



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Misc Appli 742 of 2005

MBUGUA & MBUGUA ADVOCATES.....
APPLICANT

VERSUS

KENINDIA ASSURANCE CO. LTD.....
RESPONDENT

R U L I N G

The firm of Mbugua and Mbugua Advocates (*herein after called the Advocates*) acted for Kenindia Assurance Company in HCCC No. 2974 of 1997. On 1.9.2005 they filed their advocate/client bill of costs which was on 8.3.2006 taxed in the sum of KShs.180,821.50. The Deputy Registrar issued a Certificate of Taxation on 16.3.2006. On 22.3.2006 the advocates lodged an application by way of Notice of Motion for an order that judgment be entered in their favour for the said sum. On 3.4.2006, judgment was entered for the said sum by consent and a stay was ordered for 15 days. On 27.4.2006, the Deputy Registrar issued a decree in terms of the said judgment. The following day i.e. the 28.4.2006 the advocates applied for execution for the said sum. A warrant of attachment of movable property was then issued on the same day. Sale of the client's property did not take place as they paid the advocates a sum of KShs.151,464.00 directly and KShs.15,163.55 to the auctioneers as their fees. The advocates on 23.6.2006 applied for re-issue of warrants of attachment to recover balance of KShs.29,357/= plus interest of KShs.5424.60. The attachment that followed provoked this application by the client seeking stay of execution, nullification and/or cancellation of the warrants of attachment and sale and costs. Interim stay of execution was granted **ex-parte** on 13.7.2006 and the application fixed for hearing **inter parties** on 24.7.2006.

The application is expressed to be brought under Order L of the Civil Procedure Rules and Section 48 of the Advocates Act. The application is predicated on the main grounds that warrants cannot be issued once the bill has been taxed as the advocates must file a plaint to recover costs in terms of Section 48 of the Advocates Act; that there is no decree giving rise to the warrants and that the advocates have been paid in full. The application is supported by an affidavit sworn by one Flora Opiyo the Senior Manager Legal Department of the Client. She depones that indeed the advocate/client bill of costs was taxed in the sum of KShs.180,812/5 but that sum was not all paid to the advocates. The client being an agent of Kenya Revenue Authority collected V.A.T. and withholding tax at 16% and 5% respectively and remitted the same to K.R.A. The client paid the advocate KShs.151,464.00 and the auctioneers KShs.15,163.55. It is also deponed for the client that there is no sum outstanding and no fee is owed to the advocates and if the issue of V.A.T. and withholding tax is disputed the advocates shield file suit. In the premises the client contends that the warrants of attachment and sale were erroneously issued as there is no decree. Finally the client contends that the advocates could not file papers in court as at 6.6.2006 since they had

not taken out practicing certificates.

The application is opposed and there is a replying affidavit sworn by Joseph Njoroge Mbugua an advocate and partner in the applicant firm of advocates. He depones that there is indeed a judgment which the client has not fully satisfied and the advocates are properly executing to recover the unsatisfied sum. The advocate has also exhibited a copy of a receipt from the Law Society of Kenya dated 31.5.2006 and a copy of his practicing certificate for year 2006 dated 2.6.2006. He also depones that he is a party to the cause and did not in any event require a practicing certificate to litigate his cause. In his oral submission he contended that the firm of Jackson Omwenga and Company Advocates was not competent to file and prosecute this application as they had not obtained leave of the court to come on record for the client in place of the former advocates M/s Okundi and Company Advocates.

I have considered the application, the affidavits filed by both parties and the submissions made to me by counsel including the authorities cited. Having done so, I take the following view of this matter. With respect to whether or not the firm of M/s Jackson Omwenga & Company Advocates is properly on record for the client I have found as follows. There is no doubt that judgment was passed for the advocates for taxed costs before M/s Jackson Omwenga and Company Advocates came on record for the client. That being the position the change of advocates from M/s Jackson Omwenga and Company could not take effect without an order of the court upon an application with notice to the advocates on record. I have been shown a copy of a letter dated 12.7.2006 addressed to the Deputy Registrar signed by both firms of advocates requesting the Deputy Registrar to record an order allowing the firm of M/s Jackson Omwenga & Company advocates to come on record for the firm of M/s Okundi and Company advocates. The Deputy Registrar does not seem to have acted on the advocates request with the result that there is no order granting leave to M/s Jackson Omwenga and Company advocates to come on record for the client. Technically therefore the change of advocates has to date not taken effect. This application is therefore liable for being struck out for having been filed by a firm of advocates who have not complied with the provisions of Order III Rule 9A of the Civil Procedure Rules. However, as the advocates raised the issue after submissions had been made on behalf of the client on this application, I have to consider the rest of the issues canvassed before me.

On the client's part objection is raised in the supporting affidavit aforesaid that the advocates in the firm of Mbugua & Mbugua advocates had as at 6.6.06 not taken out practicing certificates and could therefore not file papers in court in the name of the firm. That objection lacks merit as the advocates have exhibited a practicing certificate for the year 2006 dated 2/6/06 in the name of Njoroge Mbugua. Even if such a certificate had not been exhibited, in my view the subject of the judgment was taxed costs for the advocates. They had earned the costs and the recovery of the same was not dependent on whether or not they had a practicing certificate.

With regard to the central issues of this Notice of Motion, the client has premised its application on 4 primary grounds. The 1st ground is that the warrants of attachment and sale cannot be issued on the taxation of costs. That may very well be true but in the matter at hand, the client itself admits that the advocates costs were taxed at KShs.180,812/15. It has exhibited a copy of a letter from its former advocates M/S Okundi and Company Advocates in which letter the advocates drew their urgent attention to the concerns of the advocates herein raised in the latter's letter dated 18.3.2006. The advocates in their letter referred to the judgment herein and warned of instructing the auctioneers to proceed with attachment. The client in their letter to their former advocates dated 25.5.2006, declined to make any further payments without further clarifications. It is rather difficult to appreciate what clarifications were being sought, when the judgment for the taxed costs was by consent for KShs.180,821.50 all inclusive and a 15 day stay of execution was granted. The first ground is therefore without merit as clearly there was judgment for the costs.

The second ground of this Notice of Motion is that the advocates must file a plaint to recover their costs as per Section 48 of the Advocates Act. This ground in my view is also without merit in view of the clear provisions of Section 51 (2) of the Advocates Act which reads as follows:-

“51 (2) 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 order 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.”

A plain reading of the above section shows that an advocate need not file a suit to recover his costs where the conditions set in the said section are met. In any event this ground in my view is mischievous as when the advocates sought judgment under the above section the client was represented by counsel who consented to the judgment. The issue of filing a suit under Section 48 of the Advocates Act was never raised.

The third ground is that there is no decree giving rise to the warrants. That ground in view of what I have said above is absolutely without merit. There is indeed a decree duly issued by the Deputy Registrar of this court which has not been set aside or altered by the court.

The fourth ground which is that the advocates have been paid in full is for the reasons given above also without merit. The client goofed when it unilaterally decided to settle the decree by making payment to a party who was not joined in these proceedings. This application has no redeeming feature at all. The client has authored its own misfortune. It has paid auctioneers' charges which it should not have paid if it had acted diligently. It has made payment elsewhere which payment it was not liable to pay. It has needlessly paid dearly. This application in my view is incompetent and misconceived and I so hold. I dismiss it with costs to the advocates.

For avoidance of doubt however, the judgment entered for the advocates was all inclusive and the balance to be recovered by the advocates should not incorporate interest. However, execution costs are obviously payable by the client.

Orders will therefore issue accordingly.

DATED and DELIVERED at NAIROBI this 26TH day of SEPTEMBER, 2006.

F. AZANGALALA

JUDGE

26/9/2006

Read in the presence of:-