



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 265 OF 2015

AHMEDNASIR, ABDIKADIR & CO. ADVOCATES.....DECREE HOLDER/RESPONDENT

- VERSUS -

ROSEMARY KINANU GITUMA.....JUDGEMENT DEBTOR/APPLICANT

RULING

1. This is the chamber summons dated 6th November 2020 brought under order rule 9, 10, order 22, order 40 rule 1 and rule 2 order 51 rule 1 of the Civil Procedure Rules and section 3A, section 63.

2. It seeks orders: -

1. Spent.

2. Spent.

3. Spent.

4. That this honourable court be pleased to set aside exparte judgment that was delivered on the 31st day of January 2020.

5. That the certificate of taxation issued on the 6th day of November 2017 beset aside.

6. That leave be granted to the applicant to contest on the items herein.

7. That costs of this application be provided for.

8. Any other further relief that this honourable court many deem fit and just to grant.

3. The grounds are on the face of the application and are set out in paragraphs 1 to 6.

4. The application is supported by the affidavit of Rosemary Kinanu Gituma, the applicant herein sworn on the 6th November 2020.

5. The application is opposed. There is a replying affidavit sworn by Peter M. Gichuru Advocate, practicing as a partner in the respondent's firm sworn on the 2nd December 2020.

6. On the 21st January 2021 the court with the consent of the parties directed that the application be canvassed by way of written submissions.

The 1st Applicant's Submissions

7. They are dated 11th January 2021. The 1st respondent despite having not given the Applicant the legal opinion as requested went ahead to refer the matter for arbitration on the dispute between her and Ndege Homes Limited.

The application was dissatisfied in the way the matter was being handled and requested to have the documents put together and given to her.

8. The 1st respondent proceeded and filed a bill of costs in court. The same was not served but was heard, taxed and judgment entered without the applicant's knowledge. The advocates involved did not have express instructions from the applicant to handle the same.

The 1st respondent's bill was highly inflated and intended to punish the Applicant from exercising her right by asking to be given a breakdown of the fee note by the 1st respondent.

9. The 1st respondent has never produced any letter showing they issued the applicant with a legal opinion despite requesting for the same. The applicant has demonstrated that she deserves to be heard as her claim against the respondents is meritorious. She prays that the application be allowed as no prejudice will be occasioned to the 1st respondent if the bill of costs is set aside.

The 1st and 2nd Respondent's Submissions

10. They are dated 3rd February 2021. There is uncontroverted evidence that pursuant to the applicant's instruction an arbitration was initiated. The applicant attended the arbitration meetings and also directly corresponded with the Arbitrator.

11. The 1st respondent's bill of costs was served on the applicant's advocate who were on record for her and the said advocates filed an opposition to the bill of costs. Mr. C. B Mwangela Advocate confirmed that he received instructions to oppose the bill of costs. He also confirmed that he filed an objection to the bill. The applicant's advocate was present when judgment on the taxed costs was entered in favour of the 1st respondent.

12. No reference was filed against the taxed costs. What is being presented as a review application is nothing but a disguised reference that does not comply with section 11 of the Advocates Remuneration Order that outlines the procedure to be followed when a party wished to challenge the decision of a taxing master.

13. There was no fee agreement between the applicant and the 1st respondent. A fee note does not constitute a fee agreement as envisaged within the provisions of section 45 of the Advocates Act. They have put forward the case of **Kakuta Maimai Hamise vs Peris Pesi Tobiko & Another [2017] eKLR**. The applicant has approached this court with dirty hands and is undeserving of the exercise of this court's discretion. They pray that the application be dismissed with costs to the respondents.

14. I have considered the chamber summons, the affidavit in support and the annexures. I have also considered the replying affidavit and the annexures. I have also given due consideration to the written submissions filed on behalf of the parties. The issue for determination is whether this application is merited.

15. It is the applicant's contention that she did not give instructions to the 1st respondent to refer the matter for arbitration. Further that the bill of costs was not served on her hence she did not participate. The 1st respondent on the other hand contends that the matter was referred to arbitration upon instructions from the applicant.

16. I have gone through the replying affidavit of Peter M. Gichuru, advocate together with the annexures. I agree with the 1st respondent's submissions that arbitration was initiated on the instructions of the applicant. She cannot run away from this. The correspondences speak for themselves.

17. I also note that the applicant was represented by C. B Mwangela Advocate during the taxation of the bill of costs. The said advocate filed an objection to the 1st respondent's bill of costs on the instruction of the applicant. The applicant cannot now claim not to have participated in the said taxation. It is on record that the said advocate was present when judgment on the taxed costs was entered in favour of the 1st respondent.

18. The applicant has failed to demonstrate that there was a fee agreement between her and the 1st respondent. She has not annexed any such agreement to her supporting affidavit.

19. In conclusion I find no merit on this application and the same is dismissed with costs to the respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 10TH DAY OF JUNE 2021

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Osoro for the Applicant

Ms Khadija for Mr. Mucheki for the Respondents

Phylis - Court Assistant