



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

Civil Case 558 of 2005

KENYA SUGAR BOARD.....PLAINTIFF/APPLICANT

VERSUS

NDUNGU GATHINJI.....DEFENDANT

RACHIER & AMOLLO ADVOCATES.....1ST RESPONDENT

KEYSIAN AUCTIONEERS.....2ND RESPONDENT

RULING

By a Chamber Summons dated 26th March 2007, brought under Section 3A of the Civil Procedure Act, and Order 39 rules 1, 2A, 3 and 9 of the Civil Procedure Rules, the applicant Kenya Sugar Board seek, orders as follows: -

- 1.) That this application be certified urgent and be heard exparte in the first instance.
- 2.) That pending the inter-parties hearing of this application, there be a temporary injunction to restrain the 2nd respondent and its servants and or agents from selling or in any way disposing the applicant's property, proclaimed and attached on 6th March 2007, in a purported execution for recovery of the 1st respondents' costs taxed on 9th February 2007, in HCCC No. 558 of 2005 between Kenya Sugar Board and Ndungu Githinji.
- 3.) That the 1st respondent's purported Certificate of Taxation in HCCC No.558 of 2005 dated 15th February 2007 be set aside.
- 4.) That the consequential warrants of attachment and sale issued pursuant to the said Certificate of Taxation be set aside.
- 5.) That costs of this application be awarded to the applicant in any event.

The application was initially filed as a miscellaneous application, however on 26th March 2007, Hon. Waweru J. ordered that the application be deemed to have been filed in HCCC No. 558 of 2005, which was the suit giving rise to the application.

The background to the application as evident from the court record is as follows: -

On the 11th October 2005, the applicant through the firm of Rachier & Amollo Advocates (hereinafter referred to as 1st respondent) filed HCCC No. 558 of 2005 against the Defendant Ndungu Gathinji. The Defendant entered appearance and filed a defence and counterclaim. On 2nd December 2006, the Applicant through the 1st respondent filed a reply to the defence and counterclaim.

It would appear that there was subsequently a disagreement between the applicant and the 1st respondent. This resulted in the 1st respondent filing an advocate-client's Bill of Costs on the 19th December 2006. The Bill of Costs was filed in the same file i.e. HCCC 558 of 2005.

On 15th January 2007, the matter came up before a Deputy Registrar for taxation. The matter was however adjourned to 26th January 2007, as there was no representation for the applicant and the Deputy Registrar was not satisfied that a hearing notice had been served on the applicant.

On 26th January 2007, the matter again came up before the Deputy Registrar, when again there was no representation for the applicant. An appropriate affidavit of service having been duly filed, the counsel for the 1st respondent urged the Deputy Registrar to tax the Bill as drawn. The Deputy Registrar reserved her ruling to 6th February 2007. The ruling was not ready on that day and was adjourned to 9th February 2007, on which date the Deputy Registrar ruled as follows: -

"I have now had ample opportunity to consider the Bill of Costs. It is unopposed and I find that it is drawn strictly to scale. It is allowed as drawn."

On the 15th February 2007, the Deputy Registrar issued a certificate of taxation certifying that the Bill of Costs lodged by the 1st respondent was taxed in the sum of Kshs.26,002,290.61.

There are no further orders in the file. There is however a letter dated 2nd March 2007, received in the court on 5th March 2007. The letter which was from the 1st respondent was addressed to Keysian Auctioneers, the 2nd respondent asking them to *"move with speed to obtain warrants for attachment and sale in respect of this matter and proceed to execute the same"*.

There is also a copy of a warrant of sale of property issued to 2nd respondent on the 5th of March 2007, authorising him to sell by auction, property of the applicant, in execution of a decree in favour of the Decree Holder and realize the decretal sum of Kshs.26,004,740/61.

As per the grounds stated on the body of the Chamber Summons dated 26th March 2007, and the supporting affidavit sworn by the applicant's Company Secretary Rosemary Mkok, the main reasons advanced in support of the application are basically, that the applicant had no notice of the taxation hearing; that the taxation proceedings were irregular and bad in law as they were not done in compliance with Section 48 of the Advocate's Act as read with Rule 13 (3) of the Advocate's Remuneration Order; and that the warrants of attachment and sale were irregularly issued as there was no court decree.

Relying on *HCCC No.2255 of 2000 (Milimani) First American Bank of Kenya Limited vs Gulab P. Shah & 2 Others*, Mr. Ngii, who appeared for the applicant submitted that the court has inherent jurisdiction to set aside a taxation, which has been arrived at without following the proper procedure. Mr. Ngii further submitted that it was wrong for the respondent to rely on the certificate of costs to facilitate the execution, as a decree could not arise from the certificate without a suit being filed under Section 48 of the Advocate's Act, for recovery of the amount certified. In this regard, counsel relied on the case of *Mansion House Limited vs John Sainsbury Wilkinson Civil Appeal Number 46 of 1953* wherein it was held that a decree can only arise in a suit, and that a suit can only be commenced in any manner prescribed by the Civil Procedure Rules. Mr. Ngii therefore urged this court to use its inherent powers to prevent abuse of the court process.

In a replying affidavit duly sworn by Paul Otieno Mungla, an advocate in the respondent's firm, it is contended that the applicant was served with the Bill of Costs as well as the notice of taxation for hearing on 26th January 2007 but failed to attend court. It was contended that the applicant by conduct, waived the alleged procedural infractions by failing to raise them before the Deputy Registrar, and cannot therefore rely on the same in support of his application. It was further contended that the application before the court was incurably defective, as the applicant ought to have moved the court under Rule 11 of the Advocates Remuneration order. It was also maintained that the court did not have jurisdiction under the cited provisions of the law to grant the prayers sought in the application.

Mr. Mungla who also appeared for the 1st respondent relied on Civil Appeal Number 133 of 2000, M. G. Sharma vs Uhuru Highway Development Limited wherein it was held *inter-alia*, that the High Court Judge, not being seized of the taxation itself; and there being no appeal or reference to him from the decision of the taxing officer as provided for by paragraphs 11 (1) and (2) of the Remuneration Order, and the taxation not being a suit filed in the High Court for the recovery of costs; had no jurisdiction at all to hear the respondent's application to strike out the cause.

Mr. Mungla further submitted that Section 48 of the Advocates Act, provided for taxation notwithstanding the fact that no suit for recovery of costs had been filed, and that Section 48 (3) of the Advocates Act entitled an advocate to bring a suit the way the 1st respondent had done.

In response to the submissions made on behalf of the 1st respondents, the applicant's advocate maintained that the applicant had properly moved the court under Section 3A of the Civil Procedure Act. He contended that Paragraph 11 of the Advocates Remuneration order is limited to an applicant challenging figures in the items of taxation, and can only come into play where there is proper taxation proceedings, and not in a case such as this one where the setting aside of the taxation was sought on the grounds that the taxation proceedings were irregular. Counsel further maintained that under Paragraph 13 (3) of the Remuneration Order, the taxation of a Bill of Costs could only be done in a miscellaneous cause.

I have considered this application, and all the contending arguments. Firstly, paragraph 13 of the Advocates Remuneration Order which provides for taxation of costs as between Advocate and client, clearly provides at sub-paragraph (3) as follows: -

"The Bill of Costs shall be filed in a miscellaneous cause in which notice of taxation may issue, but no advocate may be entitled to an instruction fee in respect thereof."

Section 48 of the Advocate's Act states as follows: -

48 (1) Subject to this Act, no suit shall be brought for the recovery of any costs due to an advocate or his firm until the expiry of one month after a bill for such costs, which may be in summarized form, signed by the advocate or a partner in his firm, has been delivered or sent by registered post to the client....."

(2) Subject to sub-section (1), a suit may be brought for the recovery of costs due to an advocate in any court of competent jurisdiction.

(3) Notwithstanding any other provisions of this Act, a bill of costs between an advocate and a client may be taxed notwithstanding that no suit for recovery of costs has been filed.

It is evident from the above that Section 48 (3) provides for taxation of a Bill of Costs notwithstanding the fact that no suit for recovery of costs has been filed. The procedure by which such taxation is to be done is provided under Section 51 of the Advocate's Act as read together with the aforementioned paragraph 13 (3) of the Advocates Remuneration Order already alluded to above. Indeed the miscellaneous cause only becomes a suit for recovery of the costs where the court has ordered under Section 51 (2) of the Advocate's Act, that judgment be entered for the sum certified to be due following the taxation.

In this case, the 1st respondent did not file the bill of costs in a miscellaneous cause, but filed it in HCCC No.558 of 2005, which was actually the suit in which 1st respondent was acting for the applicant. Clearly, the 1st respondent did not comply with Section 51 of the Advocate's Act or paragraph 13 (3) of the Advocates Remuneration Order which are mandatory provisions. The bill of costs was therefore irregularly before the court.

Secondly, it is evident from the court record that upon taxation, and issuance of the certificate of costs by the Deputy Registrar, the 2nd respondent procured warrants of attachments and sale. There was no order made in the court file for the warrants to issue, nor was there any judgment entered against the applicant for the taxed amount, nor any decree issued. This was highly irregular as it was only after the entry of a judgment for the amount certified to be due that a decree could be extracted and the execution process initiated. Needless to state that the Warrant of Attachment and Sale issued against the applicant were void as the same were not premised on any court order or decree.

Contrary to the averments made by the applicant's Company Secretary, the court record shows that the taxation of the Bill of Costs was listed for 26th January 2007, and the applicant had due notice of this, having been duly served with a hearing notice. The applicant's advocate did not however attend court nor has any explanation been given for this absence. That notwithstanding, the Bill of Costs was irregularly before the court and the Deputy Registrar ought to have rejected the taxation proceedings as being defective.

I have considered the contention that the applicant's chamber summons is defective as the applicant ought to have come by way of a reference under paragraph 11 of the Advocates Remuneration Order. In my considered view, a reference under paragraph 11 of the Advocates Remuneration Order, can only be properly brought where the taxation proceedings have been properly initiated as provided under Section 51 of the Advocate's Act as read with Paragraph 13 (3) of the Advocates Remuneration Order. In this case there were no proper taxation proceedings, upon which a proper reference under paragraph 11 of the Remuneration Order could be brought.

Under these circumstances, the applicant has properly invoked the inherent powers of this court to meet the ends of justice, by setting aside the purported taxation and the purported warrants of attachment and sale. Accordingly, the chamber summons dated 23rd March 2007, is hereby granted and orders issued in terms of prayers numbers (3), (4), and (5).

Those shall be the orders of this court.

Dated, signed and delivered this 31st day of October 2007.

H. M. OKWENGU

JUDGE