



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
Misc Civil Appli 46 of 2006

PAUL GICHERU P/A GICHERU & CO. ADVOCATES:.....APPLICANT

VERSUS

HASSAN HUSSEIN AJEB:.....RESPONDENT

R U L I N G

PAUL GICHERU T/A GICHERU and Company Advocates acted for Hassan Hussein Ajab in Eld. HCCC. No.70 of 2005. Later the advocate filed his Advocate/client bill of costs which was served on the said Hassan. Taxation was to be before the Deputy Registrar. However on 27th February 2006 a consent order dated 24th February,2006 and signed by both parties was entered in the following terms:-

“ **CONSENT ORDER**

We have the honour to record the following consent order:

Let the Advocate/client bill of costs dated 13th February 2006 be taxed at Kenya shillings one hundred and fifty thousand (Shs.150,000/=) only and the respondent be allowed to pay the said sum of money within sixty (60) days from 24th February 2006”

Apparently the client (Hassan) did not pay the agreed amount within the agreed period. the Advocate therefore made an application for execution by having the clients property attached by Jomuk Auctioneers. Warrants of attachment were issued. Thereafter an application was made to break into the clients premises and the same was granted. The auctioneer broke into the premises and proclaimed some goods. However later a complaint was filed in the Auctioneer Licensing Board. Thereafter on 22nd March 2007 the Advocate filed a chamber summons seeking Garnishee orders to attach monies held for the client by M/S Manani Lilan & Co. Advocates. The application was heard by the Deputy Registrar and a Decree Nisi issued on the same day. That order provoked the current application which was file by the client on 26th March 2007. The application sought the following orders:-

- 1) That application be heard exparte in the first instance and certified as urgent.
- 2) That there be stay of execution of decree issued herein and decree NISI and order issued on 23/3/2007 pending the hearing and determination of this application.

- 3) That the decree issued on 27/2/2006 ,warrants of attachment and sale issued on 28/02/2006 and decree Nisi issued on 22/03/2007 and all consequential orders be set aside.
- 4) That the Respondents goods attached on 4//8/2006 be restituted and returned to Respondent.
- 5) That costs of the application be a awarded the Respondent.

The Notice of motion is said to be brought under S. 3A, 63(c) and (e) and S.91 Civil Procedure Act, order 50 rule 1 CPR and all other enabling provisions of the law. Prayers (1) and (2) were granted by the court on 26th March 2007 and a date set for hearing of the other three prayers.

Mr. Shimosi who prosecuted the application told the court that prayer 3 was spent and what they are now praying for is the setting aside of the decree Nisi issued on 22nd March 2007 and the release of the goods attached by the respondent. He told the court that the bill of costs was taxed by consent. However since then the Advocate did not take any steps under S.51 of the Advocates Act to have the taxed costs entered as a judgment. Under provisions of S.48 of the Advocates Act he could also have filed a suit to recover the costs. This was not done and the Advocate applied for attachment of the applicants goods. This was unprocedural as there was no judgment or decree existing by them to be executed. Further it was submitted that the auctioneer removed goods worth more than Shs.500,000/=. Applicant sought the goods to be restituted.

Lastly it was submitted that the decree Nisi issued on 22nd March 2007 purported to attach money held in a clients account by M/S Manani Lilan & Co. Advocates. That money was said to be held in trust of Family Finance for repayment of a loan and should therefore not be attached.

The application was opposed. The Advocate Paul Gicheru swore a long affidavit detailing his relationship with the applicant as advocate/client.

The auctioneer also swore an affidavit stating that after proclaiming goods when he went back he found most of them had been removed by the applicant. He only took five items whose estimated value was Shs.3,900/=. There were not sold as the applicant lodged a complaint with the auctioneers Board. the complaint was eventually dismissed.

Further it was submitted by Mr. Njuguna for the respondent Advocates that all the orders issued by the Deputy Registrar were proper as there was an order which was capable of being executed and if the applicant was aggrieved he should have filed a reference. A certificate of Taxation was issued and the applicant undertook to pay the costs.

As for Garnishee orders he submitted that monies held in a clients account is not exempted from Garnishee attachment. The Garnishee confirmed he was holding the money.

I have carefully considered the application, affidavit and annexures and the rival submissions by the counsels. There is no dispute as to the taxation of costs as the same were taxed by consent. None of the two parties claims to be dissatisfied with the taxation. the issue is on execution. In the first place the applicant claims that the Advocate respondent has no judgment to execute and only a certificate of costs. He could therefore not have gone ahead and executed. Indeed S. 48 (2) of the Advocates Act provides that a suit for recovery of costs may be filed and s.51 (2) of the same Act provides for entering judgments. It is for those reasons that the applicant maintains that the Advocate should have brought a suit and sought for judgment. However a close look and reading of S.48 of the Act shows that not in all cases a suit to recover costs have to be filed and I think this is one of the exceptions. Sub section 2 of that section reads:-

“ (2) subject to subsections (1), a suit may be brought for recovery of costs due to an Advocate in any court of competent jurisdiction”.

The word used is may and not shall which means not in all situations where a suit must be filed to

recover costs. In this particular case the costs had already been agreed upon and as such there was no need to file a suit to recover the same. Infact the parties even agreed on the mode of paying those costs. There was therefore no need to file a suit to recover them. A suit should be filed where they have not been agreed upon and there is a dispute over the same but not where there is no dispute. The Advocate in this case therefore was not obliged to file a suit under S.48 of the Act.

I now turn to the issue of weather there was judgment or not. S.51 (2) of the Act provides as follows:-

“ 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 may make such orders in relation thereto as it thinks fit, including in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”

The taxation was done by the Deputy Registrar acting as a taxing officer. Certificate of costs was issued. There after matter went to the Deputy Registrar for execution. that time she was not acting as a taxing officer but officer of the court with powers to deal with execution as a court. The bill by then had not been set aside or altered and the retainer was not in dispute. The provisions of that sub-section states that the court had powers to make any orders which includes an order that judgment be entered. The provisions are not mandatory that judgment must be entered. The court allowed execution and it was with its powers to do so. True a party can chose to apply to the court to enter judgment but I don't think the court erred to order for execution of the taxed costs. The parties were all aware of the amount taxed and an order already given. As provided for in S.28 of CPA execution can apply to orders and the Deputy Registrar therefore correctly ordered for execution. The submissions that there was no judgment or decree capable of being executed do not hold.

The other issue was that of Garnishee orders issued. Applicant said the money held by M/S Manani Lilan & Co. Advocates were held in trust for Family Finance for repayment of a loan the applicant and others had as they owned the premises for which rent was paid jointly and therefore could not be subject of Garnishee orders. Provisions of order 22 rule CPR are very clear what monies cannot be attached. Money held by an advocate for a judgment debtor is not exempted. In any case the firm of M/S Manani Lilan & Company Advocates who are holding the money were served and they never disputed that they are holding such monies or they are holding it in trust for Family Finance or any other debtor. The orders of Garnishee Nisi were therefore properly issued.

Lastly is the issue of restitution of the property allegedly carried away by the auctioneer. The auctioneer is not a party to this application. However he was instructed by the respondent. The auctioneer has sworn affidavit and stated the items carried away and listed in presence of a police officer. They are said not to have been sold as the applicant had filed a complaint before the Auctioneers Licensing Board. That complainant was dismissed and this court is not sitting over appeal against that dismissal. There is therefore nothing to show that the auctioneer carried goods other than those he has listed in the affidavit. Those goods are said not to have been sold. The same may be returned once the applicant pays the necessary auctioneers fees.

The upshot of the above is that I find no merit in all the prayers made by the applicant. the application is dismissed with costs.

Since the parties agreed that the ruling in this application bide the application in HMCA.NO.47 of 2006 which involves came parties and same issues I do order that it do abide to that application

Dated and Delivered at Eldoret on 19th June,2007.

KABURU BAUNI

JUDGE.