



REPUBLIC OF KENYA
IN THE LAND AND ENVIRONMENT COURT

AT MALINDI

ELC 61 OF 2006

JAPHET NOTI CHARO.....PLAINTIFF/APPLICANT

=VERSUS=

JOSEPH KIRIMO CHARO SHUTU

KIRIMO FONDO SHUTU

FRANCIS K. FONDO

HARRISON CHARO SHUTU.....DEFENDANT

AND

OMAGWA ANGIMA T/A OMAGWA ANGIMA & CO. ADVOCATES...RESPONDENTS

R U L I N G

1. Before me is a notice of motion application dated 1st August 2016. The application brought under Order 9 Rule 7 and 8 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act prays for Orders;

1. (SPENT).

2. THAT there be stay of execution herein pending the hearing and determination of this application inter-partes.

3. THAT the firm of OMAGWA ANGIMA & CO. ADVOCATES does not have any locus standi to file its bill of costs and any audience in this matter or at all.

4. THAT the bill of cost taxed in this matter in Malindi HCC Misc Suit Number 9A of 2010 is null and void.

5. THAT costs to this application be provided for.

2. The application is supported by the annexed affidavit of Japhet Noti Charo, the Plaintiff/Applicant herein sworn on 1st August 2016. The grounds upon which the application is premised are stated on the body thereof as follows;

i. **THAT** the Plaintiff herein was at the 20th day of February, 2008 acting in person.

ii. **THAT** on the 22nd day of February 2008, the firm of OMAGWA ANGIMA & OTARA Advocates instead of filing a notice of Appointment of Advocates filed a notice of change of Advocates from OMWANCHA & CO ADVOCATES who was not on record.

iii. **THAT** subsequently the firm of OMAGWA ANGIMA & CO Advocates from nowhere filed a bill of costs against the Plaintiff/Applicant.

iv. **THAT** the firm of OMAGWA ANGIMA & CO. ADVOCATES does not have audience in this matter.

v. **THAT** it would be fair, reasonable and just that the bill taxed by the firm of OMAGWA ANGIMA & CO. ADVOCATES against the Plaintiff be declared null and void.

3. The Application is opposed. In a replying affidavit sworn on 13th September 2016, Mr. Omagwa E Angima Advocates depones that the Applicant personally gave him instructions on behalf of the respondent Law Firm and indicated at the time that Messrs Omwancha & Co. Advocates were previously acting for him on this matter. Counsel contends that it was on the basis of those instructions that the Law Firm filed a notice of change instead of a notice of appointment of advocates. It is the Respondent's case that no objection was ever raised by any party in the suit on account of the fact that the law firm (in which the applicant's present counsel was then a visiting partner) filed a notice of change rather than a notice of appointment of advocates.

4. The Respondents further avers that they continued discharging their professional duties as such advocates until the time that the Applicant instructed M/S Martin Mutindi & Co Advocates on 28/8/2009 without settling their costs hence necessitating the filing and subsequent taxation of the Advocate client bill of costs. The Respondents also contend that the current firm of advocates for the applicant are not properly on record as they filed a notice of appointment on 19th August 2016 after the judgement was delivered but without obtaining leave of the Court as required by the Rules.

5. I have carefully perused the application and replying affidavit filed in opposition thereto. I have also considered the rival submissions of the two counsels representing the parties herein.

6. First and foremost, I think it is proper that I deal with the contention that Messrs Richard O. & Co. Advocates presently acting for the plaintiff/Applicant are not properly on record having filed a notice of Appointment on 19th August 2016 without leave of the Court. Order 9 Rule 9 of the Civil Procedure Rules provides as follows;

“When there is a change of Advocates, or when a party decides to act in person having previously engaged an Advocate, after Judgement has been passed, such change or intention to act in person shall not be effected without an order of the Court,”

a) Upon an application with notice to all the parties; or

b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

7. It is not contested that the Applicant's Advocate presently on record filed a Notice of Appointment herein on 19th August 2016. What is not clear however from the parties' submissions is whether or not judgement had been passed on that date as envisaged by Order 9 Rule 9 of the Civil Procedure Rules as cited herein above. Black's Law Dictionary, Ninth Edition at page 918 defines a judgement as “a court's final determination of the rights and obligations of the parties in a case.” Section 25 of the Civil Procedure Act which provides for Judgments and Decrees states as follows;

25. The court after the case has been heard, shall pronounce judgement, and on such judgement a decree shall follow:

Provided that it shall not be necessary for the court to hear the case before pronouncing judgement:

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i. Where the plaint is drawn claiming a liquidated demand, and either –

a) The defendant has not entered such appearance as may be prescribed; or

b) The defendant having entered such appearance, has failed to file a Defence within the time prescribed; or

ii. In such cases as may be prescribed under section 81(2) (f).

8. The case referred to under Section 81 (2) (f) of the Civil Procedure Act are those where a summary procedure is used to recover debts, liquidated demands or immoveable property. In **Ngome -v- Plantex Company Ltd (1984) KLR 792**, the Court of Appeal held that a judgement is a judicial determination or decision of a court on the main question or questions in a proceeding.

9. A look at the record herein shows that on 6th September 2013, this suit was dismissed for want of prosecution under Order 17 Rule 2 of the Civil Procedure Rules. In my view, the authorities referred to show that there must be a consideration of, and determination of the issues before the court before a judgement is entered for or against a party with regard to the said issues or questions. In my considered view, the dismissal of the suit herein as aforesaid did not entail a determination of any questions or issues before the court. That being the case, Order 9 Rule 9 of the Civil Procedure Rules is inapplicable in the circumstances of this case as no judgement has been passed. Arising from the foregoing, I find and hold that the Applicant's counsel is properly on record courtesy of the notice of appointment filed herein on 19th August 2016 and that I may proceed accordingly to determine their application dated 1st August 2016 and filed herein on 19th August 2016.

10. The Application as outlined herein above is premised on 2 main grounds namely;

i) That Messrs Omagwa Angima & Co Advocates does not have any locus standi to file its Bill of Costs and any evidence in this matter, and

ii) That the Bill of Costs taxed in Malindi HCC Misc (sic) Suit No. 9A of 2010 is null and void.

11. I must state from the very beginning that the application before me is not very clear as to why Messrs Omagwa Angima & Co Advocates do not have any locus standi and/or evidence on the matter before me. From the certificate of Taxation of costs dated 1st March 2011, it is evident that the said Law Firm's Advocate/Client Bill of Costs was taxed at Kshs. 1, 826,551 as against the Applicant herein. It would appear again from a proclamation of attachment of movable property attached to the Applicants Supporting Affidavit that the law firm has now appointed an auctioneer to recover the same.

12. In my view, the Applicant ought to have raised the issues of standing and whether or not the law firm had "audience" in the taxation when he was served with the Bill of Costs that led to the taxation of costs. Having failed to do so or in the event the taxing master failed to give due consideration to the objections raised, the only other avenue open to him was to file a reference to this Court. The provisions as to the time of filing of a reference are found in Rule 11 of the Advocates Remuneration Order. It provides: -

"1) should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

2) the taxing officer shall forthwith record and forward to the objector the reasons for his decision

on those items and the objector may within 14 days from the reception of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.”

13. Even though the applicant contends that the law firm just came from “nowhere” and filed a Bill of Costs, I did not understand the Applicant to say that he did not instruct counsel and/or that counsel did not act on such instructions. While it is admitted that the law firm filed a Notice of Appointment, I have perused the record and it is apparent that the law firm filed a number of documents including a Replying Affidavit sworn by the Applicant on 10th March 2008 in response to an application dated 1st February 2008. Paragraphs 2 and 3 of that Affidavit read as follows:

“2. That with my Advocate on record I have gone through the defendant’s said application together with the supporting Affidavit and in reply thereto state as follows.

3. That the Plot in Question measuring 2 Acres is my property and unless I gift any part of it to another no one can claim it.”

14. That document is clearly drawn and filed by Omagwa, Angima & Otara Advocates as the law firm was then Known. While the Applicant claims that he instructed Messrs Omagwa Angima & Otara Advocates and not Messrs Omagwa Angima & Co. Advocates, the Respondents have clearly explained at paragraph 9 of the Replying Affidavit that the partnership of Omagwa Angima & Otara Advocates broke up and he proceeded to file a Notice of change of Advocates in the name of the succeeding firm – Omagwa Angima & Co. Advocates which firm continued on record until 28th August 2009 when the Applicant appointed Ms Martini Mutindi & Co. Advocates to come on record. In **Musyoka & Wambua Advocates -V- Rustam Hira Advocates (2006) e KLR**, it was held: -

“section 51 of the (Advocates) Act makes general provisions as to taxation, as the marginal note indicates. One of those provisions is that the court has a discretion to enter judgement on a certificate or taxation which has not been set aside or altered, where there is no dispute as to retainer. This in my view is a mode of recovery of taxed costs provided by law in addition to filing of a suit.

In the present case, there is no allegation that the Advocate had no instructions to act in the matter for the client. So, there is not, and there cannot be a dispute as to retainer. As it stands now the certificate of taxation has not been set aside or altered. In the circumstances, I see no reason to deny the advocate judgement as sought.”

15. The applicant before me has attacked the Bill of Costs stating that the same is illegal and that I should declare the same null and void. I think all the issues being raised herein should have first been raised before the taxing master. In a matter like this where even the decision of the taxing master is not annexed to the applicant, this Court cannot be expected to go behind the taxing master to inquire if there are other issues which were not taken into account at the taxation. Section 51 of the Advocates Act presumes that by the time a certificate of costs is issued as is the case herein, all the necessary and relevant matters must have been considered by the taxing master. And the court cannot in any event make such inquiries except while dealing with a reference where the issue of the exercise of the taxing master’s discretion is to be considered.

16. In the present case, there is no reference before me to warrant an inquiry of the nature that is sought by the Applicant. Accordingly, the application is dismissed with costs to the respondent.

Dated, signed and delivered in Malindi this 12th day of May, 2017.

J. O. OLOLA

JUDGE