



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAKURU**

**Miscellaneous Application 485 of 2010**

**N. K. GITHUAT/A CRESSWELL, MANN & DOD  
ADVOCATES.....PLAINTIFF/RESPONDENT**

**AND**

**THE REGISTERED TRUSTEES OF THE MONASTERY  
OF OUR LADY OF VICTORIA KENYA.....DEFENDANT**

**AND**

**REGISTERED TRUSTEES OF KENYA  
EPISCOPAL CONFERENCE.....OBJECTOR/APPLICANT**

**RULING**

By an Application dated 9th January 2012 and filed on 11th January 2012, the Objector sought one order -

“That the execution and attachment herein be stayed pending hearing and determination of this application.”

The origin of the application lies in the judgment and decree entered and issued by the court of the Senior Principal Magistrate on 17th August 2011 and issued as a Decree by the Deputy Registrar on 22nd November 2011 (the Decree).

Following the issue of the Decree the Judgment Creditor, the Respondent in this application, applied for execution of the decree and assigned the execution to Legacy Auctioneering Services Nakuru (the Auctioneers). The Auctioneers moved to the Applicant's premises, and proclaimed the Applicant's movable assets on 14th December 2011 to satisfy the Judgment Creditor's decree for Sh 3,392,502/=.

Alarmed with the proclamation, the Applicant moved Court and obtained reprieve in the orders made and issued on 10th January 2012 staying execution and attachment herein pending the hearing and determination of the application.

The firm of Crosswell Mann & DoD Advocates acted for the Applicant herein, raised and had its Bill of Costs taxed at Sh 3,387,193.50 (the fees). It addressed several demands to its client: Registered Trustees of the Monastery of Our Lady of Victory, but received no joy by way of reply. The Monastery had closed down its operations, and the Monks had relocated. There was nobody knowledgeable to answer them, until the Advocates stumbled upon the address of the Catholic Secretariat in the person of Rev. Fr. Vincent Wambugu, the Secretary-General of the Catholic Secretariat, who in a letter dated 1st October 2010 sought particulars from the Advocates of their fees, including how they received instructions. Unfortunately there is no material to show that the Advocates fully briefed the Secretariat in the matter of Nakuru HCCC No. 146 of 2004 between JOEL KIBIWOTT AND OTHERS VS. REGISTERED TRUSTEES OF THE MONASTERY OF OUR LADY OF VICTORY and judgment on how it was resolved. Clients are usually loathe to be loaded with figures of fees without full explanation as to how they have arisen.

However be it as it may, Advocates like other registered professionals sell their services for a fee. Once they have taken a brief, the client is to pay them for their services. The Applicants understand this fully. Their complaint is the manner in which the Advocates went about executing for their fees.

Mr. Matiri learned counsel who argued the Advocate's case, acknowledged as much, that even if the procedure for execution was irregular, or unlawful, the Advocate is still entitled to his fees. Whereas I agree with that tenure of the law, I hasten to add that there are attendant consequences to both procedural and outright illegality. An act outside the law will be illegal and therefore null and void ab initio that is, of no effect in law.

On the other hand procedural illegality will lead to the act being set aside, and the defaulter taken back to the starting line. The procedural law for setting aside execution is set out in Order 22, rules 51, 52, 53

and 54 of the Civil Procedure Rules.

In this case the Objector claims to be legal and equitable owner of the property attached (rule 51), and has exhibited material tending to show so. Despite this, the Advocate gave notice to proceed with the execution (Rule 54), but was stopped by order of stay (rule 52). The Advocate has urged strongly that the attachment and subsequent execution of the property attached should not be raised, as provided under rule 53 of Order 22.

With the material availed to the court there is no doubt that the Objector is the legal and equitable owner of the goods proclaimed and attached. I say both legal and equitable because the processes of transfer and conveyance may still be taking place. However because of the procedural impropriety in observing the orders of enforcement of the Certificate of Costs and judgment therefor, the process cannot be completed.

The substantive law for enforcement of payment of Advocates fees is found in Section 48(1) of the Advocates Act, (Cap. 16, Laws of Kenya). It says as follows -

“48 (1) Subject to this Act, no suit shall be brought for the recovery of any costs due to an Advocate or his firm until the expiry of one month after a bill for such costs, which may be in summarized form, signed by the Advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause, to be verified by affidavit filed with the plaint, for believing that the party chargeable therewith is about to leave Kenya or abscond from the local limits of the court's jurisdiction, in which event action maybe commenced before the expiry of one month,

(2) Subject to subsection (1), a suit may be brought for the recovery of costs due to an Advocate in any court of competent jurisdiction.

(3) Notwithstanding any other provisions of this Act, a Bill of Costs between an Advocate and a Client may be taxed notwithstanding that no suit for recovery of costs has been filed.

For completeness of this Ruling, and guidance of the parties, I will also refer to Sections 51 and 52 of the Advocates Act. Section 51 provides -

51(1) Every application for an order for the taxation of an Advocates Bill or for the delivery of such a bill and delivery of up of any deeds, documents and papers by an Advocate shall be made in the matter of an Advocate,

(2) 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.

And Section 52 says -

“S. 52. Any court in which an Advocate has been employed to prosecute or defend any suit or matter may at any time declare the Advocate entitled to a charge on the property recovered or preserved through his instrumentality for his taxed costs in reference to that suit or matter, and may make orders for the taxation of the costs and for raising money to pay or for paying the costs out of the property so charged as it thinks fit, and all conveyances and acts done to defeat or operate to defeat the charge shall, except in the case of a conveyance to a bona fide purchaser for value without notice, be void as against the Advocate.

PROVIDED that no order shall be made if the right to recover costs is barred by limitation.”

Again referring to the Advocates Act, Section 2 defines “court” means the High Court. In this case, after the taxation of costs, all the Taxing Officer was required by law to do, was to issue a Certificate of Costs showing the taxed costs. The Advocate would then move the court (the High Court) after compliance with the requirements of Section 48 of the Advocates Act wait for 30 days, before commencing suit, and during that waiting period serve the client with the Certificate of Costs and in default of payment seek an order for entry of judgment under Section 51(2) of the Act. If no payment is made the Advocate may seek an order of attachment of property in terms of Section 52 of the Act by moving the Court under Section 48 of the Act.

So on the question of legality, the Advocate failed to comply with the statutory requirements of the Advocates Act. The Advocate sought an entry of judgment before the subordinate court. The Advocate after obtaining a Certificate of Taxation on 16th January 2010, ought to have moved the court in terms of Section 48 and 51 of the Advocates Act.

The entry of judgment was therefore illegal and consequently the purported attachment of the Applicant's goods was equally illegal. The procedural steps of proclamation were also illegal as they were predicated upon illegal orders.

For those reasons, I set aside the execution and proclamation of the Objector's property. I hereby direct the Objector to enter into negotiations with the Advocate on settling of their costs.

**Dated, signed and delivered at Nakuru this 13th day of July, 2012**

**J. ANYARA EMUKULE  
JUDGE**