REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Miscellaneous Application 184 of 2008

IN THE MATTER OF AN ADVOCATE

AND

IN THE MATTER OF ADVOCATE'S REMUNERATION ORDER

BETWEEN

RAJNI K. SOMAIA ……..APPLICANT

-VERSUS-

DELPHIS BANK LTD ……. RESPONDENT

Coram:

Mwera Judge

Marete for the Plaintiff/Applicant

Gichaba for the Defendant/Respondent

CC. Raymond.

R U L I N G

The respondent/applicant bank (client) filed a chamber summons dated 10.3.2009 under O9A r. 10, O9B r. 8, O21 rr. 22, 23, 91 for the main orders against applicant/respondent (advocate) that;

a) a decree given herein be set aside and

b) that the execution of that decree abides the determination of HCCC 66/08 (O.S).

To rearrange the grounds on which the application was based and from arguments that were heard, it was stated that a notice of motion dated 17.10.2008 by the applicant/advocate brought under S. 51 of the Advocates Act was set down for hearing on 23.2.2009 and in absence of counsel for the respondent/client bank, orders were given:

i) entering judgment for costs of Ksh 4,087,033/10 in favour of the advocate and

ii) permitting the advocate to execute a decree therefrom.

(Note: The above was in respect of M/s. Civil Applications no. 361, 362 and 459 all of 2003, where the advocate's bills of costs were taxed totaling the sum of Ksh 4.0m above). The advocate then extracted a decree without issuing a notice of judgment to the client or giving it a draft decree to approve, then he had the same put in the course of execution by serving warrants of attachment and sale on the client – bank on 6.3.2009. So because the applicant/client/bank had not been represented at the hearing of 23.2.2009 and it had not seen the decree that followed to approve or otherwise, the orders of 23.2.2009 should be set aside because the intended execution would prejudicially affect the business and reputation of the applicant/bank. And that in any event there was HCCC 66/08 (O. S) pending between the parties to take account of Ksh 14.05 m said to be due from the respondent/advocate to the bank. Mr. Marete who argued the summons swore an affidavit whose substance is partly reproduced above and shall presently appear below.

Mr. Gichaba did not agree with the prayers as put and his submission is as below.

Considering Mr. Marete's position he argued that indeed the hearing notice for 23.2.2009 was received in his office on 26.1.2009 but it was never brought to his attention at all. It was in the course of preparing for some other proceedings, that he came by that notice taken ex parte by the advocate and on a date his firm did not participate in taking that hearing date. Mr. Marete freely took responsibility for that oversight/omission but added that even so, the advocate/respondent did not give notice of the judgment obtained ex parte and the applicant was not shown the consequent decree to approve or otherwise, before it was put in the process of execution. Then he alluded to the pending HCCC 66/08 (O. S) in respect of similar causes to the ones involved in the motion of 17.10.2008, earlier referred to.

Counsel appeared to argue that they were not invited to take the date of 23.2.2009 together but then it transpired that that date was taken on 19.1.2009 – the same day M/s. Njoroge Regeru & Co. Advocates who briefed Mr. Marete in this matter, came on record. Without determining exactly at what time of the day the date of 23.2.2009 was taken by the respondent/advocate and at what time the notice of change was filed by Mr. Marete's firm, it was not easy to determine and lay blame on the advocate for not inviting that firm in fixing the date of 23.2.2009. The case of Chemwolo & Anr –vs- Kubende [1986] KLR 492 was cited to emphasize that this court had a wide discretion to set aside a judgment entered in default pursuant to O9A r. 10 CPR. That case also added that if such judgment is regularly entered the court will not usually set it aside unless, to do justice, there are triable issues with a prima facie defence that warrants a trial.

Mr. Gichaba went over several dates when the applicant bank had not appointed counsel to represent it in the matter and it had first Mr. Siganga, then Mr. Aringo holding brief for the-yet-to-come on record M/s Njoroge Reguru firm which did so on 19.1.09. That is also the day the advocate took 23.2.2009 for hearing of the application dated 17.10.2008. Mr. Gichaba claimed, and the court was not given an alternative side, that it was on that 19.1.09 after setting down the date, that Mr. Marete's firm served the notice of appointment. And with that, the hearing notice for 23.2.2009 was served on 26.1.2009 as Mr. Marete conceded above. The court was told that all along before and after Mr. Marete's firm came on record the motion of 17.10.2008 was served. There were no grounds of opposition or replying affidavit filed before the hearing on 23.2.2009 when Mr. Marete did not appear, or even as at the time of these proceedings. Thus Mr. Gichaba, continued, the bank did not appear on the known day of hearing the motion, and it had not filed papers to oppose it at all. Accordingly the ex parte orders of 23.2.2009 were deserved.

Counsel moved on to argue that O21 r. 6 CPR did not apply (to issue 10 – day notice of judgment entered against defendant in default of entering appearance or filing defence). That the judgment here did not arise from a suit commenced by plaint. It was as per S. 51 Advocates Act and the applicant bank knew of the date orders were sought to obtain the judgment which was not a result of formal proof envisaged under O21 r. 6 CPR. The court heard that similarly O 20 7(2) CPR (which is permissive and not mandatory that the other side should approve a decree) did not apply. And in any event the applicant/bank could suffer no prejudice, the decree having been regular in all respects. And that the

applicant/bank's conduct, regarding setting down the present application was not without fault. It was filed on 10.3.2009. Twenty – one days were granted to set it down for hearing inter partes. The applicant did not comply, with no reason given. It did not therefore deserve the discretionary orders it seeks. And that save for what Mr. Marete conceded openly in court, nowhere in his affidavit did he own up to having been served with the hearing notice for 23.2.2009 earlier.

And lastly that there would be no purpose served by setting aside the orders of 23.2.2009. What then, with the application of 17.10.2008 still unopposed to date? Nothing at all. The bank had not, in good faith, deposited the sum in question at all. Two cases were cited in regard to a purpose to be served if the orders were set aside – Patel –v-s- East African Cargo Handling Services Ltd [1974] EA 75 and a party wanting in conduct and candour (*See* Mbogo & Anr –vs- Shah [1968] EA 93), does not deserve discretionary orders.

In this court's view the discretion to be exercised either O9A r. 10 or 9B r 8 CPR falls when proceedings leading to the judgment (s) to be set aside have been precipitated by a claim commenced by way of plaint followed by serving summon(es) to enter appearance e.t.c. Here the judgment complained of arose from the court being moved in accordance with S. 51 Advocates Act. That is a certificate of costs has been issued and the party in whose favour it is moves the court to make the sums therein stated a judgment from which a decree is extracted and then executed. One would be inclined to surmise that a judgment is a judgment by whatever course followed, but that would appear to mix the respective courses with no justification. If such was to be the position, then the provisions of law would clearly state so. Here this court is disposed to treat a judgment obtained under a plaint different from one under S. 51 Advocates Act.

Having taken that course, this court is satisfied that the judgment obtained in this cause on 23.2.2009 was proper. The bank's lawyers were notified of that date well in advance. Mr. Marete admitted from the Bar that much and accordingly this court was of the mind that his firm which had once asked Mr. Aringo to hold its brief, even before it was appointed, did instruct him to appear on 23.2.2009. He did, but developed cold feet to appear in court when Mr. Gichaba told him of the business of the day. The replying affidavit of Mr. Somaia clearly stated so (*see* para 14) and the same was not denied. In any event all along, even to date, the applicant bank has not filed any papers to oppose the motion of 17.10.08, heard on 23.2.2009. The overall picture is that the orders of that date were regularly and properly obtained. Should they be set aside? This court does not think so. The bank has not shown interest to oppose the prayers in the motion dated 17.10.2008 even as of now. So what will setting aside serve? Nothing at all. What about HCCC 66/08 (O.S) alluded to by the applicant/bank? If oversight or error may be excused, it was not demonstrated before thus court that MISC. APPL. NO. 361, 362 and 459 all of 2003, subject in the motion of 17.10.2008 – fall under HCCC 66/08 (O. S) due for hearing later.

So hearing of that O. S need not be brought into these proceedings.

In sum, this application is dismissed with costs.

Orders accordingly.

Delivered on 4.6.2009.

J. W. MWERA

JUDGE

JWM/hao