of costs may be filed in the current **Misc. Civ. Application – See Sankale Ole Kantai t/a Kantai & co Advocate -vs- KBS Ltd (2006) KLR**. To that end, I find no reason upon which such an order to direct the applicant to deposit the costs in court. It has not been said that the Respondent has been unable to pay the certified costs upon a decree issued by the court or that he is about to abscond the court's jurisdiction. I decline to make such an order.

Consequently, I come to the conclusion that the application dated 16<sup>th</sup> March 2015 is merited. It is allowed in terms of **Prayers No. 3 and 5**.

The Warrants of Attachment issued on the 24<sup>th</sup> February 2015 Sanjomu Auctioneers and the subsequent proclamation of attachment dated 12<sup>th</sup> March 2015 are set aside.

The Applicant shall have costs of application.

**Dated, signed and delivered in open court this 28<sup>th</sup> day of January 2016.**

**JANET MULWA**

**JUDGE**