

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL MISC. NO. 50 OF 2001

MWANGANGI & CO. ADVOCATE.....APPLICANT

VERSUS

PETER MULI MAINGI.....RESPONDENT

R U L I N G

By notice of motion dated 6.11.2003 the applicant seeks orders of stay of execution of the order of taxation herein pending the filing of substantive suit by the applicant/respondent.

The application is based on grounds that the applicant/respondent is in the process of taking court execution proceedings and yet no substantive suit has been filed and served upon respondent/applicant in respect of the taxed Advocate/client bill of costs and that absence of the suit contravenes Section 48 of advocates act and respondent/applicant will suffer substantial loss if execution proceeds. The application was also supported by affidavit of Peter Muli Maingi in which he depones that he engaged the Applicant/Respondent to act for him in HCCC 219/97, he was awarded damages but the company was wound up and advocate lodged his bill for taxation which was done and he has been unable to pay the legal fees of 65,000/= and the respondent is in the process of taking out execution proceedings with a view to attaching his property and yet no substantive suit has been filed against him.

The applicant respondent did not file any replying affidavit or grounds of opposition. She however addressed court and told court that a suit has been filed and served to respondent. The court was not given the number of the case file. Even if that be the case the respondent cannot apply for execution before the filing of a suit as per provisions of section 48 of the advocates Act. No execution can take place before a substantive suit is filed against the applicant. I do see that application for execution of decree was filed in court on 18.11.2003. The process of execution is illegal and the court will order a stay of the taxed costs till a substantive suit is filed by respondent against the applicant. Application is allowed with costs to the applicant. Right of appeal 14 days.

Dated, read and delivered at Machakos this 12th day of February, 2004.

R. WENDOH

JUDGE