REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Civil Miscellaneous 135 of 2005

R.M. MATATA & CO. ADVOCATES….....APPLICANT/RESPONDENT

VERSUS

PETER MAINGI…….....…...RESPONDENT/APPLICANT

RULING

1. The Application before the Court is brought under Order L rule 1 of the (Old) Civil Procedure Rules, Section 3A of the Civil Procedure Act, Sections 48 and 49 of the Advocates Act (Chapter 16) and any other enabling provisions of the law. Prayers 1 and 2 of the Application are spent: they requested to preserve the issues and subject matter for determination pending the hearing of this Application. Both were granted at the *ex parte* stage. The matter is now coming up for determination of prayers 3-5 of the Application. They are in the following terms:

1. THAT the warrant of attachment and sale issued to the Applicant and the entire execution process be set aside and annulled for being irregular and null and void;

2. THAT the cost of execution/Auctioneers charges be borne by the Applicant/Respondent

3. THAT the costs of the Application be awarded to the Respondent/Applicant.

2. The uncontested facts and procedural posture of the case is as follows. The Respondent firm, R.M. Matata & Co. Advocates ("Respondent") represented the Applicant, Peter Maingi ("Applicant") in the High Court Probate and Administration Case No. 150 of 1992. The Respondent apparently rendered professional services upon a retainer but along the way the client-Advocate relationship broke down prompting the Respondent to file a Bill of Costs against the Applicant, Peter Maingi ("Applicant"). The same was successfully taxed but it is not clear the amount of money at which it was taxed. In the documents filed in the instant Application, the Applicant says the amount taxed was Kshs. 33,487.50 in favour of the Respondent in a ruling delivered on 25/08/2005 while in an application filed on 27/03/2007, the Respondent pegs the amount taxed at Kshs. 85,049/=. The actual amount taxed is irrelevant for the resolution of the present Application, however.

3. What matters is that, on 27/03/2007, the Respondent filed a Notice of Motion under section 51(2) of the Advocates Act seeking to enter judgment against the present Applicant based on the Bill of Costs which had been taxed. According to the Court records, however, that Notice of Motion Application was withdrawn on 26/04/2007 vide a Notice of Withdrawal of even date. Yet, on 05/06/2007, the Respondent filed an Application for Execution of Decree seeking to attach and sale by public auction the Applicant's

property. A Warrant of Attachment was subsequently issued subject to which the Respondent instructed Eastern Auctioneers to attach the Applicant's movable properties. The instructions were carried out on 12/06/2007 when the auctioneers proclaimed the goods. It is this last act that prompted the Applicant to approach this Court.

4. The Applicant's case is straightforward: The provisions of the Advocates Act at section 51(2) obligates an advocate who has successfully taxed a Bill of Costs, where there is no dispute as to retainer, to apply for judgment but obviates the need for proving the actual amount owed by providing that the amount covered in such a Bill shall be final and cannot be disputed. What this section does is to give the Court discretion to enter judgment in the amount contained in the Certificate of Costs upon a proper application for judgment by the Advocate. There might still be a lively debate on the exact form of procedure to use to obtain such a judgment (whether it must be brought by Plaint or whether a Notice of Motion would suffice) but there is no doubt that after a Certificate of Taxation is issued, the taxing Advocate must move the Court for a judgment from which a decree would then issue.

5. The Respondent appeared well versed with these procedural requirements at first. They duly filed a relevant application for judgment as provided for in section 51(2) of the Advocates Act. Yet, the Respondent inexplicably withdrew that Motion and then started an ill-advised process of execution. That process was, without question, an illegal one. The law is quite clear: a taxing Advocate must approach the Court for an appropriate judgment in the terms of the Bill of Costs from which such an Advocate can derive a decree, and, then, ultimately, proceed with execution. There are good reasons for this measured and phased approach: it protects the client against the technically-savvy and formally-literate Advocate and gives her ample opportunity to contest the charges levied against her by her erstwhile former attorney. Provisions of the law, however technical, authored for the benefit of the client must be strictly enforced. There is really no need to say more. The Advocate here violated the law seemingly wilfully in withdrawing the appropriate application to secure a judgment and then resorting to a premature process of executing the decree. That process was, without question, a nullity. It is declared so. That must mean, by necessary implication, that this Application is allowed with costs to the Applicant, Peter Maingi. Those are the orders of the Court.

DATED and **SIGNED** this **5TH** day of **JULY 2012**.

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J.M. NGUGI
JUDGE

DELIVERED and **SIGNED** in open court at **MACHAKOS** this **6TH** day of **JULY, 2012.**

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GEORGE DULU

JUDGE