



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

MISCELLANEOUS CIVIL APPLICATION NO. 75 OF 2019

IN THE MATTER OF THE ADVOCATES ACT & THE ADVOCATES, REMUNERATION (AMENDMENT) ORDER, 2014

AND

IN THE MATTER OF RECOVERY OF TAXED COSTS AS BETWEEN ADVOCATES & CLIENT

BETWEEN

OKONG'O WANDAGO & COMPANY ADVOCATES.....APPLICANT

Versus

DORINE DANDE.....RESPONDENT

RULING

The Notice of Motion dated 18/6/2020 was filed by **Dorine Dande (the applicant)** through the firm of **Kerario Marwa Advocate** seeking an order that this court be pleased to review and set aside its orders in certificates of costs dated 5/6/2020 in **Migori HCMISC APP 75, 76 and 77 of 2019** and that costs be in the cause.

The grounds upon which this applications is made is that the Bill of Costs in the above stated matters were taxed on 7/4/2020 in the absence of the Respondent; that no notice was served on the applicant notifying her of the scheduled taxation so that she could appear and defend herself or through her advocate. It is the applicant's contention that she will suffer a grave injustice if the orders are not reviewed or set aside.

The applicant swore an affidavit dated 18/6/2020 in support of the application. To the affidavit she attached a certificate of costs served on her by the Respondents DD1 – 3 and she reiterated that she was not served with the Bill of costs and Notice of Taxation of the Bills of costs; that failure to serve her with the Bills of costs and Notice of Taxation was a violation of her rights to fair hearing and right to be represented by an Advocate.

Mr. Mavin Odero, Counsel from the Respondent firm of Advocates filed a replying affidavit dated 1/7/2020 opposing the application. He deponed that the Bills of costs were served on the applicant on 3/12/2019 and that when the Bill of costs come up for hearing on 3/12/2019, the Deputy Registrar was satisfied the same were duly served on the applicant before proceeding to tax it; that the Process Server **Peter Ochara Anam**, a licensed Process Server duly swore an affidavit on 17/2/2020 indicating that a taxation notice was served on the applicant on 10/2/2020 (MO1), that the Advocate/Client Bill of Costs dated 3/12/2019 arises from services rendered by the Respondents in various matters i.e. Ksm Election Pet No. 35 of 2018 Mogesi Agness Bange & Others vs IEBC consolidated with Migori High Court Pet No. 1 of 2018 Dorine Dande vs Mogesi Agnes Dande and Appeal No. 4 of 2018 Elizabeth Talia & 4 others vs Mogesi Agnes Bange which was delivered on 31/5/2018; that Migori Misc Application 76 of 2019 arose from **Migori CM's court Election Petition No. 3 of 2018, Mogesi, Agnes Bange & others =vs= IEBC (MO2)**.

That Migori Misc Application No. 77 of 2019 arose from a bill of costs dated 6/02/2019 arising from services rendered **in Election Petition Appeal No. 1 of 2018 Dorine Dande =vs= Mogesi Agness Bange (MO3)**; that notices in the 76 and 77 of 2019 were served on the Applicant as evidenced by the affidavit of service (MO4). It is the Respondents contention that having been served with the Advocate clients bill of costs, the applicant was accorded an opportunity to be heard.

On 2/7/2020 J. Mrima gave directions that these application be canvassed by way of submissions and allowed them to file submissions; but counsel for the applicants failed to comply. Counsel for the Respondents however filed their submissions on 19/8/2020 on which they relied on the replying affidavit of Odero Advocate; that the instant application is not replicated in Misc Application No. 76 and 77 of 2019 and that the three applications, namely 75, 76 and 77 are not consolidated for purposes of determining this application: It was also submitted that the affidavits of service MOI – 4 annexed to the replying affidavit are evidence of service of the bill of costs and taxation notice on the applicant and there has been no challenge to the said affidavits and it is the best evidence available on the issue of service. Counsel relied on the

decision of **Samson Cheruiyot Barnwach & Another vs Mary Cheptoo Soti (2020) EKLR** where the court upheld an affidavit of service as proper evidence of service.

I have duly considered the application dated 18/6/2020, the affidavits and submissions by the Respondent.

It is indeed worth noting that Misc Application 75, 76 and 77 are not consolidated. They are being heard together for convenience as they relate to the same parties but the applications were different and had not been consolidated.

As pointed out by counsel, the application dated 18/6/2020 was only filed in Misc Application 75 of 2019. However, Mr. Odera in his replying affidavit addressed all the applications 76 and 77 of 2019. I will therefore deal with each application in this ruling which will apply to all the three applications. The applicant's main borne of contention is that she was not served with the Bills of costs nor was she notified of the date for taxation. In Misc Application 75 of 2019, the same arises from services rendered by the Respondent in High Court Petitions of Appeal No. 2 of 2018 Caroline Akinyi & Others =vs= I. E. B. C. & others as consolidated with Petition of Appeal No.1 of 2018 and No. 4 of 2018 Dorine Dande =vs= Mogesi Agness Bonge & 22 others and Elizabeth Talia & 4 others =vs= Mogesi Agnes Bonge delivered on 31/5/2015. I have seen the affidavit of service sworn by a process server by name Peter Ochara Anam. He deponed that on 10/2/2020, he personally served the applicant with the Bills of Costs dated 3/12/2019 which was due for taxation on 18/2/2020.

According to the process server the service was at the applicants home which was known to him and that the applicant received the documents and signed for them. I have seen that MOI, the taxation notice, bears a signature which is allegedly the applicants. In her affidavit, the applicant generally denied service of the bills and notice but has not denied specifically that the signature on the documents is hers. This affidavit was before the taxing master on 18/2/2020 as it was filed on 17/2/2020. There is no specific challenge on the affidavit of the applicant that it was not truthful or that the applicant was not served as alleged. The applicant's allegation has no basis. I would in this case adopt the decision of the Court of Appeal in **Samson Cheruiyot Barnwach & Another =vs= Mary Chepto Soti supra** where the Court said

“The affidavit of service which was filed by the process server complied with 5 Rule 15 of the Civil Procedure Rules in so far as it indicated the date, time and manner in which the Appellant was served and identified the person who pointed out each appellant to the process server. Although no address of the person who pointed out was given, this was not a mandatory requirement and the omission did not vitiate the service.”

In this case, the process server deponed to having served the applicant at her home and she signed the documents. So far there is no challenge to that affidavit.

As regards, Misc Application No. 76 of 2019, the advocate / client Bill of Costs is for services rendered by the Respondent in Migori CM'd Election Petition No. 3 of 2018 Mogesi Agnes Bonge & others =vs= I. E. B. C. where the Respondents defended the applicant. Again by an affidavit of service dated 14/2/2020 the process server Peter Ochara Anam deponed that he served the applicant at her home on 10/2/2020 and that she signed the documents upon receipt. Apart from a general denial that she was not served, there is no specific denial of the contents of the process server's affidavit. The applicant did not deny the signature allegedly appended by her. The affidavit of service complied with the Rules of service and the applicant's claim of non service has really no basis. I find that the applicant was duly served.

In Misc Application No. 77 of 2019, the Advocate / Client Bill of Costs arose from Election Petition No, 2 of 2018 as consolidated with Election Petition No 1 of 2018 and No 4 of 2018 Dorine Dande =vs= Mogesi Agnes Bange where the Respondent rendered services to the applicant. Again the Respondent exhibited an affidavit of service sworn by a process server Peter Ochara Anam on 17/2/2020 in which he deponed that he personally served the applicant who duly signed the documents. The applicant has not specifically challenged the contents of the said affidavit or that she signed it. The affidavit of service complies with the rules on service under Order 5 Rule 15 Civil Procedure Rules. I find that the applicant was dully served and this application has no basis. The applicant was accorded an opportunity to defend the Bill of costs but squandered that chance when she ignored or intentionally refused to attend court personally or through her advocate. The application dated 18/6/2020 is unmerited and I believe it was meant to delay and derail the execution process. The application is hereby dismissed in regard to Misc Application 75, 76 and 77/ 2019 with the applicant bearing the costs of the applications.

DELIVERED, DATED and SIGNED at MIGORI this 8th day of July, 2021.

R. WENDOH

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Odera for Respondent

Ms. Nyauke court assistant