



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Civil Miscellaneous 42 of 1993
M.M. KIOGA & CO. ADVOCATES APPLICANT

VERSUS

JOSEPH MACHARIA 1ST RESPONDENT
WAWERU THIRIKWA 2ND RESPONDENT

RULING

The genesis of this matter was the taxation of advocate/client bill of costs. Following the said taxation on 23rd May 1994, the advocate M.M. Kioga & Co. Advocates applied for execution of the taxed amount. The execution was by way of attachment and sale of the judgment debtor's parcel of land *Kiirua/Naari – Maitei/339*. It should be noted that execution was allowed to proceed before entry of judgment of the taxed amount. That however is not before me for consideration. That parcel of land belonged to Waweru Thirikwa. The advocate proceeded to obtain prohibitory order against the property and when the setting of terms of sale was due to be heard, Thirikwa made an application by way of Chamber Summons filed in court on 24th October 2002. Although this is a High Court matter, that application was heard by the Senior Deputy Registrar. The application sought the terms and conditions of sale and the prohibition order to be declared null and void. By the ruling of the Senior Deputy Registrar of 14th May 2004, that application was rejected. The advocate therefore continued with the process of selling the attached property. Thirikwa, through his advocate made an application by Notice of Motion dated 15th June 2004. The application sought to stay the sale of the property and also sought the setting aside of the taxation of the advocate's costs and all the subsequent orders. That application was heard by Sitati J. The learned judge delivered her ruling on 21st February 2006. The learned judge granted stay of the sale of the property. In addition, the learned judge gave opportunity to Thirikwa to object to the taxation as provided under paragraph 11 (1) of the Advocates Remuneration Order within 14 days. The judge also ordered that Thirikwa would deposit Kshs. 79,469.60/= in an interest earning account in the joint names of both parties advocates within 14 days of the date of ruling. From the file, it is not clear what transpired thereafter. Counsel for Thirikwa however did write to the Deputy Registrar by their letter dated 27th February 2006 seeking reasons for various items in the taxed bill to enable him file the objection proceedings. Thereafter, an application was made by Notice of Motion seeking to set aside the orders of Sitati J. That application filed on 3rd March 2006 was heard by Ouko J. The learned judge, by his ruling dated 8th June 2007 had this to say:-

“Taking into account the casual approach the respondents (Thirikwa) or their counsel have giving this serious matter, and bearing in mind that they have deliberately failed to comply with the conditions for which the stay order was issued, I will review the order of the court issued on 21st February 2006 (of Sitati J.) by vacating it, and order execution to proceed.”

From the record, it does seem that the property was offered for sale by the auctioneer and the auctioneer did eventually sign an acknowledgement receipt acknowledging payment of the 25% of the purchase price by the purchaser. That acknowledgement receipt is dated 30th November 2007. It is in that background that Thirikwa has now brought before this court an application that he entitles, “Notice

of Objection of 1st applicant against sale by auction of the land title number Kiirua/Naari-Maitei/339 and uttering of false documents.” It is dated 25th January 2010. By that application, Thirikwa seeks for:-

1. ***“The respondent’s case all consequential orders be set aside and be substituted to be dismissed and call it (sic) proceedings into this Hon. Court.***
2. ***Sale by auction of the same (sic) be revoked. Sale of land title number Kiirua/Naari/maitei/339.”***

The grounds upon which Thirikwa relies upon in his application are that the advocate obtained an order of sale of his land by fraud, collusion or perjury. That the first applicant (Thirikwa) land was sold despite having deposited Kshs. 580,000/= on 3rd May 2006 in joint account of the advocates as per order of the court of 21st February 2006. Further, that Thirikwa was not properly represented by his advocate and finally that Thirikwa’s land was sold because of negligence of his advocate on record in failing to inform the court that he had deposited into the joint account Kshs. 580,000/=. In a short affidavit sworn by Thirikwa, he alluded to the fact that he had not obtained justice in this case due to lack of *viva voce* evidence and further that section 3 (3) of the Law of Contract Act was not complied with. It is to be appreciated that Thirikwa filed the present application in person and since he is a lay man that may very well explain why it is not coherent. However, in the light of the ruling of Ouko J. of 8th June 2007, where the Hon. Judge found that Thirikwa had failed to comply with the orders of Sitati J., the present application is misconceived. It is misconceived because unless and until the orders of Ouko J. are either set aside or appealed against, this court would have no jurisdiction to entertain the reopening of the issue relating to the execution by M.M. Kioga & Co. Advocates against Thirikwa. It is no wonder that counsel representing the firm of M.M. Kioga & Co. Advocates described the application as scandalous, argumentative and further stated that it did not support any facts. I make a finding that the application is incompetent being very aware of the overriding objective of the Civil Procedure Act as stated in Section 1A (1) of that Act. That section provides:-

“The overriding objective of this Act and Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act.”

The Court of Appeal in the case **Muthike Mwaniki And Genesio Kubunya Njagi** Civil Application No. NAI 91 of 2009 (UR 57.2009) in respect of the overriding objective stated:-

“The courts including this Court in interpreting the Civil Procedure Act or the Appellate Jurisdiction Act or exercising any power must take into consideration the overriding objective as defined in the two Acts. Some of the principal aims of the overriding objective include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing.”

Even bearing in mind that provision, this court would have no jurisdiction to entertain Thirikwa’s application in view of the orders made by Ouko J. on 8th June 2007. On the issues relating to Thirikwa’s advocate and on the alleged negligence, that is a matter for consideration by the Law Society of Kenya. I do accept as argued by learned counsel Mr. Kaumbi that Thirikwa’s application is incompetent. The application therefore dated 25th January 2010 is hereby dismissed and the costs thereof are awarded to M.M. Kioga & Co. Advocates.

Dated and delivered at Meru this 2nd day of July 2010.

MARY KASANGO
JUDGE