

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
MISC CIV APPLI 60 OF 2004

PETER KAMWATHI PLAINTIFF

VERSUS

JOHN MUTULE NYENZE DEFENDANT

MANTHI MASIKA & CO. ADVOCATES APPLICANTS

RULING

By an application dated 28/6/05, the applicant Peter Kamwathi, seeks the following orders; temporary Stay of Execution; that the warrants issued to the Respondent authorizing attachment and sale of the applicants' property be set aside, cancelled and/or be recalled that the property seized in execution of the warrants be restituted forthwith and costs of the application be awarded to the applicant. The application is expressed to be brought under Order 50 Rule 1 Civil Procedure Rules, Section 3 A Civil Procedure Act, Section 48 and 49 of Advocates Act.

The application is premised on grounds found on the face of the application and a supporting affidavit sworn by Francis Mwanza Mulwa, counsel for the applicant. A replying affidavit was filed by Francis Manthi Masika Advocate, the Respondent/applicant herein.

Francis Manthi Masika, was instructed to represent the applicant in H.C.C.C 16/1998 which the Advocate did till the suit was determined in favour of the applicant on 30/5/05. The Respondent demanded their fees but the applicant failed to pay. The Respondent then filed a bill of costs which was taxed on 3/2/05 at Kshs.179,554.50 and a certificate of costs was issued on 17/2/05. Based on that ruling of 17/2/05, the Respondent sought to execute the said order on 18/5/05 which execution is now challenged by the applicant. It is the applicants' contention that the issuance of the warrants is irregular as they do not originate from any suit or decree capable of being executed and that the amount taxed can only be recovered by way of the Respondent filing a plaint to enable the applicant be heard in his defence.

In his replying affidavit the Respondent avers that Rule 13 of the Advocates Remuneration Order does not provide that recovery of an Advocates' fees can only be by way of a plaint but that the only requirement is that a miscellaneous cause be filed.

This application came up for hearing on 22/9/05. The Respondent was aware of the hearing date because he had been served and he filed a replying affidavit which I have referred to above. The court proceeded to hear the application ex parte. The Respondent/applicant in applying for warrants with intent of executing relies on Rule 13 Advocates Remuneration Order which deals with taxation of costs as between the Advocate and client. That has been done in this cause. However, Rule 13 of Advocates Remuneration Order does not indicate how these costs are to be recovered if the client fails to pay up. Section 48 of the Advocates Act makes provision for recovery of costs; when a suit for such recovery can be filed, how, what court and that costs can be taxed even in the absence of a suit having been filed as was the case in these proceedings.

Section 49 deals with the procedure where a suit for recovery of costs has been filed.

Both sections are clear, that a suit has to be filed for recovery of costs. Even where the costs have already been taxed as in this case, the Advocate cannot go ahead and execute without filing a suit. If the costs had not been taxed, the advocate would still file a suit claiming the costs and if they are not agreed, they are taxed before judgment can be entered.

Counsel for the applicant had cited the case of ***SHARMA versus UHURU HIGHWAY DEVELOPMENT LTD. EA 133/00*** where Rule 13 of the Advocates Remuneration Order and Section 48 and 49 were considered by Court of Appeal. It was held that Rule 13 (3) of the Advocates (Remuneration) Order deals with the subject of taxation of costs whereas Section 48 of the Advocates Act is concerned with the recovery of costs and that the two are not in any way in conflict.

Accordingly, I do find that the applicant/Respondent has flouted procedure. Counsel should have filed a suit for recovery of costs in accordance with provisions of Section 48 and 49 of Advocates Act. The attachment of the applicants' goods is irregular and the same is set aside and warrants cancelled. If any property has been attached it should be restituted forthwith. Respondent/applicant will bear costs of the attachment and this application.

R.V. WENDOH

JUDGE

Dated at Machakos this 4th day of October 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE