



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISCELLANEOUS CIVIL APPLICATION NUMBER 138 OF 2014

NJUGUNA MATIRI & COMPANY ADVOCATES.....APPLICANT

VERSUS

NATIONAL BANK OF KENYA LTD.....RESPONDENT

(Arising From Kericho HCCC No 43 Of 2011 Between Paul Kiprotich Arap Koech Alias Kiprotich Arap Kenduiywo -Versus – National Bank Of Kenya Limited and 2 Others (Later Transferred To Nakuru))

RULING

1. By an application dated the 1st March 2016 under the provisions of **Order 22 Rule 22 and Order 49 Rule 5 of the Civil Procedure Rules** and **Section 51(2) of the Advocates Act** the Respondent, National Bank of Kenya sought orders:

1. *Spent*

2. *That the execution and attachment issued herein on the 17th February 2016 be stayed until the matter is heard interpartes or until further orders of the court.*

3. *That the execution proceedings instituted against the Respondent and all consequential orders be set aside unconditionally.*

4. *That the Advocates do meet the auctioneers charges if any.*

2. The grounds upon which the application is based are stated that the ruling of 9th February 2016 was delivered *ex parte*, that the Advocate has already been paid the taxed costs, that there was no certificate of costs issued and that there is no decree capable of being executed and therefore the execution by the Advocates was malicious and premature. It is also stated that the firm of Matiri Mburu Chepkemboi & Co. Advocates who were issued with the warrants are not parties to the proceedings.

In her affidavit in support, the applicants Branch Manager, Mrs. Mary Tallam depones that there was no certificate of costs or a decree upon which execution could issue and therefore the said execution was malicious and unlawful and ought to be nullified.

3. The application is opposed by the Advocates by the Replying affidavit sworn by Njuguna Matiri Advocate on the 4th March 2016. He states that along with the application for execution to the Deputy Registrar, he sought for adoption of the Certificate of costs as a decree. Acting on the letter dated 10th February 2016 the Deputy Registrar issued warrants of attachment and attachment by way of

proclamation ensued. It is his disposition that the Advocate-client bill of costs was filed by Matiri-Mburu & Chepkemboi Advocates to whom the warrants of attachment were issued and that the certificate of costs was also issued in the same names. He sought that the application be struck out as incompetent.

4. To start with, the Bank states that there is no certificate of costs issued nor a decree from which execution could issue. The advocates in their responses did not exhibit such certificate of costs or decree. The Advocate-client Bill of costs dated 30th June 2014 is however attached.

5. The court is left to wonder whether the bill of costs was taxed and if so, whether a certificate of costs was issued and the decree therefrom.

The applicant Bank through its advocates submit that the Deputy Registrar acted on a letter dated 10th February 2016 by the Advocates to adopt the certificate of costs and issue both a decree and warrants which is unprocedural as it is a judge who may adopt the certificate of costs as a judgment from which a decree may follow for execution purposes.

6. The issue of representation of the Respondent-Bank arose and to illustrate the confusion, Mr. Kiburi Advocate for the Bank stated that the firm of Matiri Mburu & Chepkemboi Advocates filed the bill of costs dated 30th June 2014 was, the notice of taxation was issued in the name of Njuguna Mariti & Co. Advocate whereas Notice of appearance was filed in the name of Njuguna Matiri & Co. Advocates. Also filed in the name of Matiri & Co. Advocates are affidavits dated 15th September 2014, and written submissions dated 17th September 2014.

Further, it is shown that court pleadings are in the name of Njuguna Matiri & Co. Advocates. A cheque issued in payment of Kshs.439,367/= costs and dated 23rd February 2016 in respect of this claim is in the names of Njuguna-Matiri & Co Advocates. I have also seen the warrants of attachment issued by the court in the names of Matiri Mburu & Chepkemboi Advocates for a sum of Kshs.439,367/=.

7. I have confirmed that Mr. Matiri Mburu Advocate has been filing court pleadings under different names. It is prudent that the name under which the advocate practice and duly registered is used in all court documents to avoid misconstruction that the said advocate(s) practice under several firms of Advocates. If the firm has changed partners or names and the change is registered, the Advocates ought to file a change of Advocates for all and sundry to be able to identify the firm and the particular advocate who has conduct of the suit on behalf of a party. For an advocate to use different names for different purposes may be construed as a sign of dishonesty. That having been said, I am satisfied that Advocate Njuguna Matiri is a partner in the Law firm of Matiri Mburu & Chepkemboi Advocates and the one having conduct of this application on behalf of the firm.

8. On the certificate of costs, there is no dispute that the Advocate-client bill of costs was taxed. It is also clear whether a certificate of costs was issued by the deputy registrar, and if so, none was shown to the court. The letter written to the Deputy Registrar requesting for adoption of the certificate of costs (which in my view had not even been issued) and also the decree was premature and unprocedural. **Section 51(2) of the Advocates Act** states:

“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 costs covered thereby and the court may make such order in relation thereto as it thinks fit, including a case where the retainer is not disputed an order that judgment be entered for to be due with costs.”

9. The question that this court to determine is who should adopt the certificate of costs as judgment of the court. Mr. Matiri submits that the Deputy Registrar has the power and jurisdiction and relying on **Section 2 of the Civil Procedure Act**, states that a court is defined as:

“means the High Court or a subordinate court acting in exercise of its civil jurisdiction.”

In the **Ragot and Co. Advocates -vs- West Kenya Wholesalers Ltd (2006) e KLR**, the court **held that the Deputy Registrar in the exercise of taxation powers does so as subordinate to the High Court, that the Deputy Registrar has no original civil jurisdiction but only as delegated by administrative acts on behalf of the High Court.**(underlining mine) My understanding of the above section is that a certificate of taxation is final only to the extent of the amounts so taxed, if there is no objection by way of reference to the Judge, meaning, by the High Court. Any other act of adopting of the certificate as judgment of the court falls under the jurisdiction of the High Court, and not the Deputy Registrar further, the High court has to be moved by way of a motion to adopt the said certificate of costs as a judgment of the court. It cannot be by way of a letter of request to the Deputy Registrar as the Advocates would wish this court to hold. I fully agree with the respondent banks submissions that the Judge has the sole discretion and jurisdiction to deal with any matter emanating from the action of a Deputy Registrar. I also agree with counsel submission that a party in whose favour a certificate of costs has been issued, and there being no objection to either the amount taxed or retainer, has an option to recover the costs by way of a separate suit or by way of an application within the miscellaneous cause to the Judge to adopt the certificate of costs as judgment of the court. Only after that would a decree be issued for purposes of execution.

10. Having come to the above findings, I find the Advocates/Applicants execution and attachment issued on the 17th February 2016 to have been premature and unprocedural, and therefore unlawful.

It is noted that the sum of Kshs.439,367/= subject of the execution as stated in the warrant of attachment was paid by the respondent bank vide its cheque dated 23rd February 2016 to the firm of Njuguna Matiri & Co. Advocates. If that cheque was paid then the court is of the opinion that the Advocate-client bill of Costs as taxed was thus settled bringing the matter to rest.

11. For those reasons I find the application dated 1st March 2016 merited. It is allowed with costs to the Respondent, National Bank of Kenya Limited. The execution proceedings instituted against the said Respondent, and all consequential orders are set aside unconditionally.

The Applicant shall pay the auctioneers charges if any.

It is so ordered.

Dated, signed and delivered in open court this 15th day of September 2016

JANET MULWA

JUDGE