



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MILIMANI**

**ELC MISC APPLICATION 187 OF 2017**

**PATRICK KIMATHI MUCHENA T/A ARIMI KIMATHI & CO .ADVOATES.....APPLICANT**

**VERSUS**

**MARIA LILIAN O.OUYA.....RESPONDENT**

**RULING**

1. This is a Ruling in respect of three separate applications which were all brought by the Applicant Maria Lilian Ouya. The Applicant is an Advocate of the High Court who was being represented by Patrick Kimathi Muchene T/A Arimi Kimathi & Co. Advocates. Sometime in 2017, the Applicant withdrew her instructions from the firm of Arimi Kimathi & Co. Advocates. The firm proceeded to file an Advocate/Client bill of costs which was duly taxed. The process of execution started leading to the filing of these three applications.

2. The first application is dated 22<sup>nd</sup> February 2020. It seek the following orders:-

**1) Spent**

**2) Spent**

**3) Spent**

**4) That this Honourable Court be pleased to set aside its proceedings and orders made on 13<sup>th</sup> February 2020.**

**5) That in the alternative, this Honourable Court be pleased to review its proceedings and orders made on 13<sup>th</sup> February 2020 and make consequential orders.**

**6) That this Honourable court be pleased to enlarge time and allow the Applicant to file a reference against the Bill of Costs taxed on 17<sup>th</sup> October ,2019 out of time.**

**7) That the costs of the Application be provided for,**

3. The second application dated 10<sup>th</sup> August 2020. It seeks the following orders.

**1) Spent**

**2) Spent**

**3) Spent**

**4) Spent**

**5) That this Honourable court be pleased to direct the 2<sup>nd</sup> Respondent to unconditionally release the Applicant's motor vehicle registration number KCG 354A pending the hearing and determination of this application and the application dated 25<sup>th</sup> February ,2020 before court.**

6) *That this Honourable court be pleased to declare that the purported execution proceedings levied by the 2<sup>nd</sup> Respondent auctioneer are unlawful and thus null and void.*

7) *Spent*

8) *That the costs of the application be in the course.*

4. The third application is dated 17<sup>th</sup> August 2020 it seeks the following orders:-

1) *Spent*

2) *That this Honourable court be pleased to issue an order directing the 2<sup>nd</sup> Respondent, Peter K Ng'ang'a T/A Petfriend Auctioneer, to unconditionally release the Applicant's Motor Vehicle Mercedes Benz Registration number KCG 354 A pending the*

3) *That this Honourable Court be pleased to issue a mandatory order directing the OCS Muthangari Police Station to enforce its Order of 11<sup>th</sup> August ,2020 that is, retrieve the Applicant's motor vehicle Mercedes Benz registration number KCG 354 A from Respondents.*

4) *That this Honourable Court be pleased to issue a declaration that failure to release to the said motor vehicle Mercedes Benz registration number KCG 354 A to the Applicant, is in contempt of this Court's order of 11<sup>th</sup> August 2020 and the Applicant be hereby granted permission to commence contempt of Court proceedings against both Respondents.*

5) *That the costs of the Application be in the cause.*

#### **The first application.**

5. In this application, the Applicant contend that she had instructed her former Advocates M/s Agina & Associates to represent her but that the said firm of Advocates acted negligently in that they did not attend court on 13<sup>th</sup> February 2020 and on six other occasions. The Applicant argues that failure by her former Advocates to attend court led to entry of judgement ex-parte which has now resulted in execution process.

6. The Applicant contends that she intends to file a reference against the taxing officer's ruling which was delivered on 17<sup>th</sup> October 2019. The Applicant argues that the taxing officer did not address serious factual and fundamental issues of law which she intends to raise in the reference.

7. The Applicant contends that she was not aware that her former Advocates did not attend court on 13<sup>th</sup> February 2020. She states that her former Advocate sent her a WhatsApp message on 14<sup>th</sup> February 2020 attaching a certificate of taxation dated 15<sup>th</sup> November 2019 without any guidance on what she was expected to do. The former advocates thereafter refused to take her calls. The Applicant thereafter instructed another firm of Advocates who went and perused the court file. This is the time the new Advocate discovered that her former Advocates had failed to attend court on seven occasions.

8. The Applicant contends that she does not have a job and that if execution proceeds, she will suffer great damage. She argues that the intended reference raises serious issues which ought to be addressed.

9. The Advocate/Respondent opposed the Applicant's application based on a replying affidavit sworn on 24<sup>th</sup> July 2020. The Respondent contends that the Applicant's application is frivolous, vexatious and is an abuse of the court process. He contends that the Applicant is guilty of indolence and inordinate delay which has not been explained.

10. The Respondent further contends that the Applicant is intent on misleading the court into granting the orders by claiming that she did not know what was expected of her yet she is an advocate of the High Court with over 29 years of experience. The Respondent argues that this application is brought with the sole purpose of delaying this matter and that a litigant cannot blame her advocate when it is her duty to follow up her case.

11. In response to the Respondent's replying affidavit the Applicant filed a further affidavit in which she contends that she is not guilty of any delay as the current application was filed 14 days after the certificate of taxation was adopted as Judgement of the Court. The Applicant argues that there was an express agreement as regards fees and that the taxing officer took the value of the subject matter of the suit as Kshs.20,000,000/=when the purchase price at the time of instructing the Respondent was kshs.1,500,000/=.

12. The Applicant contends that she has been in commercial and corporate world all her working life and that she does not know what goes on in the world of litigation. The Applicant argues that the execution process arises from irregular warrants which were not properly extracted and served.

13. I have carefully considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions by the parties. There are two issue which emerge for determination. The first one is whether this court should set aside the proceedings of 13<sup>th</sup> February 2020 together with the consequential orders. The second issue is whether this court should enlarge the time within which the Applicant should file a reference to this court. Of course the other issue will be which order is to be made on costs.

14. On the first issue, the Applicant is blaming her former lawyer for acting negligently by failing to represent her properly in court. The Applicant therefore argues that the mistake of her lawyer should not be visited upon her. The Advocate/Client bill of costs was filed on 10<sup>th</sup> October 2017. The Respondent's Advocate entered appearance on 31<sup>st</sup> October 2017 and filed a Notice of preliminary objection on 1<sup>st</sup> November 2017.

15. The taxing officer then directed the parties to file written submissions on both the bill of costs and the preliminary objection. The Advocates filed written submissions as directed. On 24<sup>th</sup> July 2018, the taxing officer in a one paragraph ruling struck out the bill of costs and granted leave to the Advocate to file a fresh bill of costs. Aggrieved by this Ruling, the Advocate for the client file a chamber summons in which he contended that the taxing officer having struck out the Advocates bill had no business granting the advocate leave to bring up a fresh bill.

16. In a ruling delivered on 21<sup>st</sup> March 2019, this court set aside the ruling of 24<sup>th</sup> July 2018 and remitted the bill back to the same taxing officer with instructions to tax the same considering the preliminary objection which had been raised. The taxing officer taxed the bill and delivered ruling on 17<sup>th</sup> October 2019. The Advocate then made an application dated 13<sup>th</sup> November 2019 seeking entry of Judgement arising from the certificate of taxation. This application was duly served upon the Applicant's former Advocate who did not attend court on 13<sup>th</sup> February 2020 when the same was allowed.

17. The Applicant is arguing that she was not properly represented by her former lawyer. The Applicant blames her former lawyer for not appearing in court on 23<sup>rd</sup> July 2019, 26<sup>th</sup> September 2019 and 2<sup>nd</sup> October 2019 , 9<sup>th</sup> October 2019 , 17<sup>th</sup> October 2019 , 15<sup>th</sup> November 2019 and 13<sup>th</sup> February 2020. On all these occasions, the Applicant's former lawyer was notified but chose not to attend court. It was incumbent upon the Applicant to keep following her matter which was before court. The Applicant being a lawyer was expected to be more keen in following up the matter especially considering that it was a bill of costs where she was expected to pay money to the Applicant.

18. The Applicant cannot simply say that she was let down by her former lawyer and expect the court to set aside the proceedings. In **Dayton Valuers Limited Vs John Ngugi (2020) e KLR** Justice Kasango quoted from the case of **Savings and Loans Limited Vs Susan Wanjiru Muritu Nairobi (Milimani) HCCC No. 397 of 2002** where Kimaru J stated as follows:-

**“Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a Case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her Case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate's failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present Case, it is apparent that if the Defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff's determination to execute the decree issued in its favour, is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant. (emphasis added)”.**

19. The Applicant's lawyer and the Applicant herself were expected to know well the consequences of not attending court. There is no good reason why there was no attendance by the Applicant's lawyer. When the Applicant's lawyer became aware of the taxation, he sent a certificate of taxation to the Applicant who wants the court to believe that she did not know what to do with it and yet she is a lawyer of over 29 years standing. Her explanation that she has never engaged in litigation cannot be taken as an excuse.

20. I have looked at the Ruling of the taxing officer and the proposed grounds for attack were the Applicant to be given extension of time for filing the reference. The taxing officer exercised her discretion well. She considered the submissions which had been filed including the preliminary objections as had been directed by the court which remitted back the bill for taxation. It will therefore serve no purpose if the Applicant was to be given extension to file a reference out of time. I therefore find no merit in this application which is dismissed with costs to the Respondent.

It is so ordered.

### **The Second Application**

21. In this Application, the Applicant contends that her motor vehicle Registration No.KCG 354 A was attached in execution of a decree which was not properly extracted as the draft decree was not sent to her former lawyer as required by law. The Applicant also contends that the 2<sup>nd</sup> Respondent in this application who is an auctioneer went to her compound and removed the vehicle without showing her letter of instruction from the 1<sup>st</sup> Respondent or even give her notification of sale.

22. The Applicant also contends that she was not served with a proclamation notice. It is on this basis that the Applicant seeks the order for release and declaration that the attachment was not lawful.

23. The 1<sup>st</sup> Respondent opposed the Applicant's application based on grounds of opposition dated 4<sup>th</sup> September 2020, a preliminary objection dated 4<sup>th</sup> September 2020 and a replying affidavit dated 4<sup>th</sup> September 2020. The 1<sup>st</sup> Respondent contends that the certificate of taxation which was issued is final and cannot be challenged through these proceedings. The 1<sup>st</sup> Respondent also contends that the 2<sup>nd</sup> Respondent has not been a party in the proceedings and has been improperly enjoined.

24. The 1<sup>st</sup> Respondent contends that he followed all the procedures required by sending a draft decree for approval by the Applicant's lawyers. A letter of instruction was properly given to the 2<sup>nd</sup> Respondent who went to attach the properties of the Applicant after getting all

the documents which were required.

25. On his part, the 2<sup>nd</sup> Respondent says that he went through all the procedures up until he removed the Applicant's vehicle from her compound. The Applicant went to Muthangari Police Station where she reported that the vehicle had been stolen in a robbery incident which was not the case.

26. In a supplementary affidavit filed by the Applicant, she contends that joinder of the 2<sup>nd</sup> Respondent is not fatal and can be excused under Article 159 of the Constitution. On the issue of execution of decree, the Applicant contends that the same was not extracted in a proper way and that the documents by the 2<sup>nd</sup> Respondent were not obtained in a genuine way. She contends that the documents which the 2<sup>nd</sup> Respondent used were forgeries.

27. I have looked at the documents annexed to the affidavit of 1<sup>st</sup> and 2<sup>nd</sup> Respondents. All these documents followed the procedure required by the law. The 2<sup>nd</sup> Respondent was properly instructed by the 1<sup>st</sup> Respondent. The documents which the 2<sup>nd</sup> Respondent required from the court were issued properly. There is therefore no basis upon which the Applicant can argue that the documents were forged. I do not find any merit in this application which is hereby dismissed with costs to the Respondents.

It is so ordered.

### **The Third Application**

28. In this application, the Applicant contends that the 2<sup>nd</sup> Respondent as well as the 1<sup>st</sup> Respondent be held to be guilty of contempt of court for failure to release the attached motor vehicle. The Applicant contends that once there was stay of sale, this meant that the Respondents should have released the motor vehicle.

29. I did not see any response to this application by either the 1<sup>st</sup> or the 2<sup>nd</sup> Respondent. They only filed submissions touching on the same. Be that as it may, this court only granted an order for stay of the sale of the attached motor vehicle. There was no order for release which was given by this court and this explains why the Applicant filed this application to compel the 2<sup>nd</sup> Respondent to release the vehicle. This application is misconceived and the same is dismissed with no order as to costs. The interim orders which had been granted staying sale are hereby discharged.

It is so ordered.

Dated, Signed and Delivered at **Nairobi** on this **25<sup>th</sup> day of February 2021.**

**E.O.OBAGA**

**JUDGE**

In the Virtual presence of:-

Mr Onyango for Applicant

Mr Kirika for Mr Kimathi for Respondent

Court Assistant: John

**E.O.OBAGA**

**JUDGE**