

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL MISC. NO. 64 OF 2003

NDUVA KITONGA & CO. ADVOCATES.....APPLICANT

VERSUS

JOSEPH MUSAU MATHEKA.....RESPONDENT

R U L I N G

By the application dated 31.7.2003 and filed in court on the same day the applicant/respondent seeks an order of stay of execution of the courts decree or order dated 21.5.2003 pending hearing of the application interparties; an order that the order of this court taxing the respondent's bill dated 21.5.2003 be set side and that costs of the application be given to the applicant.

The application is based on grounds that the applicant retained the respondent to represent him in CRC.2367/01 at Machakos Law Courts at an agreed fees of Kshs.35,000.00 whereby the applicant paid to the applicant 29,000/=. That the bill of costs filed herein was never served on the applicant nor was there a suit filed prior to the taxation. The application is also supported by the affidavit of the applicant Joseph matheka in which he adds that after he was acquitted under S.215 CPC and having paid Kshs.29,000/= out of Kshs.35,000.00 he was surprised to see auctioneers come to attach his goods on 24.7.2003 for Kshs.111,828/= which was a decree of the High court JMM 2. He went ahead to instruct his advocate to file this application. He denies having been served with the taxation notice on 14.5.2003 as sworn by the process server in the return of service dated 19.5.2003.

The respondent Nduva Kitonga filed a replying affidavit in which he contends that the retainer agreed upon as per the agreement 'MKI' was Kshs.135,000/= but not Kshs.35,000/= and that applicant only paid Kshs.28,000/= and he filed his bill of costs after the criminal matter was determined and that applicant was served with bill of costs and hearing notice but he declined to acknowledge receipt as evidenced by return of service MK2.

Though the respondents counsel had been served with hearing notice for this application there was no attendance at the hearing of the application.

The court has however taken note of the contents in the replying affidavit.

At the time of filing the application, the applicant notes that his goods had been attached by respondent following taxation of bill of costs. However I do note that the action taken by respondent to tax their bill was premature. They did not file any suit against their client who is the applicant for recovery of the costs as required by S48 and 49 of advocates Act. Even without going into the issue of whether the applicant was served with taxation notice or not, the taxation herein was irregular and premature and the order of 21.5.2003 taxing the respondent/applicants bill of costs is hereby set aside with all consequential orders. Costs to be borne by applicant/respondent.

Dated, read and delivered at Machakos this 16th day of January, 2004.

R. WENDOH

JUDGE