



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**MISC. APPLICATION CASE NO. 90 OF 2013**

KIUME KIOKO & CO. ADVOCATES..... APPLICANT

VERSUS

BARNABAS BWAMBOK KIPRONO .....1<sup>ST</sup> RESPONDENT/APPLICANT

BERNARD ONKUNDI OTUNDO .....2<sup>ND</sup> RESPONDENT/APPLICANT

DANCAN OCHENGE OYARO .....3<sup>RD</sup> RESPONDENT/APPLICANT

JAMES KAMBO MUTHUSI..... 4<sup>TH</sup> RESPONDENT/APPLICANT

KEFA NYAMONGO OENGA ..... 5<sup>TH</sup> RESPONDENT/APPLICANT

KENNETH ODUOL ESAU ..... 6<sup>TH</sup> RESPONDENT/APPLICANT

AND

BLUE ICE ENTERPRISES CO. LIMITED

t/a CARRIBANA BAR & GRILL .....OBJECTOR/APPLICANT

**RULING**

[1]. There are two applications filed in this case. The first application is dated 21.11.2013. The same is filed by 1<sup>st</sup> to 6<sup>th</sup> respondents against the firm of Kiume Kioko & Co. advocates. The same seeks a stay of execution of the decree and judgment issued on 1<sup>st</sup> November 2013 together with all consequential orders against the respondents pending the hearing of this matter. It seeks to have the irregular *ex parte* judgment to be vacated and set aside *ex debito justiciate*. The application is grounded on the fact that the respondents have been served with the advocates/client bill of costs for the alleged kshs. 2,561,443 drawn by m/s Kime Kioko & CO. advocates arising out of Mombasa HCCC no. 609 of 2011.

[2]. The respondents claim that they have never instructed the firm of Steve Kithi & Co. to act for them in respect of that case. They also argue that the certificate of taxation dated 5<sup>th</sup> August 2013 is fraudulently obtained and is a nullity. The applicant equally argue that they were not served with the notice of motion application dated 30<sup>th</sup> September 2013. Finally that the Deputy Registrar of the court had no jurisdiction under Section 51 (2) of the Advocates Act to enter judgment.

[3]. Finally that the firm of Kiume Kioko was not instructed by them and that the costs as assessed are

excessive. The second application is dated 15<sup>th</sup> September 2013. It is by Blue Ice Company Ltd. t/a Carribana Bar & Grill who are the objectors to the proposed attachment. They pray for an order of stay of execution of the decree issue on 22nd day of October 2013 and its consequential orders. Further they pray for an order that the proclamation dated 13<sup>th</sup> November 2013 by the agents of the applicants herein namely Eshikhoni Agency Auctioneers is unlawful. Finally it prays for an order that the items proclaimed belong to Blue Ice entertainment Co. Ltd. t/a Carribana Bar & Grill.

[4]. That application is grounded on the fact that the properties proclaimed belonged to them. That the objector is a separate legal entity and any judgment entered against them is unlawful. Finally that though some of their directors are parties to the suit the company was not a party to the suit.

[5]. The first application is supported by the affidavit of Bernard Onkundi Atundo who states that their Enterprise Carribana Bar & Restaurant on Lenana road was proclaimed by Eshikhoni Agency who had a warrant of attachment from Kiume Kioko & co advocates for Kshs. 2,561,443.00/-.

He denied that they had neither instructed M/s Steve Kithi & Co. Advocates nor Kiume Kioko advocates in the suit from which the warrant of extension arose. He further denied that he and his co-applicants were never served with any notice of motion application dated 30.9.2013. He averred that the exparte judgment entered on 1.11.13 and the certificate of taxation dated 19.7.2013 were ever notified to them. He said that he had lodged a complaint to the Advocates Complaints Commission.

[6]. Mr. Lennox Mugambi a Director of Blue Ice Entertainment Co. Ltd. t/a Carribana bar and Grill swore and affidavit stating how the tools of trade of his company were proclaimed by auctioneers known as Eshikhoni auctioneers. He said the properties proclaimed were the property of Blue Ice Entertainment Co. Ltd. He said that neither himself nor his company were parties to the suit. He argued that the proclamation and the warrant of attachment were erroneously issued. He therefore applied for the execution herein to be stayed.

7]. In the meantime, Mr. Kioko Kiume advocate brought an application under certificate of urgency to stop a disciplinary cause against himself by the Law Society no. 7 of 2014 from a complaint by one Bernard Onkundi Otundo which was based on the issues herein and I granted a stay on 20.3.2014 pending the interpartes hearing of this application. In his submissions to the applications herein says that the Deputy Registrar of the High Court has power to do what she did. That she has power under Section 51 (2) of the Advocates Act that the only recourse open to the applicants was to appeal.

[8]. In the file also were submissions by an interested party in the name of Stephen Kithi Ngombo. Mr. Kithi came from the firm of Steve Kithi & Co. advocates. From my perusal of the file I was unable to see when he was made a party to the suit. However in the file there was a long affidavit and various annexures and all of them referred to this case and a complaint to the Law Society by the 2<sup>nd</sup> Respondent in this application. I therefore perused the affidavit since it has a bearing in this application. He argued that the only reason the aforesaid suit was not filed in the names of Steve Kithi & Co. was because he had acted for the claimants in the conveyance of the property (Kilifi Mtwapa 403 which was being purchased by the applicants herein from Creek Marketing and Development Ltd) and the fact that he witnesses their signatures and was precluded by Rule 9 of the Advocates Practice Rules. He attached a sale agreement. He argues that the applicants did not personally know Mr. Kiume Kioko and had not provided the address of service to him and so the use of Steve Kithi and company advocates address for service should not be seen as collusion with M/s kiume Kioko & Co. advocates.

[9]. Those are basically the main contentions in this case. In the *miscellaneous application no. 90 of 2013* itself what really happened?

On 15.5.13 the firm of Kioko Kiume & Co. advocates filed a Miscellaneous Civil application against the 1- 6th respondents. The same was a bill of costs for kshs. 2,561,443.00/=. The matter came to court before the Deputy Registrar on 19.6.13 and the bill was fixed for taxation on 12.7.13. It was further fixed for hearing on 19.7.13. On 19.7.2013 Mr. Kioko appeared for the applicant while Mr. Kithi appeared for the respondent. Mr. Kiume said he was present for the bill dated 9.05.13 and was ready to proceed. Mr.

Kithi said that he does not oppose the bill.

[10]. The Deputy Registrar then proceeded to record the following order

*“By consent the bill of costs dated 09-05-13 is taxed at kshs. 2,561,443.00/= as drawn. Certificate of taxation to issue.”*

The matter came up for mention on 1.10.13 when it was stood over to 18.10.13. On 18.10.13 it came against before the Deputy Registrar. Mr. Waithera advocate appeared for Mr. Kiume. There was no appearance for respondent. Mr. Waithera told the court as follows;

*Before court is the notice of motion dated 30.9.13. The same is not opposed. We are enforcing a certificate of taxation. We are yet to file an affidavit of service, though we are filing one. I pray the application is placed aside.*

Later at 11.20 a.m. Mr. Waithera appeared for Mr. Kiume. Where there was no appearance for the respondent. Mr. Waithera then said

*We had filed our affidavit of service. We are ready to proceed. The notice of motion dated 30.9.13 was served on the respondents advocates who stamped on the face of the application. Here is no reply. We pray that the application is allowed as prayed. The certificate of taxation was served to the respondent on 08-08.13. However I have not furnished proof of the same. I pray for leave to put in a supporting affidavit.*

The court adjourned the notice of motion to 01.11.13. Leave was granted to the applicant to file supporting affidavit.

[11]. The court adjourned the notice of motion to 01.11.13. leave was granted to the applicant to file supporting affidavit. On 1.11.13 before the Deputy Registrar Mr. Kiume appeared for the applicant and there was no appearance for the respondent. Mr. Kiume told the court;

*The respondent was served before court is a notice of motion dated 30.09.13. We had filed a supporting affidavit dated 29.10.13 which confirms the respondent was duly served with a certificate of taxation. As the application is unopposed, we pray that it be allowed as prayed.*

The Deputy Registrar made the following order

*The notice of motion dated 30.09.13 is allowed as prayed. Respondent to bear costs of the application.*

Thereafter a certificate of taxation dated 5.8.13. A judgment was entered and a decree for Kshs. 561,443/- on 1.11.13 and a warrant of execution which now gives rise to these proceedings.

[12]. I have very carefully perused the entire court file herein. There are a number of issues that arise herein, was there instructions by the 6<sup>th</sup> respondents to M/s Steve Kithi & Co. advocates herein? On 21<sup>st</sup> of July 2011 an agreement for sale was entered between Creek Marketing and Development Ltd. and the 6<sup>th</sup> applicants herein. Mr. Steve Kithi witnessed the agreement for sale for the 6 applicants/respondents.

On 15<sup>th</sup> September 2011 an affidavit dated 14<sup>th</sup> November 2011 which had four (4) clauses had in it a relevant clause no. 2 which stated as follows:

*2. “That following the actual and/or constructive breach of the said sale agreement by the vendors herein, we do hereby authorize the firm of Kithi & co. advocates to institute all appropriate proceedings as are available to us at law regarding the deposit paid to the vendors in the said sale agreement and totaling to Kshs. 3,350.00/=.”*

This is the cause that Steve Kithi and company now rely on to say that they had instructions from the 1st to 6th objectors. The affidavit containing this clause was also used to support the suit Mombasa civil suit no. 609 of 2011 by Kiume Kioko advocates.

In Mombasa HCC no. 609 of 2011 aforesaid, paragraph one of the same one says that the plaintiffs address is care of Steve Kithi & Co. advocates 6<sup>th</sup> floor GPO building Digo road p.o. box 227 Mombasa. The plaint however is drawn and filed by Kiume Kioko advocates 6<sup>th</sup> floor GPO building Digo Road p.o. box 80896 Mombasa – 80100. The plaint is signed by Kiume Kioko advocates for the plaintiffs.

[13]. The issue here is, which advocate is for plaintiffs? The retainer and address for service on the plaint show that the advocate is Steve Kithi and Co. advocates. However, Kiume Kioko & co. advocates have signed the plaint and said they are for the plaintiffs who appointed Kiume Kioko? The retainer is crystal clear that the objectors wished Steve Kithi & Co. advocates to institute all appropriate proceedings. Mr. Steve Kithi in his affidavit paragraph 18 states that Mr. Kiume filed suit because he (Kithi) could not do so because he had witnessed the sale agreement. Does that therefore mean he instructed M/s Kiume Kioko? Yes it does. Did he have any authority from the respondents to do so? He did not have any. If this argument is that he had implied Authority from the retainer to instruct Kiume Kioko & co. advocates should the firm of Kiume Kioko then not demand their fees (if any) from the instructing counsel (s) then Steve Kithi & co. advocates?

[14]. There is another very serious thing! When Mr. Kiume filed his miscellaneous application 90 of 2013 against the respondents and appeared before the Deputy Registrar, why then, was Steve Kithi & Co. advocates served with the documents? Why did Mr. Kithi of Steve Kithi & Co. advocates appear for the respondents for whom he had instructed Mr. Kiume Kioko & Co. advocates? Why did he compromise the bill of costs against his instructing clients.

It completely beats logic on the behavior of Steve Kithi & co. advocates. Mr. Kithi argues that he was instructed by the applicant/respondents in writing. He then instructs Kiume Kioko & co. Advocates to act for the applicant/respondents. His excuse being that he acted for the applicants in a transaction of sale.

He then accepts service of the bill of costs against the applicant/respondents. He does not appear to have consulted them. When the matter comes before the Deputy Registrar he concedes to taxation as drawn. Thereafter, he is served with other applications, his firm stamps them and he fails to appear before the Deputy Registrar. On all other subsequent court appearances. Prejudicial court orders against the applicant are then issued.

[15]. Mr. Kiume filed this suit without any instructions from the objectors herein. There is absolutely no nexus between his firm and the objectors. This fact is born out in Mr. Kithi's affidavit paragraph 18 and 24 and 28. There is no way therefore his firm can sustain any claim for legal fees against the objectors herein. Kiume Kioko & co. advocates and Steve Kithi & Co. advocates were on the same side. When they pretended that Mr. Kiume Kioko was for his firm and was for the applicant/respondent herein in miscellaneous application no. 90 of 2013, this became fraudulent. It was unfortunate and meant to fleece the objectors. I have set out the proceedings before the Deputy Registrar to prove this point.

The Court of Appeal in Kinlue Holdings Ltd. Vs. Whit Holdings and Macharia Njeru CA Civil Appeal no. 264 of 1997.

*‘ A retainer binds an advocate to act for his client in such a manner as to protect his clients interests and not to jeopardize his interest’*

In this case the firm of Steve Kithi & Co. did not act in the objectors interests.

In Misc. civil Appeal No. 240 of 2002 RV district Land Registration & another the court stated,

*“Although an advocate has austensible authority to compromise his client's case*

*employment of such authority cannot be held where the counsel consent to orders which are dramatically opposed to the express instructions which he has been given by a client ...”*

[16]. Initially, I have at some length set out the history of Miscellaneous application no. 90 of 2013 herein to show what it was all about. This application was filed by Kiume Kioko & co. advocates for the purposes of taxing their bill of costs as against the respondents. Once it was taxed and a certificate of taxation issued by Deputy Registrar, a suit had to be filed to recover the taxed amount. The procedure to do so is well set out in MG Sharma Vs Uhuru Highway Development Ltd, Civil appeal no. 133 of 200.

See also the case of L.N. Ngolya & co. advocates Vs. Jackson Murithi Mombasa High Court Misc. Case no. 12 of 2005. The miscellaneous application herein was not a suit and should not be converted as such to recover the costs for Kiume Kioko & Co. advocates Section 48 and 51 (2) of the advocates Act are imperative in recovery of costs.

For all those reasons,

1. I allow the application dated 21<sup>st</sup> November 2013. The same is allowed to the extent that judgment and the decree issued on 1<sup>st</sup> November 2013 are set aside. The taxation and certificate of taxation and all consequential orders are set aside with costs to the applicants against Kiume Kioko & Co. advocates.
2. I allow the application dated 15<sup>th</sup> November as prayed with costs.
3. I Strike out miscellaneous application no. 90 of 2013 as an abuse of the process of the court and as being filed by a person without instructions and order that the orders obtained therein were a nullity.

It is so ordered.

DATED and SIGNED at BUNGOMA this 18th day of September 2015.

**S. MUKUNYA**

**JUDGE**

DELIVERED in MOMBASA this 7<sup>th</sup> day of October 2015 by Hon. Justice

**A. Omollo.**

**UDGE.**