



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc. Appli. 207 of 2007

MERCY NJERI KIUNA APPLICANT

Versus

GITAU KARIUKI & CO. ADVOCATES..... RESPONDENT

RULING

In the Chamber Summons dated 9th April, 2008 and filed same date, under Order IXB Rule 8 and Order XXI Rule 22 of the Civil Procedure Rules and also section 3A of the Civil Procedure Act, the Applicant Mercy Njeri Kiuna had four prayers the first one being for certification of urgency, which was granted by the Duty Judge, and the last prayer number 4 being for costs of the Chamber Summons which the Applicant wants me to grant together with the main prayers numbers 2 and 3. Prayer number 2 states as follows:

“There be a stay of execution of the Decree issued on 4th March 2008 and the warrants of attachment thereof arising out of an ex-parte Judgment entered herein and other subsequent orders issued thereafter pending the full hearing and final determination of this application.”

A part from the Duty Judge certifying of this Chamber Summons urgent, he also granted on interim order which subsists to-date and lapses with the delivery of this ruling. That is what prayer number 2 just quoted above requires and since the Applicant got it as he wanted it, it means that the remaining important prayer is only number 3 which states as follows:

“That the ex-parte Judgment entered herein on 19th February, 2008 and the certificate of Taxation dated 30th July, 2007 and the subsequent orders issued by this Honourable Court be set aside.”

Much has been brought to my attention but I elect to be brief. I will not be worried about the sum of money mentioned by the Applicant as the decretal sum as opposed to any other sum of money. That is for the parties to clear with the Deputy Registrar.

But while I take note of the fact that the Applicant has brought this Chamber Summons because she says she was neither served with the papers concerning the Respondent’s bill of costs nor served with subsequent Notice of Motion in the instant case praying for Judgment, I must in the first instance be concerned with the procedure adopted by the Applicant to challenge the Judgment dated 19th February, 2008 and the certification of Taxation dated 30th July, 2007.

Mr. Gitau the Respondent Advocate, who was facing Mr. Gatumuta the Applicant's counsel in this matter, pointed out that the Judgment dated 19th February, 2008 now under attack was entered under a procedure instituted by a Notice of Motion under Section 51 (2) of the Advocates Act in accordance with Order L (1) of the Civil Procedure Rules. Those proceedings he maintained are different from proceedings covered by order IXB of the Civil Procedure Rules and therefore Order IXB will not apply. He went to say that to challenge the Judgment dated 19th February, 2008, the Applicant ought to have moved this court by Notice of Motion under Order L (17) of the Civil Procedure Rules, Mr. Gatumuta did not agree.

But what Gitau said would perhaps, and I say “**perhaps**” because I am yet to pronounce my opinion on the issue, have been proper only for the purpose of challenging the Judgment; because for the purpose of challenging the certificate of Taxation, the Applicant had to invoke paragraph 11 of the Advocates (Remuneration) Order and further, that had to be done in separate proceedings with a special name which is “**Objection**” within a limited period, normally 14 days from the date of receiving reasons for the challenged taxation from the Taxing Officer. Rule 11 specifically says the “**Objection**” to the High Court be by “**Summons**” meaning “**Chamber Summons**” and Notice of Motion, would have been acceptable. The limitation of time must be observed so that in case of lateness, a court order enlarging or extending time must be sought and obtained. Further all those “**Objection**” proceedings must be undertaken before proceedings for Judgment under section 51(2) of the Advocates Act are undertaken.

That being the position, it follows that challenging the certificate of Taxation, the way the Applicant is doing in this Chamber Summons dated 9th April, 2008 is grossly misconceived as the same is:

(a) out of time;

(b) wrong procedurally;

and

© not covered by the applicable law.

This court will therefore have no lawful way of setting aside the Certificate of Taxation complained of. Since the setting aside of the Certificate of Taxation is an integral part of prayer number 3 in this Chamber Summons, it follows that the whole of prayer number 3 fails.

However, in case it is held that the two limbs in prayer number 3 can be separated to be considered to stand or fall separately, then the limb concerning the certificate of taxation having failed as stated above, I now remain with the limb concerning the Judgment and again will not agree with Mr. Gitau that the correct application is a Notice of Motion under Order L Rules 1 and 17 of the Civil Procedure Rules.

This is because, like an ordinary suit which is instituted by a Plaintiff or an originating summons, under section 51 (2) of the Advocate's Act, proceedings are instituted by way of a Notice of Motion.

But when it comes to “**Hearing And Consequence of Non-attendance**” in any of those suits or proceedings, the correct applicable procedure is in Order IXB where proceeding by Chamber Summons is, proper.

Having said the above, I now have to look at the reasons the Applicant is giving to explain why she failed to oppose M/s Gitau Kariuki and Co's Notice of Motion dated 28th September, 2007, not only by failing to file a replying affidavit and/or grounds of opposition, but also by failing to be present during the hearing of the said Notice of Motion on 19th February, 2008. It is that she had not instructed the said Advocates to act for her in HCCC No.1260 of 2006 and was not served in the Taxation proceedings as well as in the Notice of Motion dated 28th September, 2007.

Mercy Njeri Kiuna was the 6th Defendant in HCCC No.1260 of 2006 and if she did not instruct M/s Gitau

Kariuki & Co., Advocates to act for her in that suit, has not explained to this court how she entered appearance and filed a defence, for example in that suit. The process server, in this HC Misc. Application No. 207 of 2007 was Mr. Gitau who has sworn affidavits in this court saying he was serving documents at the home of the Applicant upon the Applicant's younger sister who was giving her name as Joyce Kianira. The Applicant says she knows no sister by that name and stops there without demanding to cross examine the process server on that issue and on the issue that she had not instructed the same person to defend her in HCCC No.1260 of 2006. Yet this was a proper case for such cross examination to be done.

In the circumstances, I find it difficult to believe what the Applicant is saying in this Chamber Summons. I make it clear that in a suit like this one, personal service is not mandatory because service of summons upon an adult member of the person's family is sufficient - see Order V Rule 12 and the questioned service effected in this matter was therefore good and acceptable service. Accordingly this limb of prayer number 3 also fails.

On the whole therefore, Chamber Summons dated 9th April, 2008 be and is hereby dismissed with costs to the Respondent Gitau Kariuki & Co., Advocates.

Leave to appeal granted.

Dated this 17th day of July, 2008

J.M. KHAMONI

JUDGE

Present:

Mr. Gatumuta for the Applicant

Mr. Gitau for the Respondent

Kabiru Court Clerk