



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**

**ELC MISCELLANEOUS APPLICATION NO. 47 OF 2018**

**AMBWERE T.S & ASSOCIATES.....ADVOCATE**

**AND**

**FRANK NYAMBU WAFUKWA & OTHERS.....CLIENTS**

**AND**

**MARTIN KIVUVA MUSONDE.....APPLICANT**

**RULING**

*(Application to set aside an attachment originating from an Advocate/Client Bill of costs; applicant stating that he did not instruct counsel to file the suit which gave rise to the Bill of costs; Advocate asserting that he was so instructed by the applicant; the suit in issue being a suit for adverse possession filed by 41 persons; applicant not among those 41 persons; applicant not therefore bound by any judgment in favour of the Advocate; execution against the applicant set aside)*

1. There are two applications before me. The first is that dated 18 January 2021 filed by Martin Kivuva Musonde against M/s Ambwere T.S & Associates Advocates as 1<sup>st</sup> respondent and Frank Nyambu Wafukwa & Others jointly 2<sup>nd</sup> respondents. The principal order sought in the application is to set aside and vary the ruling of this court of 26 February 2020 and 11 November 2020 and have the applicant be heard and to defend both applications on merit. There is also the prayer for the law firm of M/s B.M Musau & Company Advocates to come on record for the applicant. Interim orders of stay were issued on 19 January 2021. The second application is that dated 25 January 2021 filed by M/s Ambwere T.S & Associates Advocates against Frank Nyambu Wakufwa & 40 Others. It seeks orders to set aside the interim orders issued on 19 January 2021 or in the alternative for Mr. Musonde to deposit the sum of Kshs 300,000/= as security. Since the two applications were related, I directed that they be heard together.

2. The genesis of the matter is that M/s Ambwere T.S & Associates Advocates (the Advocates) filed the suit Mombasa ELC No. 81 of 2016 (OS), where Frank Nyambu Wakufwa & 40 others (the plaintiffs) filed suit for adverse possession over the land parcel Mainland North/Section 1/413. The suit was defended but before it could be heard, the plaintiffs changed counsel. The Advocates then filed their Advocate/Client bill of costs for taxation. The bill was taxed by the taxing master but there was a challenge to the taxation and it came before me. I delivered ruling on 26 February 2020. The parties then appeared again before the Deputy Registrar on 13 March 2020 and they reconciled the figures by consent to the sum of Kshs. 970,175/= as the fees payable to the Advocate. The Advocate subsequently filed an application for judgment to be entered. The application was allowed and judgment was entered in his favour on 11 November 2020. The Advocate remained unpaid and he proceeded to execute for the money jointly and severally against the plaintiffs by way of attaching their valuables. Among the properties sought to be attached were those of Martin Kivuva Musonde (the applicant). The applicant, who introduces himself as the Bishop of Mombasa Archdiocese, contests this attachment mainly on the ground that he never instructed the Advocate to file the suit Mombasa ELC No. 81 of 2016 (OS) (the suit). He also contends that he never instructed Chebukaka & Associates Advocates, the law firm that took over the conduct of the suit from M/s Ambwere T.S & Associates Advocates. He thus contends that he has not been heard in response to the Advocate/Client Bill of costs and the reference.

3. In opposing the application, and in his own application, Mr. Ambwere has deposed that at no time has the applicant ever complained that he was wrongly included in the suit and that he has hitherto never complained that he never instructed the Advocate. He has challenged the applicant to disclose when he realized that he was a plaintiff and what action he took to disassociate himself from his co-respondents. He deposed that on 11 November 2020, the applicant through the law firm of M/s B.M Musau & Company Advocates sent him an email inquiring about the ruling on taxation. He avers that it is thus clear that the applicant was well aware of the matter and his assertion to the contrary is a big and malicious lie. He has further deposed that he and Ms. Teresia Munywoki Advocate of M/s B. M Musau & Company Advocates have been in constant communication over settlement of the Advocate fees which however broke down when the Advocate insisted on having Kshs. 500,000/= as deposit. He deposed that a suit that has been finalized cannot be relitigated on the grounds of no instructions and that it is irregular for the applicant to sue his co-respondents.

4. In his submissions, counsel for the applicant asserted that the retainer to the Advocate is disputed and relied on the case of *M.S Shariff & Co Advocates vs Omari Mbwana Zonga (2020) Eklr* among other authorities. Mr. Ambwere on his part submitted that the applicant is a resident of the disputed land and has built a massive house. He submitted that he has not explained how he was made a plaintiff and does not deny being plaintiff.

5. I have considered all the above. First, I have no reason to deny the law firm of M/s B.M Musau & Company Advocates to be on record for the applicant. That order is allowed.

6. The gist of the matter is whether or not the applicant instructed the Advocate to act for him in the suit Mombasa ELC No. 81 of 2016

(OS). It is the contention of the applicant that he never did and the opposite is the assertion by the Advocate. To try and find where the truth lies, I have perused the file Mombasa ELC No. 81 of 2016 (OS). The Originating Summons was filed on 21 April 2016. The summons was filed by *Frank Nyambu Wakufwa, Musa Juma Shoghosho, Jimmy K. Mongo, George Gamba Zombo & 37 Others*. The 37 others were not mentioned in the body of the Originating Summons but there was filed a consent to file representative suit filed by 37 persons. I have gone through all the 37 names. I have not seen the name of the applicant. I therefore have serious doubt as to whether the applicant was ever plaintiff in the suit. If he was not plaintiff, then I do not see how he can be liable to pay fees to the Advocate for the Advocate/Client relationship will not exist. I think on that ground alone, I must allow this application.

7. I therefore set aside the execution of the judgment in relation to the Advocate/Client Bill of costs against the applicant. Although the applicant wants orders to be heard on the taxation, I see no need because he is not one of the respondents therein. I will regard the matter as one where execution is being levied against a person who is not a party to the proceedings, and I think I need to make clear, which I hereby do, that the judgment entered in favour of the Advocate can only be executed against the 41 persons who are the plaintiffs in Mombasa ELC No. 81 of 2016 (OS) and no other person. Martin Kivuva Musonde is not among the plaintiffs in Mombasa ELC No. 81 of 2016 (OS) and the judgment on costs does not therefore affect or bind him. Flowing from the above, I find the application dated 25 January 2021 to be unmerited and it is hereby dismissed. Martin Kivuva Musonde will have the costs of his application and the costs of the application dated 25 January 2021 against the Advocate.

8. Orders accordingly.

**DATED AND DELIVERED THIS 2<sup>ND</sup> DAY OF FEBRUARY 2022.**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA.**