



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 48 of 2008

CHRISTOPHER ORINA KENYARIRI T/A

KENYARIRI & ASSOCIATES ADVOCATES. APPLICANT

VERSUS

PETER SIRO NYARIKI ANGWENYI. RESPONDENT

RULING

The application before the court is a Chamber Summons dated 16th March 2009. The relevant prayers in the application which concern the court at this moment is prayers 3, 4 and 5 they state: -

- (3) That an order do issue restraining the applicant/respondent, his servants, Agents and other parties from attaching and/or selling the Respondent/Applicant's assets until further orders of this court.
- (4) That the order made on 28th January, 2009 allowing the applicant/Respondent's Bill of Costs dated 27th August, 2008 as drawn and the decree and execution process flowing therefrom be set aside.
- (5) That the costs of this application be provided for: -

The grounds upon which the application is based included

- (a) that the applicant or his advocate, was not served with the Taxation Hearing Notice
- (b) that the proclamation by the Auctioneers was not properly served upon the applicant or his advocate and
- (c) that the assets listed in the proclamation are fictitious as the latter never entered the house.

The applicant concentrated on the manner of service of the Taxation notice. He urged that the clerk who swore to have received the notice did not belong to the applicant's advocate since the advocate has never had one and uses none. He further argues that whoever the clerk was, he had made it clear to the process-server that he would only take the Taxation Notice to forward it to the advocate concerned who would then confirm whether the date for taxation was convenient before receiving it as a service.

The court has examined the process-server's affidavit of service sworn on 21st January, 2009 by one Christopher Orina Kenyariri, an advocate of the High Court. It confirms the fact that he served someone

he terms “**the clerk**” who had instantly told him that he would forward the Taxation notice to the advocate concerned who would in turn confirm whether the date was convenient first before receiving the notice.

A reasonable interpretation of what the clerk said on receiving the Taxation notice is that he was not accepting it until the advocate accepts it.

Furthermore the so called “**clerk**” was not identified by name nor was the advocate to receive service of the Notice identified. This is important on the face of the applicant’s denial that he does not at all employ a clerk-who could have been served as claimed by the process-server.

It is accordingly decided by the court that even if the facts deponed by Mr. Christopher Orina Kenyariri were true and they happened, nevertheless the service so described would still have been improper one in view of the fact that the said “**clerk**” is not known nor identified by the process-server himself in his affidavit.

The result is therefore that service of the Taxation Notice was improper and imperfect.

What follows is that had this fact been drawn to the attention of the Deputy Registrar before whom taxation took place, she would most likely and indeed ought to have ordered for a fresh service. She would not have likely proceeded with the taxation in the absence of proper service. But she actually did so because of the representation that a good service had been made by the Respondent. The result was that a certificate of taxation was issued and the execution process undertaken, again by the respondent herein.

To prevent damage occurring before rectification of the situation is obtained by the applicant, the latter seeks an order restraining the Respondent who is the original Applicant/Plaintiff from attaching or selling applicant’s assets until further orders of this court. He also seeks that this court sets aside the order of the Taxing Master dated 28th January, 2009 allowing the Bill of Costs dated 27th August, 2008.

I have carefully considered this application and in particular, the two prayers above noted. While I am comfortable to deal with the injunction prayer until the applicant applies to rectify the situation facing him, I am however sure that the second prayer of setting aside belongs to the jurisdiction of another court, not this court. I am aware that this court’s jurisdiction is wide but where the law has provided a manner of seeking any given relief, then a party seeking such relief has an obligation to follow the law.

In this case what the applicant/defendant is seeking is to set aside an order made by the taxing master in the absence of proper service and in the absence of the applicant who was not served. The taxation order, if I understand the issue, was therefore made exparte. The applicant’s relief appears to me to be in applying to the same taxing master to set aside the exparte orders of taxation made on 28th January, 2009. His approach to this court to set the said orders aside was improper and misconceived. He could only approach this court to set aside the said orders in an appeal if such a method was available to him.

In the circumstances this court will grant the injunction order sought but only for a limited period to allow the applicant to sort himself out. On the other hand, this court will not exercise its possible discretion in the manner prayed by the applicant.

ORDERS

- 1) The applicant/defendant is hereby granted restraining orders against the Respondent/Plaintiff in terms of prayer (3) of the application dated 16th March, 2009 for a period of 6 months.
- 2) The prayer to set aside the taxing Masters orders of 28th January, 2009 is hereby dismissed.
- 3) Costs of this application are to the applicant/defendant to the extent of 50% only the same to be

agreed upon or taxed.

Dated and delivered at Nairobi this 29th day of May 2009.

D A ONYANCHA

JUDGE