



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc. App. 477 of 2006

JASON ONDABU T/A

ONDABU & CO.ADVOCATES ::::::::::::::::::::DECREE HOLDER/RESPONDENT

VERSUS

KODECK NYAMWEYA OKWORO ::::::::::::::::::::JUDGEMNT DEBTOR/APPLICANT

RULING

The events leading to the application were sparked off by the lodging of an advocate's client's bill herein on 20th June 2006 seeking the sum of 55,519.00. There is a notice for taxation taken out but the same does not bear a filing stamp. There is a supporting affidavit filed in court on 28th July 2006 but sworn on 27th July 2006. The key deponents in respect of the same which are relevant to this ruling are paragraphs 2,3,4 and 5. The salient features of the same are that the advocates obtained instructions from the applicant to carry out transaction to enable the client purchase 10 acres of land at Kshs 1,700,000.00, which 10 acres was to be hived out of property consisting 90 HA. They engaged a surveyor to subdivide the same into two portions so that they could get a title deed. They prepared transfer documents which were signed by the parties leaving a copy for them. The client agreed to pay them Kshs 44,400.00 to cover the cost of the transaction but only paid 2,000.00 hence the filing of the bill for taxation.

A perusal of the record shows that taxation was done ex parte on 25.7.2006 after the Deputy Registrar was satisfied that the other side had been served. It is indicated on the record that the R/S was seen but a copy of the same had not been filed on the record. The ruling was given on 17.08.06 taxing the bill at Kshs 52,449.00 and certificate of taxation issued on 6.9.2006.

On 20th February, 2007 the Counsel filed an application under Section 51(2) of the Advocates Act and Order L rule 1 of the Civil Procedure Rules and all enabling provisions of the law seeking judgment against the client for the sum of Kshs 52,449.00.

The said application came before this court on 6.3.2007 and the court being satisfied that the Respondent to that application who is the current applicant had been duly served, as he was known to the process server granted the said application ex parte. Following the orders made on 6.3.2007 a decree for the amount was duly drawn and warrants for attachment in execution issued on 30.3.2007. This prompted the current applicant to file this application under Order XX1 rules 22(1) Rule 6, Order 1XB rule 8, Section 3 of the Civil Procedure Act and all enabling provisions of the law seeking orders that the ex parte decree issued by this Honourable court on 6.3.2007 and warrants of attachment issued on 30th March 2007 be stayed pending hearing inter parties of the application and consequently be set aside due to non disclosure of material facts by the Decree holder Respondent which Respondent should be ordered to pay costs of the application. The matter came to court under certificate of urgency on 9.5.2007 whereby the applicant

was given a conditional order for stay pending hearing inter parties on condition that the decretal sum was deposited in court. This ruling is in respect of the interparties hearing.

The grounds in support of the application are set out in the body of the application, supporting affidavit, annexures and oral submissions in court. The major ones are that:-

- (1) There has never existed an advocate client relationship between the disputants.
- (2) That it is true that the applicant purchased land within Kajiado District but denied that the same was curved out a bigger portion of land. The land he purchased already had a title deed comprising 10 acres going at a price of Kshs 300,000.00 and not the exaggerated sum of Kshs 1,700,000.00.
- (3) That no survey was carried out as the land already had a title deed. That all that Counsel did for him was to witness the execution of a transfer form.
- (4) That he was never served with the application for judgment on the taxed costs. Save that some papers relating to Misc. Application 427 of 2006 were left in one of his matatus in Nakuru Town. When he made efforts to find out what the papers were all about, he found that they related to some other papers.
- (5) He was surprised when Auctioneers descended on him in connection with proceedings, in Mis.Appl.477/06. He made efforts to trace records and then filed the current application seeking stay or setting aside of the decree in question.
- (6) They also maintain that the documentations relating to the said land transaction exhibited by Respondent advocate are a forgery as they relate to land other than that which he was buying and the signature of the vendor and seller are forgeries.
- (7) The applicant did not comply with the civil procedure rules concerning issuance, approval and service of the decree before setting execution process in motion.

In reply Counsel for the Respondent advocates submitted that as per deponents in the replying and further replying affidavits the respondent maintains that he was given instructions to act for the applicant. These instructions are given once and last the entire transaction.

2. The Return of Service is clear and shows that the applicant had notice of the proceedings but chose not to appear. They maintain service was proper.
3. That none of the provisions of law cited by the opposite party applies to those proceedings. Further that matters complained of fell under the Advocates Act to which the Civil Procedure rules do not apply.
4. On the basis of the foregoing he urged the court to disallow the application because the decree is proper as he had instructions to act for the applicant in the said land transaction.

On the law the applicants Counsel referred the court to **HALISBURYS LAWS OF ENGLAND VOLUME 44 page 62** paragraph 85 line 9 from the bottom where it is stated “*It has been said that it is the duty of a solicitor to obtain a written authority from his client before commencing a suit, and certainly it is desirable that for the sake of both solicitor, and client, that the retainer should be reduced into writing so that its terms may be perfectly clear and beyond dispute*”. At page 64 paragraphs 88 line 1 –4 it is stated “*As a general rule a person even if he is receiving legal aid, has the right to choose whom he will employ as his solicitor. Conversely a person has no authority unless specifically authorized, to retain a solicitor to act on another persons behalf*”. At page 118 paragraph 153, it is stated “*Before – after or in the course of the transaction of any non-contentious, business a solicitor, and his client, may make an agreement as to the solicitors remuneration in respect of it. The agreement must be in writing, signed by the person to be bound by it or his agent in that behalf. The agreement may provide for*

remuneration by a gross sum, commission or percentage, or by salary or otherwise and at the option of the parties it may be inclusive or exclusive of disbursements”.

The court was also referred to the case of **IN RE A SOLICITOR [1955] 1Q.B 155** where it was held that “on the plain meaning of Section 57 (3) of the solicitors Act 1932 an agreement between solicitor and client with regard to the amount of charges for non-contentious business must be in writing in order to displace the authorized scale, accordingly the alleged oral agreement could not be relied on by the client”. In the case of **WATTS VERSUS THE OFFICIAL SOLICITOR [1936] 1 A.E.R. 249** it was held that: “as the official solicitor had the same right as any other litigant to choose who should be his solicitor and was entitled to act for himself he was entitled to control the defence of himself as representative of the deceased defendant and the change of solicitor on the record was properly made and the learned judge had no jurisdiction to make the variation complained of”

The Respondent, relied on the case of **WILLIAM VERSUS BANK OF BARODA (K) LTD NAIROBI MILIMANI HCCC NO.91 OF 2004** in which Kasango J. at page 3 of the ruling made observation that she was of the view that in respect of taxed costs there cannot be a stay of execution as the learned judge had ruled so in the case of **SANDE INVESTMENT LTD AND 3 OTHERS VERSUS KENYA COMMERCIAL FINANCE CORPORATION AND FIVE OTHERS** (citation not given). The finding of the learned judge as set out at page 4 of the ruling are “*The Civil Procedure Act does not apply to the Advocates Act and the Advocates Act does not provide for stay of taxed costs. More over costs being what they are that they are awarded to a party who either succeeds in its claim before court or a party who succeeds to have a claim dismissed. In the courts view. It is not just for the court to stay execution of such costs. Such a party having so succeeded should not be prevented from being compensated or from enjoying the said compensation*”. That finding had been drawn from a finding by the court of appeal in the case of **FRANCIS KABAA VERSUS NANCY WAMBUI AND ANOTHER CIVIL APPEAL NO.298 OF 1996** in which the Court of Appeal had this to say “*The application according to the notice of motion is to stay the order of Amin J, in which he dismissed the applicants suit then before him. Before us the applicant says that what he wants is a stay of an order that he should pay costs. But this is not really what the order of Amin J. was all about. In any case even if that were so, the appellants, if he succeeds in his appeal, would be refunded his costs. Further more, we do not think that stay can be granted in respect of costs.*”

On the courts assessment of the facts herein there is no dispute that the subject of these proceedings is taxed costs in a non contentious matter wherein the advocate asserts to have rendered professional services worth the amount charged while the client says that the services rendered were minimal and what was paid was sufficient to cover the services rendered.

- (2) It is also not disputed that the grieving orders were given exparte by the Deputy Registrar allegedly due to none attendance of a party allegedly duly served.
- (3) It is not disputed that allegations bordering on fraud have been made.
- (4) It is not disputed that the proceedings are affected by both the Advocates Act in so far as the Advocates remuneration rules are concerned and the civil procedure rules in so far as the adoption and execution of the resultant decree is concerned.
- (5) It is also common ground that there is no document spelling out the terms of the instructions.

It is on the basis of the foregoing common ground factors that the applicant has moved to upset the decree herein, without offering suggestions as to what further steps are to be taken up herein to help resolve the matter. The respondents counsel on the other hand says that the matter is sealed and there is nothing that this court can do for the applicant as Civil Procedure Rules do not apply to the Advocates Act Reliance was placed on he case of **WILLIAM MUTHEE MUTHONI VERSUS BANK OF BARODA (K) LTD MILIMANI HCCC NO.91 OF 2004** a decision by Kasango J. This decision being a decision of a court of concurrent jurisdiction, it is not binding on this court and this court is supposed to revisit those provisions and make its own, finding. A perusal of page 1 of the said file shows clearly that the learned

judge was faced with the same situation as herein. She was dealing with an application for stay of execution under Order 41 Civil Procedure Rules. In the learned judge's opinion at page 4 of the ruling Civil Procedure rules do not apply to the Advocates Act. This court is of the opinion that it differs with that reasoning. The reason for doing so is that the Advocates Act is not self executing. It is not self executing because it does not provide for procedures under it for execution and enforcement of the orders emanating or arising from it. A party wishing to enforce an order arising under the Advocates Act has to fall back on the Civil Procedure rules for enforcement. Once an order of taxation is adopted as a judgment and translates itself into a decree and enforcement process is set in motion the Civil Procedure Rules and provisions take over from where the Advocates remuneration rules leave it or hand over. This being the case it is the finding of this court that Civil Procedures apply and affect the Advocates Act only as far as the adoption of orders emanating from the Advocates Act as Judgment and decree and their enforcement are concerned.

Although this court is not sitting in judgment on appeal and that decision this court is entitled to concur or distinguish that decision so long as the same is within the facts and the law before it.

The court is aware that reliance was placed on a Court of Appeal decision quoted therein. From the brief facts of the Court of Appeal decision it dealt with costs already awarded by a court of competent jurisdiction which is not the scenario we are dealing with herein. That was a situation where the order for costs had crystallized in a contentious proceeding and the expression of doubt as to whether stay could be granted or order for costs is simply a doubt by the Court of Appeal. It did not lay down a cardinal principle that stay can never be granted on an order for costs. The existence of a doubt leaves room for each case to be considered on its own peculiar facts like in this case. For example where costs are part of a decree being appealed against in the Court of Appeal, I doubt if the Court of Appeal can be called upon on the basis of that decision the decree and sever off the portion dealing with the decree and order it to be executed and stay the rest. A decree comprising both costs and judgment sum has to be dealt with as one component.

For purposes of this ruling it is the finding of this court that Civil Procedure Rules apply to the advocates Act but is limited to the adoption of the order arising or emanating from the Advocates Act as a judgment of the court and enforcement of the decree are concerned. Their operation and where they take over the proceedings from the Advocates Act herein ended with the filing of the application for the adoption of the amount in the certificate of costs as a judgment of the court for enforcement purpose.

It is not disputed that the order in respect of the adoption was made ex parte. In order to fault it the applicant has to bring himself within the rules and principles governing the setting aside of ex parte orders. Order 1 XB rule 8 gives a discretion to the court to do so. The ingredients the court has to look for are those established by the landmark case of **SHAH VERSUS MBOGO [1967] E.A.116** which are to the effect that the courts' discretion for setting aside is intended to be exercised to avoid injustice or hardship resulting from accident in advertence or excusable mistake or error but not to assist a party who has deliberately sought (by evasion or otherwise to obstruct the cause of justice. In determining whether the ingredients have been satisfied or not one has to go to the reasons advanced for setting aside. In the circumstances of these proceedings those relied upon by the applicant are that:-

- (1) Lack of instructions giving rise to the amount in the bill presented to court.
- (2) Lack of notice of the hearing of the adoption proceedings. To support their stand they state that the papers served on them were in respect of taxation in MISC. No.427/2006 annexure KN01. Lack of instructions can only be dealt with when the issue of ex parte taxation can be gone into after the matter is reopened for the applicant. As for lack of notice, the same is valid because annexure KNO1 speaks for itself. It is proof that the applicant was misled. Had he been served with proper papers relating to Misc. Appl. 477/2006 he may have filed his papers in time and the matters could have been heard inter parties. It is also evident that the bill annexed to KNO1 had no number. No explanation was given in the submissions as to why that mix up arose whether it was deliberate or in advertent if it was deliberate then it is evidence of serious misconduct but since there is no explanation and the proceedings are still going on herein, there is no need for this court to dig in to that:

It is enough to say that on the basis of annexure kn1 and its accompanying bill with no case number is sufficient ground of reopening the matter for the applicant. Failing to reopen the matter would cause hardship and injustice in view of the attack made on the entire bill which cannot be ignored. The intention to challenge the bill as presented is another sufficient ground. The net result of the foregoing assessment is that the applicant has shown justification for this court to exercise its discretion in his favour which I hereby do and set aside the ex parte orders made on 6.3.2007. This court has jurisdiction to set aside the orders conditionally or unconditional. The determining factor as to whether the ex parte orders are to be set aside conditionally or unconditionally depends on the next procedural steps to be taken in the matter. The next procedural steps to be taken herein is for the reopening of the matter so that the current applicant is heard on the application dated 3.1.2007 and file don 20.2.2007. That application was filed in pursuance to the provisions of Section 5 (2) of the Advocates Act and order L rule 1 of the Civil Procedure Rules seeking adoption of the amount comprised in the certificate of taxation as a judgment of the court. This court is alive to the fact that the additional provisions of order 50 rule 1 are merely for purposes of facilitation. This means that the only valid opposition that the applicant can reasonably bring in respect of this matter is the procedure laid down under Section 51(2) of the Advocates Act Cap.16 Laws of Kenya which provides that the certificate of the taxing officer by whom any bill has been taxed shall unless it is set aside, or altered by the court be final as to the amount of the costs covered thereby and the court has a discretion to make such order in relation thereto, as it thinks fit including in a case whereof retainer is not disputed and an order that judgment be entered for the sum certified to be due with costs. Section 51(2) on the other hand gives power to the court to make alteration to the taxing officers bill. The power to alter is discretionary and it is set out in rule 11 and 12 of the Advocates remuneration rules under rule 11 the objection is to be directed to the same taxing officer and it is to be presented within 14 days from the date of the taxing officers ruling. The objection is to be raised on any of the items allowed. The 14 days herein expired long time ago. This means that when this court, will be making its final orders it should not loose site of the fact that it has a duty to avoid granting orders in vain. Granting an order to the applicant to file a replying affidavit to advocates application of 3.1.2007 will be an exercise in futility because there is no jurisdiction for the High Court to fault the taxation order unless and until its jurisdiction has been invoked under rule 11 and 12 of the Advocates Act. The best that this court can do for ends of justice to be met is to allow the applicant access the jurisdiction under those two rules.

The sequence of events under those rules are as follows:-

- (1) A party wishing to object to the taxing officer's order is to move under rule 11(1) which allows him 14 days from the Date of taxation to give notice to the Deputy Registrar to give reasons for the taxation.
- (2) The taxing officer is to give reasons for the taxation which are required to be given forthwith.
- (3) If not satisfied with the reasons as in number 2 above the aggrieved party moves to the high court within 14 days setting out the grounds for his objection.
- (4) Where the high court has given an opinion on the taxation under rule 11(2) any party still aggrieved has a right of appeal to the Court of Appeal with leave from the High Court.
- (5) Rule 11(4) gives the High Court power in its discretion by order to enlarge the time fixed by sub rule (1) or 2 for the taking of any step. This power is invoked by way of a Chamber Summons irrespective of whether the time sought to be enlarged may have already expired.
- (6) Under rule 12 reference to the High Court is by the taxing officer himself but with the consent of both parties.

Reopening the matter for the applicant under rule 11 of the Remuneration rules of Cap.16 Laws of Kenya will ensure that ends of justice is met in this matter as that will give him an opportunity to question the basis for allowing amounts in the bill and since he is required to give reasons for objections raised he can give the grounds raised herein as the basis and then the Deputy Registrar will consider them and

thereafter proceed according to law. Section 3 of the Civil Procedure Act which has been cited by the applicant gives this court jurisdiction to give directions under rule 11 of the remuneration rules of Cap.16 Laws of Kenya. It states: *“In the essence of any specific provision to the contrary nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed by or under any other law for the time being in force”*.

The proceedings giving rise to this ruling were initially initiated under the Advocates Act and the remuneration rules made there under the procedures leaped from the Advocates remuneration rules to the Civil Procedure Rules for purposes of execution. The execution process has been faulted under the Civil Procedure Act Rules. In order to remedy the complaint the parties have to be restored back to the position they were supposed to be in under the remuneration rules. If that position is not restored any remedial orders granted in favour of the applicant will be rendered useless as this court cannot redress the complaint unless its jurisdiction is involved under the Advocates remuneration rules. Since the current remedy sought by applicant is not under the Advocates remuneration rules but direction under those rules are inevitable in order to bring the matter to a final determination, direction to be taken under the remuneration rules is inevitable. This court has jurisdiction to deal with the taxed bill under the said rules only if properly invoked. That invocation cannot arise unless directions are given to enable the applicant do so. The only point that the Court can use to hop from the Civil Procedure Act to the Advocates remuneration rules is Section 3 Civil Procedure Act. This court does not think that it was the intention of the legislature in both processes to lock out a litigant from the seats of justice by providing no avenue through which to ventilate grievances if any, especially in circumstances where serious attack have been levelled and will be levelled against the taxed bill which attack go to the foundation of the rules.

For the reasons given above the ex parte decree issued by this court on 6.3.2007 and the warrants of attachment issued on 30th March 2007 be and are hereby set aside on the following conditions:-

- (1) The amount of money deposited herein to remain so deposited until the procedures to be initiated under rule 11 of the advocate’s remuneration rules under Cap.16 Laws of Kenya have been finalized.
- (2) That the applicant moves within 30 days from the date of the delivery of the ruling herein to present an application for leave to file objection to the taxing masters ruling out of time. The application will both seek leave to apply for enlargement of time within which to lodge objection out of time and for the lodging of objection out of time.
- (3) The applicant will have costs of the application as he had a genuine complaint.
- (4) There will be liberty to apply to either party.

DATED, READ AND DELIVERED AT NAIROBI THIS 29TH JUNE 2007.

R.N. NAMBUYE

JUDGE