



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL MISCELLANEOUS APPLICATION NO. 58 OF 1996

MAKAU ADVOCATE ::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

THOMAS MUTINDA MBALASI ::::::::::::::::::::::::::::::::::: RESPONDENT

Coram: J. W. Mwera J.
Munyasia Advocate for Applicant
Makau J. Advocate for Respondent
C.C. Muli

RULING

The respondent/applicant in his application dated 18.5.2001 prays this court to enlarge time within which he may object to the taxing master's decision determining the costs to be paid between the client/applicant and advocate/respondent. Mr. Munyasia cited Regulation 11 (4) of the Advocates Remuneration Order under the Advocate's Act, herein the Act, and S.3A Civil Procedure Act. The court was also asked to set aside the consent orders of 8.5.2001 by which the client's wife guaranteed to ensure payment of the costs due to Mr. Makau, and during the submissions the court heard that there was an earlier consent order by the respondent and the applicant's lawyer whereat the client agreed inter alia to liquidate the taxed costs at Sh.5000/= per month until payment in full in default he be committed to civil jail.

Mr. Munyasia argued that after properly filing this miscellaneous application in respect of advocate – client costs, Mr. Makau, the advocate, proceeded to execute for the same after taxation, the taxation that was said to be unknown by the client, without filing a suit under S. 48 of the Act. That all was thus unprocedural, contrary to the law and therefore invalid. He desired everything to be set aside so that taxation would commence all over.

Mr. Makau expressed the view that his costs were taxed after due notices, and the sum due was known to the applicant/client. That the client at one time or another undertook to pay the balance of costs taxed and even paid some to the auctioneers and to Mr. Makau's chambers. As at this point the court was not told exactly how much is owing. He concluded the orders prayed were not merited.

Considering all the submissions by counsel this court is of the view that a bill of costs was served on the client. It was taxed on 11.12.97 at Sh.26188/=. If he did not attend that session, he came to know of the sum due from him and he must have paid some of it. This court is not about to doubt the authority of

the lawyer who recorded a consent order on behalf of the applicant to pay the balance of costs with effect from 9.9.99 at Sh.5000/= per month. There has been no application to impeach this order and it must be taken to be proper and valid. Stopping here for a while if, the client/applicant defaulted to pay up as it appears he did, he was to be committed to civil jail. And that is what happened on 2.5.2001. This was an agreement he had bound himself to and could be put into force without filing a plaint or other.

So on 8.5.2001 the client's wife one Regina Mukhee Mutinda fearing for the health of the debtor – client in civil jail, filed a consent letter with Mr. Makau wherein she undertook as guarantor of the debtor, to pay off the remaining taxed costs. Again this court was not told that the consent order was invalid in anyway in the nature of contracts. So if she does not pay up one would say that Mr. Makau Advocate would take it up to enforce it. But be that as it may.

In the circumstance of this matter, this court is unable to grant the prayers of the client – debtor. His being thrown in civil jail is what he bound himself to on 9.9.99 in case of default to liquidate the balance of costs. Such a consent did not need the advocate suing his client separately as per S.48 of the Act.

The logical flow of things, in order to invoke this section, is that when after a client does not pay up the costs taxed in a miscellaneous application, the taxed costs having been served on him, then to recover them the advocate should file a suit by way of plaint. If and when he succeeds, then can he apply for execution of the judgement and decree therein by way of attachment and sale or arrest and committal to civil jail.

Here the advocate did not need to take the course under S.48 of the Act. The client bound himself and later his wife to pay the balance of costs due to the plaintiff. They did this on this miscellaneous application file. They acknowledged costs owing and undertook or guaranteed to pay. So if the client was thrown in civil jail that is what he bound himself to. And if his wife fails to honour her guarantee to pay the costs owed by the client again one would say that Mr. Makau would move to enforce that contract of guarantee. The latter seems to be current.

Prayers dismissed. The client would do well to pay up or else his wife will be in trouble on her guarantee which was recorded by consent and it is seemingly standing as valid.

Orders accordingly.

Delivered on 25th July 2001.

J. W. MWERA

JUDGE