



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISC. APPLICATION NO. 440 OF 2011

NDUNG’U MWAURA & CO. ADVOCATES.....PLAINTIFF/RESPONDENT

VERSUS

MICHAEL KINYENJE MURIUKIDEFENDANT/APPLICANT

RULING

The Application before the court for consideration is the Notice of Motion dated 7th day of August, 2015. It is brought under Section 3, 3A of the Civil Procedure Act, Order 10 Rule 11 of the Civil Procedure Rules and all enabling provisions of the law.

The Defendant/Applicant has sought the following orders:-

1. Spent
2. That judgment entered herein on the 9th day of June 2015 and all subsequent orders made hereto be set aside pending hearing and determination of this application.
3. That the court grant the defendant/applicant leave to file his defence out of time.
4. That the costs of this application be provided for.

The application is premised on the grounds set out on the body of the same and its supported by the affidavit of Michael Kinyenje Muriuki annexed to the application and sworn on 7th day of August, 2015.

The Defendant depones that sometimes in the month of March, 2005, he instructed the Plaintiff to claim general and special damages from a fatal road accident wherein his son was involved. That pursuant to the said instructions, the Plaintiff filed civil suit number 1095 of 2005 at Thika but he failed to pursue the case and cut off communications between him and the Defendant herein.

That the Defendant only came to learn of the bill of costs filed herein by the plaintiff on the 3rd August, 2015 when Kingpin Auctioneers visited his homestead to proclaim his goods. He denied having instructed the firm of M/s Otieno Arum & Co. Advocates to represent him in the Bill of costs and alleges that the affidavits of service filed in this matter are false and misleading.

He avers that the proclamation of his goods was done through an illegal process since he has never been served with any court process. He urges the court to set aside the judgment entered in this miscellaneous cause.

The application is opposed vide a Replying Affidavit sworn by Jairus Mwaura Ndungu on the 30th

November, 2015. In it, he depones that he was instructed by the defendant to represent him in civil suit number 1094 of 2005 in Thika Chief Magistrate's Court and before the trial could commence, the court file got misplaced. The file was reconstructed and the case was heard but before the judgment, it disappeared again. The file was reconstructed a second time but before the Plaintiff could take a hearing date, the Defendant/Applicant withdrew instructions from the Plaintiff and instructed the firm of Otieno Arum & Co. Advocates.

That the applicant had not paid the Plaintiff any money as legal fees since the commencement of the suit and naturally, upon withdrawal of the instructions by the applicant, the Plaintiff filed a bill of costs for the professional services rendered. The applicant was served with the bill of costs after which he instructed the firm of Otieno Arum & Company to act for him in the taxation.

That the bill of costs came up on several occasions for taxation but the firm of Otieno Arum & Co. advocates never showed up despite invitation for fixing and service of the hearing notices. The said hearing notices were well received and stamped by the said firm of Advocates.

That the bill was eventually taxed on the 2nd December 2014 and on the said date, there was no representation on the part of the defendant as his advocate did not attend court. The Plaintiff applied for judgment to be entered against the Defendant for the taxed costs in the sum of Kshs.119,065/-.

The firm of Otieno Arum & Co. Advocates failed to attend court for the hearing of the said application and the same was allowed by the court and judgment was entered accordingly. It is that judgment that the defendant/applicant seeks to set aside.

In a further affidavit sworn by the defendant/applicant on the 8th day of December, 2015, he denied having instructed the firm of Otieno Arum & Co. Advocates. He further depones that from the information received from the firm of Otieno Arum & Co. Advocates, they have never employed a secretary by the name Jacky and the alleged stamps appearing on the invitation letter dated 3/7/2012 and hearing notice dated 12/7/2012 are unknown to them.

Parties agreed to canvass the application by way of written submissions which they duly filed. The submissions reiterate the contents of affidavits filed herein by the respective parties.

I have carefully considered all the materials before me. The applicant seeks to set aside the judgment entered on 9th June, 2015 and all the consequential orders. He first came to court under certificate of urgency on the 10th day of August, 2015 when the application was considered ex parte by Hon. Justice Onyancha who granted the applicant an interim stay of execution on condition that the decretal sum and the auctioneers charges estimated at Ksh.180,000 is deposited in court within 21 days. In default of deposit being made as ordered the interim stay order to automatically stand discharged without more. That order was not complied with.

The main ground relied upon by the applicant in support of his application is that he was not aware of the bill of costs until his goods were proclaimed by the auctioneers and that he did not instruct the firm of M/s Otieno Arum & Co. Advocates to act for him in the taxation.

On his part, the Plaintiff depones that he served the applicant with the bill of costs following which he instructed the firm of Otieno Arum & Co. advocates to act for him.

From the record, it is clear that the firm of Otieno Arum & Co. Advocates filed a notice of appointment of advocates in Misc. 440/2011 on the 7th day of December, 2011. The question that begs for an answer is, who instructed them and how did the instructing client come to know about the matter? What is more interesting is that even the said firm of advocates deny that they were instructed in the matter.

There is ample evidence on record that the firm of Otieno Arum & Co. Advocates were on record for the applicant and that they were served with hearing notices every time the bill of costs came up for hearing.

It is also on record that they were served with the hearing notice for the application dated 21st February, 2015 and they duly stamped and affixed their signature on the same.

In view of the above, it is very dishonest of the defendant and his advocates to depone that they were not aware of the taxation yet he was served with the bill of costs and it was after the said service that he instructed the firm of Otieno Arum & Co. Advocates who filed a notice of appointment of Advocates. The defendant has not denied instructing the Plaintiff to act for him in Civil Suit No. 1094/2015 at Thika. He has not stated anywhere in his affidavits that he paid legal fees to the Plaintiff for the services that were rendered to him in the above matter.

In my opinion, the application has not been made in good faith and it is full of falsehood. The application has no merits and it is hereby dismissed with costs to the Plaintiff.

DATED, SIGNED and DELIVERED at Nairobi this 9th day of June, 2016.

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L NJUGUNA

JUDGE

In the presence of:-

.....*for the Plaintiff*

.....*for the Defendant*

.....*clerk*