



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPL. NO. 329 OF 2011

IN THE MATTER OF: TAXATION OF COSTS

BETWEEN

MEREKA & CO. ADVOCATES APPLICANT

V E R S U S

ENG. A. S. KITOLOLO T/A

KITOLOLO CONSULTANTS ENGINEERS RESPONDENT

ARISING FROM

CIVIL SUIT NO. 40 OF 2006 (MSA)

AUSTIN SALMON KITOLOLO PLAINTIFF

-V E R S U S-

- 1. MIDDLE EAST BANK KENYA LIMITED**
- 2. ROSEMARY NJERI WAWERU T/A THAARA AUCTIONEERS**
- 3. SULEIMAN MASOUD**
- 4. SHAHCO INVESTMENT LIMITED**
- 5. THALIA KATIA MARIA CASTANHA DEFENDANTS**

RULING

INTRODUCTION

- 1. MEREKA & CO. ADVOCATES (the Advocate)** represented Eng. S. K. Kitololo T/A Kitololo Consultants Engineers (**the Client**) in Mombasa HCCC No. 40 of 2006. The Advocates had his Advocate/Client Bill of Costs, in respect to that representation, taxed on 7th October 2011 for Kshs. 9,199,868/-.

2. The Advocate filed a Notice of Motion dated 4th November 2011 and although he stated it was brought under Section 52(2) of the Advocates Act Cap 16, it really ought to have been under Section 51 of that Act. This is because it sought judgment to be entered in respect of the taxed amount and such judgment can only be entered under Section 51. That Notice of Motion, as far as I can tell, is still pending determination.
3. The Client filed a reference against the Taxation of 7th October 2011 under paragraph 11(1) and (2) of the Advocates (Remuneration) Order. That reference was by way of Chamber Summons dated 28th February 2012. It was heard and determined by Judgment of R. M. Mwongo, J dated 11th April 2014. By that judgment the Client's reference was dismissed. The Client filed a Notice of Appeal against that judgment on 15th April 2014.
4. On my perusal of the Court file I have found that thereafter the Advocate extracted, what is in my view is wrongly entitled as, the Decree. The Decree reads as follows-

“DECREE

(In Court before Honourable Justice R. M. Mwongo on 31st March, 2014)

THIS SUIT coming up for a reference by Chamber Summons dated 28th February, 2012 in the presence of Mr. Mareka, Advocate of Mareka & Co. Advocates for the Applicant and Mr. Sionik, Advocate for the Objector IT IS HEREBY DECREED:-

1. **THAT the Chamber Summons dated 28th February, 2012 be and is hereby dismissed with costs.**

GIVEN under my hand and the seal of the Court at Mombasa this 31st day of March, 2014.”

The Advocate should have extracted an Order and not a Decree.

5. The Advocate following the extraction of that Decree proceeded, on 24th July 2014, to file an execution application of the attachment of moveable goods of the Client. It is that execution which is the subject of the application under consideration in this Ruling, the Notice of Motion dated 6th August 2014.

NOTICE OF MOTION DATED 6TH AUGUST, 2014 BY THE CLIENT

6. The above Notice of Motion (hereinafter called ‘**the Notice of Motion**’) seeks two prayers-
 - **There be a stay of execution of the Decree herein and/or all its consequential Orders pending hearing and determination of this application and/or Appeal.**
 - **Without prejudice, the Respondent be ordered to file the certificates under Rule 62(A)(3) of the Advocates Remuneration Order setting out the dates during which the other two different Law Firms acted, together with all agreements for remuneration made with the two different firms, or sums paid to them for costs and whether sums were paid in full settlement of the instruction fees.**
7. Before I proceed to consider those prayers I will first discuss whether the execution against the client by the Advocate was valid. Execution of a Decree, can be carried out as provided under Order 22 of the Civil Procedure Rules. Order 22 Rule 1(1) provides that execution should be for “**ALL money payable under a Decree or Order ...**” Looking at the Decree reproduced above, there is no order for payment of money which could justify the Advocate to execute. The Decree

reproduced above simply stated that the Client's Chamber Summons dated 28th February 2012 was dismissed.

8. Both the Advocate and the Client expended a lot of energy submitting before me on the merits and demerits of granting stay of execution pending appeal but in my view there was no valid decree for execution by the Advocate. The execution undertaken was incompetent.

PRAYER FOR STAY PENDING APPEAL IN THE NOTICE OF MOTION

9. Although in finding above I do find the Advocate's execution was incompetent I will proceed to consider the prayer for stay. This prayer is governed by Order 42 rule 6 of the Civil Procedure Rules. That Rule requires the Applicant in order to succeed in obtaining stay to satisfy the Court that substantial loss may result unless stay is granted; show that the application has been made without unreasonable delay; and to provide such security as the Court may order for the due performance of such decree.

SUBSTANTIAL LOSS

10. The client deponed in his affidavit of 6th August 2014 as follows-

"10. THAT in the event the orders sought herein are not granted then I stand to suffer substantial loss and the intended appeal will be rendered nugatory because:-

- a. **The Colossal sum involved will ruin me and my business and the success of the Appeal after execution will not remedy the ruin.**
- b. **I now face further ruin because I am now exposed to subsequent claims, by the other firms that have acted for me in HCCC No. 40 of 2006, of colossal amounts in instruction fee already paid to the firm of Kilonzo who acted for him in HCCC NO. 40 of 2006.**
- c. **It will be extremely difficult to recover the amount from the Respondent Advocate because he has no known assets and his firm now specializes in taxing bills against former Clients.**

11. **THAT consequently, I stand to suffer substantial loss and it is only fair and just that there be a Stay of Execution of the Judgment and consequential Decree pending the hearing and determination of the intended Appeal and/or pending the filing of Certificates as required by Rule 62A(3) of the Advocates (Remuneration) Order."**

11. The Advocate in response deponed that he had been in practice for

35 years and that he is an owner of several assets, one being L.R. No. 197/110, in Karen Nairobi, valued at Kshs. 70 million. He attached the Valuation, thereof, carried out by NW Realite Limited dated 20th January 2014. The Advocate further deponed as follows-

- **THAT in response to the claim that the Applicant will suffer substantial loss, it is the onus of the Applicant to prove by way of statements of Accounts, Annual Returns and Bank Statements that his business will collapse if the said decretal sum is paid to the Respondent. In any event, the Respondent has in the past acted for the Claimant and is well aware of his financial standing being one of the oldest consultant engineers in Kenya and currently involved in several construction projects in the booming construction industries in Kenya and Africa including the following-**
- **The Claimant is the Consulting Engineer in the construction of University of Nairobi Towers which is ongoing and his fees for this particular project cannot be less than Kshs. 30 million.**
- **The Claimant is involved in a very substantial construction project in DRC Province of Katanga involving the transformation of the land of the Tenke people in a modern Urban Centre with a complete township worth over Kshs. 10 billion.**
- **The assets belonging to the Claimant in the main suit HCCC No. 40 of 2006 are several and**

worth well over Kshs. 1 billion.

- **THAT my firm is not a firm that specializes in taxing against former clients and we take great exception to the use of such statements. In the contrary, it is the Applicant who is a serial none payer of Advocates fees who keeps jumping from one law firm to another when the issue of Advocate/Client fees arises and also uses his wife Juliana Muthoni Kitololo to intimidate and harass advocates including transferring assets into her names in order to make them out of reach from creditors full particulars of which are well known to the Claimant and his wife aforesaid.**

12. In my view, and being in agreement with the depositions of the Advocate, reproduced above, the Client failed to show he would suffer substantial loss if stay of execution is not granted. It was not enough for the client to state that if stay is not granted he would suffer ruin. Why would he suffer ruin? Is it because his business is not running at a profit? If so, he did not prove it by documentation – perhaps company’s bank accounts and or its balance sheet. The Advocate on the other hand sufficiently showed that he has an asset from which he could refund the Client, if the Client succeeded in his appeal.

UNREASONABLE DELAY

13. The Ruling on Taxation was on 7th October 2011. That is three

years ago. The judgment however, the subject of the Clients appeal was delivered on 11th April 2014. The Client waited, as submitted by the Advocate, until when the Auctioneers went knocking, to seek Stay of Execution. There was a delay of four (4) months which has not been explained by the Client. I do therefore find that the Notice of Motion seeking Stay of Execution was filed after unreasonable delay, which delay was not explained.

SECURITY FOR DUE PERFORMANCE OF THE DECREE

14. In my view, because the Advocate’s execution, as stated before was

invalid and because the Client has failed to show he will suffer substantial loss if Stay of Execution is not granted and also because stay was sought after unreasonable delay I shall, in exercise of my discretion as provided under Rule 6 of Order 42 order the Client to provide security as a condition of Stay of Execution.

THE SECOND PRAYER

15. The second prayer of the Notice of Motion seeks an order requiring

the Advocate to file a Certificate of previous Advocates who acted for the Client. It is important, in order to understand that prayer, to state that that the Client was represented in **HCCC No. 40 of 2006**, previous to the representation by the Advocate, by another Law firm and subsequent to the representation by the Advocate the Client is now represented by the firm of Ndegwa Muthama Katisya & Associates. In regard to that prayer for Certificate to be provided the Client relies on paragraph 62A(3) of the Advocates (Remuneration) Order. Paragraph 62A (1) provides that where there have been a change of Advocates the costs payable are drawn in one Bill of Costs and then only by the final Advocate on record. The Client argued that paragraph 62A relates to Advocate/Client Bill of Costs as much as it relates to party and party Bill of Costs. It is on that ground the Client requests the Advocate to supply a Certificate as required under paragraph 62A (3) which provides-

“(3) The bill shall be accompanied by a Certificate setting out the dates during which all Advocates acted, together with all agreements for remuneration made with them, all sums paid to them for costs and whether those sums were paid in full settlement.”

16. There are two grounds why the prayer for Certificate to be provided is superfluous. Firstly because the Bill of Costs was filed on 29th April 2011 and was taxed on 7th October 2011, which Taxation the Client participated. It would therefore be too late to have the Certificate produced because it would not serve any purpose.
17. Secondly and perhaps most importantly is that paragraph 62A does not apply to Advocate/Client Bill of Cost but to party and party Bill of Costs. I wholly adopt what Justice D. Musinga (as he then was) stated in the case **KIMANI KABUCHO KARUGA & CO. ADVOCATES –Vs- SUNDOWNDER LODGER LIMITED [2011]eKLR** as follows-

“Regarding the submission that the Applicant’s Bill of Costs was premature, Mr. Mwendwa sought to rely on the decision of Ringera J. (as he then was) in MACHIRA & COMPANY ADVOCATES –Vs- ARTHUR K. MAGUGU & ANOTHER, Miscellaneous Application No. 358 of 2001 at Milimani Commercial Courts. In that matter the Court held, inter alia:

‘Paragraph 62A of the Advocates Remuneration Order applies to the Taxation of party and party costs and the object thereof is to avoid loading a party against whom an order for costs has been made with excessive fees as a result of change of advocates by the adverse party in the course of litigation. The principle is that no litigant should be unduly burdened with costs incurred as a result of change of advocates by the adverse party ...’

The second prayer of the Notice of Motion does therefore fail for the above reasons. The Advocate shall not be required to issue a Certificate as sought.

CONCLUSION

18. In view of the above findings I order that-
- a. **There shall be Stay of Execution of the Costs taxed on 7th October 2011 pending appeal on condition that Eng. A. S. Kitololo T/A Kitololo Consultants Engineers does provide the amount of Kshs. 9,199,868/- within twenty one (21) days, which amount shall be deposited in the joint interest earning account of the Advocates in this matter. In default execution shall proceed but only after Judgment of the taxed costs is entered.**
 - b. **Prayer No. 4 of Notice of Motion dated 6th August 2014, by the Client is dismissed with costs to the Advocate.**

DATED and DELIVERED at MOMBASA this 20TH day of NOVEMBER, 2014.

MARY KASANGO

JUDGE