



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Misc Civil Case 839 of 2005

KULECHO & CO. ADVOCATES..... PLAINTIFF

VERSUS

JOEL KIEMA MUTINDA.....1ST RESPONDENT

VIOLET NDANU MUTINDA.....2ND RESPONDENT

RULING

The respondents seek by Chamber Summons dated 10th April, 2007 two main orders:- a stay of execution and to set aside a default judgment entered on 1/2/07. The application is brought under Order XXI Rule 22, Order 1XB Rule 8 of the Civil Procedure Rules, Sections 3 and 3A of the Civil Procedure Act and all other enabling provisions of the Law. The application is made upon the grounds: that judgment was obtained by concealing material facts; that the respondents' advocates were not properly served; that the judgment is in conflict with the ruling of 22.9.2006, and that the respondents assets were attached without proclamation.

There is a supporting affidavit sworn by the 2nd respondent in which it is deponed inter alia that on 22.9.2006 the respondents were allowed to file a reference from a taxation in which they were contesting more than KShs.200,000.00; that the court allowed them 7 days within which to request for reasons of taxation which condition had been complied with; that notwithstanding the compliance the court had proceeded to entertain the applicant's application for judgment even though their advocates had not been properly served with a hearing notice in respect of the application for judgment, that auctioneers had now attached their property even without serving a proclamation upon them and that unless the application is allowed they will suffer substantial loss since the amount contested is more than 200,000.00.

The application is further supported by a supplementary affidavit sworn by Benjamin Mwikya Musyoki the respondents' advocate. It is deponed in that affidavit inter alia that the person alleged to have been served with the application for judgment was not the advocates employee and had never worked for him at all and that even if the notice had been received the respondents should not suffer for the advocate's mistake. It is also deponed that the auctioneer who attached the respondents' property does not have a licence and the attachment is therefore illegal and that had the court been informed that the respondents had challenged the taxation, judgment would not have been entered for the applicant.

The applicant has opposed the application upon the grounds set out in the replying affidavit sworn by Kulecho Kwoba an advocate in the applicant firm of advocates. It is deponed inter alia by the said advocate that the judgment sought to be set aside is proper and should stand. He has further averred that the respondents were allowed to file a reference and in that regard the court gave them 7 days within

which to request for reasons for taxation which they failed to and that the respondents' advocates were properly served with a hearing notice while the respondents were served with a proclamation by the auctioneer. In the premises, the respondents' application should be dismissed.

I have carefully considered the application, the affidavits and the submissions of counsels appearing. Having done so I take the following view of the matter. There are two main issues to be determined in this application:-

- 1) **Were the respondents' advocate served with a hearing notice in respect of the application for judgment?**
- 2) **Have the respondents' advocates requested for reasons for taxation?**

If there was no service or no proper service the ex parte judgment should be set aside **ex debito justitiae** and that is irrespective of the merits or demerits of the respondents' answer to the applicants' application. In this application the respondents advocates maintain that they were not served with the hearing notice aforesaid. The contention that they do not and have never had a Peter in their employment has not been controverted by the applicants. Yet the hearing notice served upon them appears to have been acknowledged by one **Peter**. I am not therefore satisfied from the affidavit evidence before the court that the respondents' advocates were served with the hearing notice in respect of the applicant's application for judgment.

I have also perused the Ruling of Hon. Kasango, J. of 26.1.2007. The Learned Judge granted the applicant's request for judgment on the ground that the respondents had not requested for reasons for taxation from the Deputy Registrar within the time the Learned Judge had appointed. The respondents have exhibited "**VNI**" which is a letter by their advocates dated 23.9.2006 in which reasons for taxation were requested. That letter was duly acknowledged by the court on 25.9.2006 which was within the period appointed by the Learned Judge. In the premises it is probable that if that position had been presented to the Learned Judge, judgment could probably not have been entered as sought by the applicants.

The upshot of my consideration of the respondents' application is that the judgment entered against them in favour of the applicants must be set aside **ex debito justitiae**. The application dated 10.4.2007 is accordingly allowed in terms of prayers 3 and 4 thereof.

Costs shall be in the cause. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MAY, 2007.

F. AZANGALALA

JUDGE

Read in the presence of:-

Okoth holding brief for Wesonga for the Respondent and Gitonga holding brief for Musyoki for the applicant.

F. AZANGALALA

JUDGE

18/5/07