



## **REPUBLIC OF KENYA**

### **IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

#### **ELC MISC. NO. 22 OF 2019**

**MUKABANE KAGUNZA & CO.ADVOCATES**

**T/A MUKABANE KAGUNZA & CO.ADVOCATES.....PLAINTIFF**

**VERSUS**

**KENNEDY KAVANA KAMUSHU.....1<sup>ST</sup> DEFENDANT**

**AGGREY SAGWA.....2<sup>ND</sup> DEFENDANT**

#### **RULING**

This ruling is in respect of an application dated 27<sup>th</sup> May 2019 by the 1<sup>st</sup> defendant/applicant seeking for the following orders:

- a) That pending the hearing of this application inter partes an order of stay of execution of the order/decree issued herein and warrants of attachment and sale of properties of the 1<sup>st</sup> defendant applicant be granted.
- b) That pending the hearing and determination of this application inter partes an order of stay of execution of the order/decree issued herein and warrants of attachment and sale of properties of the 1<sup>st</sup> defendant applicant be granted.
- c) That the costs taxed herein in favour of the applicants/respondents herein be apportioned equally between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant respondents.
- d) That the sum of Kshs. 33,000/ paid to applicant/respondents be taken into account in calculating the balance to be paid by the 1<sup>st</sup> defendant /applicant and thereafter the proper balance due from the 1<sup>st</sup> defendant/applicant be paid to the applicant respondent herein.
- e) That the applicant/respondents herein to bear the costs of the auctioneers and this application.

Parties agreed to canvass the application vide written submission which were duly filed.

#### **APPLICANT'S CASE**

Counsel submitted that the applicant should not be forced to solely bear the total amount of Kshs. 127,680/ being costs awarded. Further that the respondent has not taken into account Kshs. 33,000/ which was paid as deposit to the respondent advocates.

Mr. Amasakha counsel for the applicant submitted that costs were awarded to the respondent against the two defendants in ELC No 362 of 2016 jointly and severally and no justifiable reason has been given why the respondent is proceeding exclusively against the applicant for the entire amount awarded.

Counsel relied on section 51(2) of the Advocates Act which provides that:

*The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.*

Counsel submitted that the respondent firm of Advocates did not comply with the above provision as they did not seek for judgment to be

entered in terms of the certificate of costs and thereafter draw a decree and apply for execution as provided for under the law.

Counsel therefore urged the court to find that the application has merit and find that the execution set in motion is irregular and that the respondent should bear the auctioneers costs.

### **RESPONDENT'S SUBMISSIONS**

Counsel opposed the application on the ground that is fatally defective hence should be dismissed with costs. Counsel sated that the amount of Kshs. 33,000/ claimed by the applicant to have been paid was received under protest as the same was for disbursements. Counsel further gave a background to the case leading to this application.

Counsel submitted that an Advocate can recover costs from either of the parties who are sued jointly and severally and that the applicant having not paid the costs in full necessitated execution.

Mr. Kagunza counsel for the respondent submitted that the application was not filed timeously and therefore should be dismissed with costs to the respondent.

### **ANALYSIS AND DETERMINATION**

I have considered the application and the submissions by counsel find that the issues for determination are as to whether the respondent followed the right procedure in the execution process upon issuance of certificate of costs and whether the applicant is entitled to the stay of execution orders.

This is an Advocate/ client costs which were taxed and costs awarded against the Advocates' clients who were two defendants in ELC No 362 of 2016. It is on record that the applicant had paid Kshs. 33,000/ as fee deposit to the respondent. It is also on record that the costs of Kshs. 127,680/ was awarded against the two clients jointly and severally. It is also not in dispute that the applicant is ready and willing to pay the balance of the costs of Kshs. 30,840/.

Section 51(2) of the Advocates Act stipulates:

*“ The certificate of a taxing officer by whom it has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of the costs covered thereby, and the court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”*

In the case of **Nyabena Alfred t/a Nyabena Nyakundi & Company Advocates v Tourism Promotion Limited t/a Serena hotel [2018] eKLR** Aburili J held that:

*‘From the above provision, it is clear, and it a rule of practice for advocates to file applications by way of notice of motion moving the court to enter judgment after taxation of their bills of costs and issuance of certificate of taxation. This procedure ensures expedition since the certificate of costs once issued is final as to the amount of the costs covered and what then remains is for the court to pronounce itself, on an application for judgment, where there is no dispute as to retainer, and order that judgment be entered for the sum of as per the certificate of costs’.*

There is no evidence that the respondent complied with the procedure of filing an application for the court to enter judgment after taxation of bill of costs and issuance of certificate of taxation. The respondent attempted to execute the decree by instructing auctioneers to proclaim the applicant's properties.

It should also be noted that the respondent proceeded to demand the whole amount awarded against the applicant without taking into consideration of the amount that had already been paid by the applicant. Further that the respondent ignored the fact that the costs were against the two clients. This shows that the respondent found that the applicant was the soft target with low hanging fruits to pounce on.

Section 27 (1) of the Civil Procedure Act provides that:-

*“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers :*

*Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order”*

Having said that I find that the respondent's action was unprocedural and therefore I order that there be stay of execution of the decree and further order that the costs be apportioned equally between the two defendants who were the respondent's clients.

The respondent should follow the proper procedure as stated above or in the alternative the applicants' offer of payment of Kshs. 30,840/ who is willing to pay his share of the awarded costs. The respondent to bear the auctioneers' costs together with the costs of the application.

**DATED and DELIVERED at ELDORET this 23<sup>RD</sup> DAY OF APRIL, 2020**

***M. A. ODENY***

***JUDGE***