



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CIVIL MISC. APPL. NO.62 OF 2010

JULIUS SAWENJA KHAKULA t/a KHAKULA & CO. ADVOCATESAPPLICANT

VS

NZOIA SUAGR CO. LTD.....RESPONDENT

AND

**EMMANUEL OTIANGALA t/a KURONYA
AUCTIONEERSAUCTIONEER**

RULING

This is a ruling on a Notice of Motion dated 12/10/2010 brought under section 1A and 3A of the Civil Procedure Act and Order 48 rule 3 and Order 50 rule 1 of the Civil Procedure Rules. It seeks for orders that this Hon. Court be pleased to set aside the warrants of attachment which were issued by the Deputy Registrar in this Miscellaneous Civil Application Number 62 of 2010 further that the auctioneer's charges and costs of this application be borne by the Respondent. By consent of the parties several miscellaneous applications of similar nature were consolidated and heard together. These are numbers 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74 and 45 – 51 and 115 – 124 all of 2010 with file no.62 of 2010 being retained.

Mr. Kiarie argued the application for the Applicant. The grounds relied on were that no decree existed at the time the Respondent applied for attachment. The facts leading to this application are that all the miscellaneous applications consolidated herein were as a result of the consent of the parties. The same were brought under section 51 of the Advocate's Act for taxation of Advocates/Clients Bill. The law requires after certificate of costs are issued, the Respondent has two options:

a) *To file a suit for execution of the costs.*

b) To file an application under section 51(2) praying for an order that the amount of taxed costs be deemed as judgment .

Once the court grants the necessary orders the Respondent is at liberty to execute. Mr. Kiarie submitted that at the time the respondent applied for execution no decree existed and the execution was therefore premature. For these reasons the counsel urged the court to set aside the warrants of attachment and order payment of all costs incurred in the erroneous attachment to be paid by the respondent.

Mr. Kakoi for the Respondent submitted that section 51 of the Advocate's Act does not require that the respondent files a suit or an application before execution. He cited the case of **MBUGUA AND MBUGUA ADVOCATES VRS KENIDIA INSURANCE HIGH COURT MISC. APPL. NO.742 OF 2005** at Milimani, where it was held that it is not necessary to file a suit in a similar matter. In the case of **Margaret Anindo vs Harambee Sacco Society High Court Misc. No.1665 of 2007** the counsel argued that a similar ruling was made. Mr. Kakoi said that Civil Procedure Act is not applicable in this case.

It is not disputed that the Advocates/Clients bills in the matters at hand were taxed by consent. Certificates of costs were later issued . Section 51 (2) of the Advocates' Act reads as follows:

“The certificate of the taxing officer by whom all any bill has been taxed shall unless it is aside or altered by the court be final as to the amount of the costs covered thereby and the court may make such order in relation thereto as it thinks fit including in a case where the retained is not disputed an order that judgment be entered for the sum certified to be due with costs.”

The plain reading of the section shows that the Respondent requires to file an application or a suit for judgment on the required certificate of costs. In this application the Respondent went ahead to apply for warrants of attachment without obtaining judgment on the taxed costs. I do not agree with Mr. Kakoi's argument that it is not necessary to file a suit or an application for judgment on the costs. In the case of Margaret Anindo which the counsel relied on, it is clear that the applicant herein had filed a notice of motion seeking for an order that the certificate of costs issued by the taxing master be deemed the decree of the court. What the court ruled is that it was not necessary for the Applicant to file a substantive suit. The reason for that finding was because an application seeking the same orders that would have been sought in a suit had been filed. It was explained by the Applicant's counsel Mr. Kiarie that an advocate has two options in law: Either to file a suit to recover costs or to file an application. I confirm that this is the correct position. There is no way that an advocate will jump the gun and purport to recover taxed costs without taking any of the two options. Similarly, in the case of **William Muthee Muthami High Court Civil Application No.91 of 2004** at Milimani the Applicant had filed an application to recover costs. The counsel for the Respondent misinterpreted the facts and the ruling in the case of **Mbugua and Mbugua Advocates**. It is very clear from the authority that the advocates launched an application by way of Notice of Motion on the 23/6/2006 for an order that judgment be entered in their favour for the taxed costs. The judgment was accordingly entered giving the Applicants the authority to execute.

The Respondent in this application had no authority to execute for the costs taxed by the Deputy Registrar. A decree was required in order to carry out the execution. It is not disputed that the Civil Procedure Rules are not applicable in this matter. Lady Justice Mary Kasango rightly ruled that the Civil Procedure Act does not apply to the Advocate's Act and that the Advocate's Act does not provide for stay of taxed costs. I concur with the honourable Judge's ruling. The initial prayer in this application seeks for stay of execution of the Applicant's property which was in order. It was granted to operate and be in force pending the determination of this application. The main prayer now before the court is for setting aside warrants of attachment and for costs of the application. It was unprocedural for the Respondent to give instructions to the Kuronya auctioneers to execute before obtaining a decree. Any costs incurred by the auctioneer or anyone else in this application ought to be paid by the Respondent.

For the reasons that I have stated above I allow the application dated 12/10/2010. The Respondent will meet the costs of this application and those of the auctioneer on presentation of the fee note by the Kuronya auctioneer or through assessment. I hereby so declare and decree.

F. N. MUCHEMI

JUDGE

Ruling delivered in open court this 10th day of May 2011 in the presence of Mr Khakula for the applicant and Mr Situma for Kiarie for the Applicant.

F. N. MUCHEMI

JUDGE