



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION NUMBER 52 OF 2018

BETWEEN

C.MASINDE & COMPANY ADVOCATES..... APPLICANT

VERSUS

PANAL FREIGHTERS LIMITED..... RESPONDENT

RULING

1. The Applicant Law Firm acted for the Respondent Company in a Claim filed against the Respondent at the E&LRC. The Claim was subsequently transferred to the Chief Magistrate's Court. The Advocate/Client relationship terminated before the Claim was concluded.
2. The Law Firm filed Advocate/ Client Bill of Costs, which was taxed by the Deputy Registrar of the E&LRC. The Law Firm then instructed SURE AUCTIONEERS to execute against the Respondent for recovery of taxed costs.
3. The Respondent has filed an Application dated 15th May 2019, seeking to have execution stayed; the Ruling of the Deputy Registrar on taxation of 14th February and all consequential orders set aside; and the Advocate/Client Bill of Costs taxed afresh before another Taxing Master.
4. The Application is based on the Affidavit of Ahmed Mwinyi Shimbwa, Respondent's Managing Director, sworn on 15th May 2019. The Affidavit replicates Grounds outlined in the Chamber Summons, which are mainly legal in nature, as summarized below: -
 - § There is no Judgment on record, and consequently, no decree capable of execution.
 - § The Ruling of the Deputy Registrar is not capable of being executed as a Judgment and Decree of the Court.
 - § Proclamation of Attachment has no anchorage in law.
 - § The Deputy Registrar could only issue a Certificate of Taxation, which on its own could not facilitate execution.
5. The Law Firm relies on the Replying Affidavit, sworn by Clemence Masinde Advocate on 10th June 2019. The Advocate's position is that:-
 - § The Respondent was served with the Bill of Costs, but failed to attend Court on taxation.
 - § The Respondent's Advocate was present when the Ruling was delivered.
 - § The Respondent went on to file separate Applications at the E&LRC and the High Court Mombasa, challenging the same Ruling.
 - § The Respondent is delaying payment of Advocates Bill, and has changed its name to LAKWOOD CONSORTIM, with the intention of defeating execution.
 - § Execution of Decree is set aside and the Law Firm is granted leave to obtain Certificate of Taxation.
 - § The Respondent is in the process of disposing of all its properties to avoid meeting its obligation to the Law Firm.

6. Parties agreed to have the Application considered and determined on the strength of their Affidavits and Submissions. They confirmed filing of Submissions at the last appearance in Court on 26th July 2019.

The Court Finds:-

7. C. Masinde & Company Advocates appears to concede, at paragraph 3 [j] of the Replying Affidavit that execution proceedings are fundamentally flawed.

8. Without giving reasons, the Law Firms asks the Court to set aside execution proceedings, and allow it to obtain Certificate of Taxation.

9. The reasons can only be, in the view of the Court, those given by the Respondent in support of its Application.

10. Among the reasons is that there is no Judgment and Decree capable of execution. Upon taxation, the Law Firm could only obtain a Certificate of Taxation. Not even the Certificate of Taxation had been obtained.

11. Section 48 of the Advocates Act, Cap 16 the Laws of Kenya, requires an Advocate to file a Suit for recovery of costs, after taxation of the Advocate/Client Bill of Costs. It is after obtaining Decree in such a Suit, that the Advocate proceeds to execute Decree.

12. The Court does not think that the Advocate would be prejudiced by having to file a Suit. The Court acknowledges that Advocates must, like all Employees who come before this Court, be paid for their labour / professional services, without delay. The corridors of justice must not be turned into hiding places for crafty Clients who seek to avoid the burden of receiving legal representation. With the Certificate of Taxation, it is possible to obtain Summary Judgment against a dodgy former Client, such as the Respondent is reputed by the Law Firm to be. The Advocate however, cannot adopt a flawed recovery process, such as the Law Firm of C. Masinde seems to have done in this dispute, and except to have the seal of approval from the Court.

13. Section 51 [2] of the above Statute requires the Advocate to file Suit if retainer is disputed. Where it is not disputed, the Advocate must move the Court to enter Judgment, and extract Decree for execution. This further cushions the Advocate against delay in recovery of costs.

14. The Court agrees with the Parties that execution is flawed. Retainer is disputed; there is no Suit filed by the Law Firm; and no Certificate of Taxation has issued.

15. The Court does not see however, why fresh taxation should be done before another Taxing Master. No reason has been given why another Taxing Master should be involved.

IT IS ORDERED:-

- a) Leave is granted in terms of prayer 2 [i] [ii] of the Application.*
- b) The Ruling of the Taxing Master dated 14th February 2019 and all consequential Orders are set aside.*
- c) Taxation of the Advocate/Client Bill of Costs to be redone in the presence of both Parties, before the same Taxing Master.*
- d) No order on the costs.*

Dated and delivered at Mombasa this 26th day of September 2019.

James Rika

Judge