



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL CASE NUMBER 560 OF 2010

MACHIRA & CO. ADVOCATES. . ADVOCATE/RESPONDENT

VERSUS

JACOB JUMA. CLIENT/APPLICANT

RULING

The ruling herein relates to two applications one dated 6th July, 2015 and the other dated 14th July, 2015.

The one dated 6th July, 2015 by the Respondent/Applicant is brought under Article 58 of the Constitution, Order 22 Rule 22, Order 9 Rule 9, Section 3A of the Civil Procedure Act, 2010 and all the enabling provisions of the law. The Applicant has sought 6 orders but the 1st and 3rd orders have been spent while prayer 2 was allowed by court leaving prayers 4, 5 and 6 for determination by this Honourable Court.

It is based on the grounds that on the 11th October, 2012, the court allowed the Plaintiff's Bill of Costs awarding of Ksh.1,075,416.58 vide a Certificate of Taxation dated 24th October, 2012, that the application dated the 19^h March, 2013 for the Deputy Registrar costs to be entered as judgment together with 14% interest on the decretal sum was allowed unopposed on the 9th May, 2013 and that the then advocate on record for the Plaintiff Messers Wamwayi & Co. Advocates did not inform the Defendant of the application dated the 19th March, 2013 nor of the demands by the Plaintiff to make good the decretal sum and for those reasons the mistake of the said advocates should not be visited upon the Defendant.

The Applicant depones that he is ready and willing to abide by any reasonable conditions that the court may order as a condition for grant of stay and/or setting aside the judgment.

The application is opposed vide a replying affidavit sworn by the advocate Messers John Patrick Machira. In the said affidavit he depones that his Bill of Costs was taxed on 11th October, 2012 for a sum of Kshs.1,075,416.58 and the client/judgment debtor was represented in the said taxation by the firm of Messers Wamwangi & Co. Advocates and the said firm participated in the taxation by filing written submission on behalf of the client.

It is further deponed that after the said taxation, the Advocate/Respondent wrote to the client/applicant on the 30th October, 2012 demanding the payment but despite the demand, the Client/Applicant refused and/or failed to settle the same.

That the Client/Judgment did not appeal against the decree and the certificate of costs remains unchallenged to date. After the judgment debtor refused to settle the taxed costs, judgment was entered against him with interest at 14% per annum and the Notice of Motion seeking entry of judgment was

served upon his advocate on record M/s Wamwangi & Co. Advocates who failed to attend court and the application proceeded ex parte.

It is further deponed that on the day the application to enter judgment came up in court for hearing, the Advocate/Respondent saw the client in court which is evidence that the client was aware of the proceedings and his preset application is meant to delay the course of justice and to buy time.

According to the Respondent, the client/applicant ignored the demand and the reminder to the same the taxed courts and the court was perfectly entitled to grant interest at the rate of 14% per annum. The Respondent avers that the issue of interest to be granted by the court is purely discretionary and the court cannot be faulted for ordering interest at 14% per annum. He deponed that the client/Judgment Debtor is blaming and condemning his advocate on record unfairly and purely as a scapegoat. He urges the court to dismiss the application.

The other application is dated the 14th July, 2015 still by the Respondent/client. It has been brought by way of a Chamber Summons under paragraph 11(1) and (4) of the Advocates (Remuneration Order) and all other enabling provisions of the law seeking the following orders: -

1.

2. ...

The summary of the facts in support of this application are that: -

The ruling to the bill of costs dated 26th November, 2010 was delivered in the absence of the parties on the 11th October, 2012 and no ruling notices were ever issued to the Respondent and/or his advocate and for that reason they had no way of knowing that the ruling had been delivered.

It is averred that had the Applicant/Client known that the ruling had been delivered he would have filed a reference. That the application seeking to enter judgment pursuant to the Certificate of Costs was proceeded in the absence of the applicant and his advocate and for that reason, the mistake of his advocate should not be visited upon him.

The Applicant avers that the Taxing Officer erred by failing to award the correct amount of time No.1 of the Bill of Costs and that there was no basis for awarding the sum of Kshs.1,362,000/- as there is no valuation or any other document in support of the claim at all.

He avers that the Deputy Registrar misapprehended the law on taxation by using improper considerations in determining the value of the subject matter and thereby failed to determine basic instruction fees on a claim whose value was not disclosed by pleadings.

The application is opposed vide a replying affidavit sworn by the a Advocate/Respondent on 20th July, 2015. In summary, the Respondent depones that after the ruling was delivered on 11th October, 2012 he wrote to the applicant's Advocate M/s Wamwangi & Co. and informed that of the outcome of the ruling and that the Bill of Costs had been taxed at Kshs.1,075,416.58 cts and demanded the remittance of the same.

He further depones that he wrote a reminder dated 20th November, 2012 but the applicant failed refused to pay the taxed costs. That the Client/Applicant was fully aware of what was taking place in court and he was informed by his advocate on record and he should not blame his advocate. That after the Bill of Cost was taxed, the Applicants advocate went to the Respondent's office and made an offer to pay the taxed account in instalments but the Respondent declined the offer.

He further averred that the value of the subject matter was estimated at Ksh.75 million in the Applicants own affidavit sworn on 6th February, 2009 and annexed to his own Chamber Summons dated 6th

February, 2009. He aver that the application is fatally defective and incompetent as it does not comply with the mandatory provisions of the law and that the affidavit has been sworn by the Advocate himself and not the Applicant. That when the Auctioneer proceeded to attach the applicant's property, he had offered to pay the costs by instalments with the Respondent declined.

The court has carefully considered the application and all the other material before it.

The Advocate/Respondent, in addition to the Replying affidavits has filed grounds of objection and a preliminary objection where issues of law have been raised and which this court finds prudent to address first as this will determine the outcome of the two applications. The two issues raised are whether the firm of Nderu & Ngaruni Advocates is properly on record or not?

And whether the affidavit in support of the application dated 14th July, 2015 is competent and valid having been sworn by an Advocate contrary to the provisions of the law.

On the first issue, the provisions of Order 9 Rule 9 of the Civil Procedure Rules are very clear: -

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been placed, such change or intention to act in person shall not be effected without an order of the court: -

(a) Upon an application with notice to all the parties, or

(b) Upon a consent filed between the outgoing advocates and the proposed incoming advocate or party intending to act in person as the case may be.”

Order 9 Rule 10 provides: -

“An application under Rule 9 may be combined with other prayers provided the question of change of advocates or party intending to act in person shall be determined first.”

The matter herein has been finalized and what is before the court is an application seeking orders inter alia to set aside an order adopting the Deputy Registrar's certificate of costs dated the 24th October, 2012. This, therefore, means that any advocate seeking to come on record has to seek the leave of the court as provided for under Order 9 Rule 9 and its only after such leave has been granted can such a firm of advocates seek other orders relating to the matter before the court.

Among the orders sought in the application dated 7th July, 2015 is for leave to be granted to the firm of Nderu & Ngaruni Advocates to come on record on behalf of the Defendant. This prayer has not yet been heard and the orders sought granted. It is still pending. It is clear from Order 9 Rule 10 of the Civil Procedure rules that when the order is sought among others in an application the question of change of advocates or party intending to act in person shall be determined first before other questions can be heard. I have perused the record and the typed proceedings and it is clear to me that this order has not yet been dealt with which technically means that the firm of Nderu Ngaruni is not on record in the matter before the court. This position is supported by the case of **Abdi Gohand Muhmud Vs Gerald Muturi Maina & Another (2004) eKLR** where Justice Visram pointed out that the application had been filed by a new advocate who had not filed a Notice of Change of Advocates. In my view, for the application to be deemed to have been properly filed, that prayer ought to have been dealt with first after which the said firm of advocates could have filed a notice of change of advocates before addressing the other prayers.

Having said, the foregoing, I must hold that the client's applications dated 6th July, 2015 and 14th July, 2015 are incompetent and both are struck out with costs.

Dated, signed and delivered at Nairobi this 29th day of September, 2016.

.....

L NJUGUNA

JUDGE

In the Presence of

..... for the advocate/Respondent

..... For the Client/Applicant