REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

H.C. MISC. CIVIL APPLICATION NO.5 OF 2014

ELLY OWINYI T/A

E.K.OWINYI & CO. ADVOCATES.....APPLICANT/ADVOCATE

VERSUS

KENINDIA ASSURANCE COMPANY LTD.....RESPONDENT/APPLICANT

R U L I N G

1. The application for determination is the Notice of Motion dated 12/03/2015 brought pursuant to the provisions of Section 3A and 63 e of the Civil Procedure Act, Order 22 Rule 13 (4) and Order 51 Rule 1 of the Civil Procedure Rules 2010. The applicant KENINDIA ASSURANCE CO. LTD seeks ORDERS THAT:

1. Spent
2. Spent
3. Spent
4. The Court be pleased to issue a declaration order that so far there is no judgment and or a decree in these proceedings dated 8/01/2015.
5. The application for execution dated 6/03/2015 be struck out.
6. The warrants of attachment and warrants of sale dated 6/03/2015 be recalled and annulled.
7. The attachment by way of proclamation carried out on the 9/03/2015 on the strength of the impugned warrants of attachment and sale dated 6/03/2015 be declared illegal, null and void.
8. The auctioneers charges if any be borne by the Advocate/Respondent.
9. The costs of this application be paid to the client.

2. The application is premised on the grounds that warrants of attachment and warrants of sale dated 6/03/2015 were taken out upon an application for execution by advocate on 6/03/2015 and attachment by way of proclamation carried out on 9/03/2015 in purported execution of a decree of this court dated 6/01/2015.

3. It is contended that there is no judgment and or decree in these proceedings dated 8/03/2015 as shown on the warrant capable of being executed yet the Advocate went before the Deputy Registrar in exparte proceedings without hearing the Client. Further that there is no order capable of being executed and issued by the court for execution as envisaged and contemplated by the provisions of Order 22 Rule 13 (4) of the Civil Procedure Rules 2010 and thus the ongoing execution process and attachment is invalid, null and void and does not lie. Further that it constitutes gross abuse of the court process as the Deputy Registrar does not have jurisdiction to order execution in the absence of judgment and decree. That the warrants of attachment and sale so issued are irregular invalid, null and void and in issuing them the court visited an injustice on the Client/Applicant.

4. It is also averred that the amount being executed for is not due to the Advocate from the Client who has made payments of the taxed costs and proper accounts are yet to be taken to determine if there are any amounts which could be outstanding, and that the applicant is ready and willing to deposit into court pending the determination of the application in the High Court the cumulative total of the taxed costs in the matter and or to provide security on terms as this court shall order as a pre condition to the grant of stay of execution. It is argued that a certificate of costs made cannot form a basis of execution proceedings and that no exparte substantive orders could be made on a date which had been fixed ex-parte without hearing all the parties and more so when judgment and or decree has not been passed on the basis of the certificate of costs and when in fact no such application as envisaged by section 51 (1) of the Advocates Act had been filed and a ruling there on delivered. It is claimed that the applicant has been condemned unheard on the application for execution contrary to the rules of natural justice and more so in the absence of a judgment capable of being executed.

5. The application is supported by the annexed affidavit of Simon Kioko the Legal Officer KENINDIA ASSURANCE LTD wherein he reiterates what has been captured in the grounds herein above.

6. In opposing the application the Respondent filed grounds of opposition dated 13/03/2015 although the title on the said grounds seems to refer to another application yet the contents refer to this application. These grounds are:

1. THAT there exists no jurisdiction to nullify or quash execution proceedings in the manner contemplated in the application.
2. THAT the application is made in bad faith and meant to delay the conclusion of this matter.
3. THAT litigation must come to an end.
4. The firm of OKONG'O WANDAGO & CO. ADVOCATES are not properly on record.

7. Parties herein canvassed the application by filing and exchanging written submissions both on the substantive application dated 12/03/2015 and the Preliminary Objection raised by M/s Abok & Co. Advocate in their grounds of opposition. I will first deal with the preliminary objection which states that:

“The firm of M/S OKONG'O WANDAGO & CO. ADVOCATES is not properly on record.”

8. From the submissions by the Respondents they contend that the firm of Shilenje & Co. Advocates was the first to file the Notice of Appointment of Advocates representing KENINDIA ASSURANCE LTD on the 13/02/2014 and have since been on record. M/S Okong'o Wandago & Co. Advocates later filed theirs to represent the same company on the 18/08/2014. It is argued that this is contrary to the provisions of Order 9 Rules 5 and 6 of the Civil Procedure Rules 2010. It is their contention that no other firm can purport to come on record without first filing a Notice of Change of Advocates and serving the same on all parties in the suit or all the advocates in the suit as provided for by law. They claim that failure to observe the law will cause confusion. They want the papers filed by Okong'o Wandago & Co. Advocates struck out.

9. M/s Okong'o Wandago & Co. Advocates on their part submit that they were instructed by KENINDIA ASSURANCE LTD who is the Respondent/Client to come into the proceedings when they realized that M/s Shilenje Advocate had not taken out a practicing certificate for the year 2014. As such they submit that they could not have filed a Notice of Change of Advocates as there was no Advocate who was properly on record and the only way they could have come on record is by filing the Notice of Appointment of Advocates which they did to safeguard the interest of their Client. They also submit that the Preliminary Objection does not meet the threshold of a Preliminary Objection and should therefore be dismissed with costs.

10. M/S Okongo Wandago & Co. Advocates also claim that they have always been in the picture in this matter and have dealt with the firm of Abok & Co. Advocates in payments and correspondences and they now have opened a joint account with them for purposes of this case and have deposited money therein. They urge the court to be very reluctant in striking out the suit merely on issues of technicalities but instead look into and consider the merits and demerits of the issues in dispute presented before it.

11. From the above submissions by Counsel for the parties herein I find that there was need by the firm of M/s Okong'o Wandago and Co. Advocates to follow the procedure for coming on record as provided under Order 9 Rule 12 although I find their failure to do so is not fatal to their case. I agree with the arguments raised by counsel for the Respondent that the only way that this court can decide whether or not the firm of Okong'o Wandago & Co. Advocates is properly or not is by way of evidence. There is truly no evidence on record to show that M/s Shilenje Advocate had not obtained a practicing certificate by the time M/S Okongo Wandongo Advocates filed their Notice of Appointment. No affidavit to annexing a letter from the L.S.K is on record and so it is hard to believe the contentions as raised. Be that it as it may the firm of Okong'o Wandago & Co. Advocates have been doing all the correspondence in this case, and have even opened a joint account with the applicants' firm and have gone ahead and brought the application herein. The firm of Abok & Co. did not object to the firm of Okong'o Wandago & Co. Advocates coming on record until now. I see no reason why now they want them struck out.

12. On the threshold of the Preliminary Objection I am pursuaded by the guidelines In **MUKISA BISCUITS MANUFUCTURING CO. LTD-VS- WEST END DISTRIBUTORS LTD [1969] E.A 698** and find that that the P.O does not raise a pure point of law which has been pleaded and which arises by clear implication out of pleadings, and which if argued as a Preliminary Point may dispose of the fact.

13. Lastly the Spirit of Article 159 of the Constitution 2010, Section 1A, 3 and 3A provides that courts should be very reluctant in striking out suits merely on issues of technicalities. For the above reasons I find that the Preliminary Objection lacks merit and the same is dismissed with costs.

14. Coming to the substantive application dated 12/3/2015 the court is alive to the fact that parties complied to the orders of this court and opened a joint interest earning account and deposited Kshs. 1,345,094/=. The applicant submits that there is no judgment and or decree in these proceedings dated 8/03/2015 capable of being executed and yet the advocate in the exparte proceedings before the Deputy Registrar without hearing the client applied for execution. The applicant also faults the execution process because there is no order capable of execution and issued by the court for execution as provided by Order 22 Rule 13 (4) of the Civil Procedure Rules 2010 and therefore that the execution process and attachment was illegal thus invalid, illegal, null and void and does not lie at all and constitutes an abuse of the court process.

15. The applicant also submits that the Deputy Registrar does not have jurisdiction to order execution through issuance of warrants of attachment and warrants of sale in the absence of judgment and decree issued by the court. Further that no certificate of costs has been issued in this matter and or in any of the matters whose bill were cumulatively taxed and allowed in the sum of Kshs. 1,653,087/= It is also claimed that the certificate of costs does not bear the name of the taxing officer who taxed it and it has not been shown that it was so issued under his hand. They maintain that the warrants of attachment and sale issued in these proceedings on the 6/03/2015 were irregular, the execution carried out on 9/03/2015 was also irregular, invalid null and void and the court in issuing them visited an injustice on the Client Applicant. The Applicants want the orders sought granted.

16. On their part the Respondent opposes the applicant's application dated 12/03/2015. They submit that the court has no jurisdiction to order stay of taxed costs either under Civil Procedure Act or otherwise. They also claim that the purported application brought after and during execution amounts to a complaint against consent which ought to have been ventilated by way of a reference within 14 days in accordance with Paragraph 11 of the Advocates Remuneration Order. It is submitted further that a certificate of costs is final as to the amount of costs. They maintain that the Civil Procedure Rules do not apply to the Advocates Act and the Advocates Act does not provide for stay of taxed costs.

17. The Respondents also submit that the application has been made in bad faith and meant to delay the conclusion of the matter. They claim that the certificate of costs is an order of the court and that filing a suit to recover costs is not mandatory. They maintain that the bill of costs herein has never been altered, set aside or disputed and therefore the same is not in dispute and need not be stayed or a plaint filed. They also maintain that the assertion that there is no judgment or decree capable of being executed does not hold. They want the application dismissed with costs.

18. First I would like to state that no party will be prejudiced in any way since the amount in the certificate of costs has been deposited in an interest earning joint account by the Advocates on record herein. From the arguments and submissions by counsel and the authorities relied upon the issue for determination is whether there is a judgment, decree and /or order that can be executed in this case and whether the certificate of costs is an order capable to be executed. To answer this question I am guided by the provisions of Section 51 (2) of the Advocates Act Cap 16 which provides as follows:

"**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 an 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"** emphasis mine.

19. From the reading of the provision above the certificate of costs is not an order of the court but a final statement of the amount of costs covered in a suit. After the Certificate of costs then the court may make such order as it deems fit including an order that judgment be entered for the sum certified to be due with costs.

It follows therefore that after a certificate of costs has been issued an Advocate needs to either file suit to recover costs under section 48 of the Advocates Act or file an application for the certificate to be converted into a judgment under section 51 where retainer is not disputed. After the court enters judgment then execution can issue. But Certificates of costs in themselves are not Judgments, Decrees or Orders capable of being executed.

20. Having said the above I find that the application dated 12/03/2015 has merit and the same is granted as prayed with costs to the applicant KENINDIA ASSURANCE CO. LTD.

Orders accordingly;

RULING DELIVERED, DATED and SIGNED in open court at Kakamega this 31st day of July 2015

RUTH N. SITATI

JUDGE

In the presence of;-

Mr. Abok……..for the Petitioner/Advocate

Mr. Ombaye for M/S Aron……for the Respondents/Applicant

Mr. Okoit……Court Assistants