



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 601 OF 2017

IN THE MATTER OF THE ADVOCATES ACT, CAP 16

REPUBLIC.....APPLICANT

VERSUS

THE KENYA MEDICAL LABORATORIES TECHNICIANS AND

TECHNOLOGISTS BOARD.....1ST RESPONDENT

ABEL ONYANGO.....2ND RESPONDENT

RULING

1. By way of a notice of motion dated 15<sup>th</sup> June 2019 expressed under the provisions of Order 51 Rule 1 and 15 of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A, Rule 11(3) of the Advocates Remuneration Order, Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act,<sup>[1]</sup> the Respondents moved this court seeking orders:-

a. Spent.

b. Spent.

c. **That** there be a stay of execution of the Certificate of Taxation issued by the taxing master on 23<sup>rd</sup> May 2019 of Ksh. 246,523/= pending the hearing and determination of costs in Constitutional Petition No. 41 of 2019.

d. **That** the Warrants of Attachment issued in this matter on the 6<sup>th</sup> day of June 2019 be set aside lifted and or vacated.

e. That the costs of this application be provided for.

2. The application is premised on the grounds listed on the face of the application and the annexed supporting Affidavit of Abdulatif Ali and the attachments annexed thereto. Essentially, the core grounds are:-

a. That by an order issued on 26<sup>th</sup> February 2019, this honourable court issued an order declaring this matter closed;

b. That the ex parte applicant thereafter filed constitutional petition No. 41 of 2019, Nicky Odongo Lubanga v The Kenya Medical Laboratory Technicians and Technologists Board and Abel Onyango citing the same issues between the parties as were raised in this case. The Respondent herein filed a preliminary objection and a Replying Affidavit in the said petition stating inter alia that the matter is res judicata and abuse of court process. Upon serving the said Notice of Preliminary Objection, the ex parte applicant herein filed a Notice of Withdrawal, which is yet to be adopted by the court.

c. That the ex parte applicant herein filed their Bill of Costs which was taxed at Ksh. 246,973/= on 9<sup>th</sup> May 2019.

d. That the firm of Kimiti & Associates who are not on record for the ex parte applicant served the Certificate of Taxation upon the Respondent herein together with a Proclamation Notice and Warrants of Attachment on 7<sup>th</sup> June 2019.

e. That the firm of Kimiti & Co Advocates who are seeking to proceed with the attachment are not on record for the *ex parte* applicant herein and cannot therefore seek to execute against the Respondent as a Notice of Change of Advocates was not filed, and, since, the costs are payable to the *ex parte* applicant, the attachment can only be levied by their advocates on record.

### **Respondent's/Applicant's Replying Affidavit**

3. Veronica Wamuyu Kimiti, an Advocate of the High Court of Kenya and the Managing Partner of the firm of Kimiti & Associates swore the Replying Affidavit dated 2<sup>nd</sup> July 2019 in opposition to the application.

4. She averred that they filed these proceedings on behalf of the *ex parte* applicant and subsequently the *ex parte* applicant opted for a change of advocates, which her firm did not object to. She however, deposed that the change of advocates was conditional to them claiming costs as awarded by the court. She averred that they filed their Bill of Costs which was taxed at Ksh. 246,973/=, and, after efforts to recover the money failed, they instructed auctioneers.

5. She further deposed that whereas it is true the firm of Machuki & Associates are on record for the *ex parte* applicant, their coming on record was conditional that her firm would execute for the costs.

### **The submissions**

6. The substance of the respective advocate's arguments in court was essentially a highlight of their pleadings in support or opposition of the application. It will add no value to rehash them here, save to state that only one core issue falls for determination, namely whether the firm of Kimiti & Co advocates having been replaced by the firm of Machuki & Co advocates can properly and legally levy the execution in question.

### **Determination**

7. The record shows that on 19<sup>th</sup> April 2018, the firm of Machuki & Associates filed a Notice of Motion dated 19<sup>th</sup> April 2018 seeking leave to come on record for the *ex parte* applicant. On 20<sup>th</sup> April 2018, the court ordered the said advocates conformity with the provisions of Order 9 Rule 9 of the Civil Procedure Rules, to serve the application upon the then advocates on record for the *ex parte* applicant. On 21<sup>st</sup> May 2018, the said application was allowed by consent. Effectively, the firm of Machuki & Associates came on record as acting for the *ex parte* applicant replacing the firm of Kimiti & Co Advocates. The said order was granted by consent of all the parties including a representative for the firm of Kimiti & Co Advocates.

8. Curiously, despite ceasing to act as aforesaid, the said firm filed a Party and Party Bill of Costs which was ultimately taxed in the sum of Ksh. 246,523/=. It is this Certificate of Costs that the said Advocates sought to execute triggering the present application.

9. The firm of Kimiti & Co Advocates having ceased to act in this matter for the *ex parte* applicant cannot purport to continue acting under the guise that they seek to recover their fees against the Respondent. It follows that the filing of the Bill of Costs and the subsequent taxation and issuance of the Certificate of Costs was improper. The said firm cannot insist on remaining on record purely to recover costs. The law provides a mechanism for recovery of costs where more than one advocate has represented a party. The procedure adopted by the firm of Kimiti & Co is alien to the law.

10. It follows that the purported execution is legally frail and therefore unsustainable. Consequently, I allow the application dated 13<sup>th</sup> June 2019 and set aside the Warrants of Attachment issued in this case on the 6<sup>th</sup> day of June 2019 and any subsequent orders or attachment flowing from the said warrants.

11. No orders as to costs.

Right of appeal.

**Dated at Nairobi this 4<sup>th</sup> day of November, 2019**

**John M. Mativo**

**Judge**

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[1] Cap 21, Laws of Kenya.