

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Misc Cause 839 of 2004

KHAN & KATIKU ADVOCATES.....PLAINTIFF

VERSUS

COSMAS K. MUTHEMBWA.....DEFENDANT

R U L I N G

Delay in the preparation and delivery of this ruling has been occasioned by my recent illness and hospitalization. The delay is regretted.

On 19th May, 2005 this court (Waweru, J.) entered judgment for the Plaintiff for taxed costs under section 51 (2) of the Advocates Act, Cap. 16. The Plaintiff had proceeded *ex parte* as there was no appearance for the Defendant, the date having been taken by consent in court on 10th May, 2005. The court was satisfied that there was no dispute as to the retainer, and the certificate of taxation had neither been set aside nor altered. Although the Defendant had filed grounds of opposition to the application for judgment, he had not filed any replying affidavit.

The Defendant has now filed an application by chamber summons dated 24th May, 2005 under Order 9B, rule 8 of the Civil Procedure Rules seeking an order to set aside the aforesaid judgment. The application is predicated upon the grounds that the misfortunes of counsel must not be visited upon the Defendant; that the Defendant has all along been desirous of defending the application for judgment upon grounds that raise salient and fundamental issues; and that the Defendant will suffer irreparable damage and loss unless the order sought is granted. There are two supporting affidavits. One is sworn by the Defendant's counsel, MILDRED NYAMOSI GAKOI, in which she explains her failure to attend court on 19th May, 2005. The second supporting affidavit is sworn by one PATRICK IMBENZI, a court clerk in the firm of the Plaintiff's advocates. It verifies some of the claims made in the advocate's aforesaid affidavit. The application is opposed by the Plaintiff. There is a replying affidavit sworn by a partner in the Plaintiff firm of advocates.

I have considered the submissions of the learned counsels appearing. The Defendant's advocate has explained to the satisfaction of the court her failure to attend court on the 19th May, 2005. However, without more, this is not sufficient to enable the court to exercise its discretion to set aside the judgment. The Defendant is duty-bound to show the court that a useful purpose will be served by setting aside the judgment. To put it another way, the Defendant ought to demonstrate that he has a defence that raises some triable issue. As already pointed out, when entering judgment the court was satisfied that there was no dispute as to the retainer and that the certificate of taxation had not been set aside or altered. Also, as already pointed out, the Defendant did not file any replying affidavit in response to the application for judgment. He filed only grounds of opposition dated 9th May, 2005. Those grounds attacked the Plaintiff's bill of costs and the taxation thereof. Yet there was no evidence that the Defendant had challenged the taxation under rule 11 of the Advocates (Remuneration) Order. At any rate, those grounds did not disclose any dispute as to retainer. Nor did they allege that the certificate of taxation had been set aside or altered.

In these circumstances, it is clear that the Defendant cannot have any defence to the application for judgment. It will therefore not serve the interests of justice to set aside the judgment of 19th May, 2005.

It would only delay the course of justice without good cause. I thus find no merit in the application and I must refuse it. It is hereby dismissed with costs. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF FEBRUARY, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 17TH DAY OF FEBRUARY, 2006.