



Mwaniki t/a Anfield Auctioneers v Benisa Limited (Miscellaneous Application E662 of 2022) [2024] KEHC 836 (KLR) (Civ) (31 January 2024) (Ruling)

Neutral citation: [2024] KEHC 836 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS APPLICATION E662 OF 2022
CW MEOLI, J
JANUARY 31, 2024

BETWEEN

MARTIN N MWANIKI T/A ANFIELD AUCTIONEERS APPLICANT

AND

BENISA LIMITED RESPONDENT

RULING

1. For determination is the Notice of Motion dated 26th January, 2023 (the Motion) brought by Benisa Limited (hereafter the Respondent/Applicant) and anchored on the grounds laid out on its face and the affidavit of advocate Morris M. Karigi, seeking to have the Bill of Costs dated 26th October, 2022 struck out *ex debito justitiae*, with costs. The advocate stated therein that Martin N. Mwaniki T/A Anfield Auctioneers (hereafter the Applicant/ Respondent) filed the subject Bill of Costs purporting to have acted on the instructions of the advocate's firm, in execution of the order issued in HCCC No. E121 of 2019 (Benisa Ltd v CMC Di Ravenna Kenya Ltd) (hereafter the 1st suit) and yet no such instructions were ever given to the Applicant/Respondent.
2. Asserting that at all material times, the advocate was on record g for the Respondent/Applicant herein, in the 1st suit, he swore that the Bill of Costs filed in the present matter is vexatious, scandalous and amounts to an abuse of the court process since a separate suit was filed in Nairobi Milimani CMCC No. E3893 of 2022 (Haki Traders Limited v Anfield Auctioneers & Benisa Limited) (the 2nd suit) touching on the same issues raised in the current Bill of Costs. That it is therefore imperative that the matter be placed before a Judge for the purposes of determining the question of the purported instructions or lack thereof of the Applicant/Respondent.
3. In opposing the Motion, the Applicant/Respondent swore a replying affidavit on 9th February, 2023 terming the Motion as being fatally defective. The Applicant/Respondent averred that contrary to



- the averments in the Applicant's affidavit, instructions were given to him by the said Respondent's/ Applicant's advocate, to sell certain attached motor vehicles via public auction, pursuant to the order issued in the 1st suit. That it is therefore imperative that the current Bill of Costs be taxed to enable him to recover his costs from the Respondent/Applicant and settle the charges and costs in the 2nd suit. Consequently, the Applicant/Respondent urged the court to dismiss the Motion.
4. By way of his supplementary affidavit sworn on 9th June, 2023 the Respondent's/Applicant's advocate Morris M. Karigi reiterated his earlier averments concerning the lack of instructions, save to add that the application for execution annexed to the replying affidavit was not prepared or issued by his firm.
 5. The parties filed and exchanged written submissions. Counsel for the Respondent/Applicant anchored his submissions on the decisions in *Wafula Simiyu & Co. Advocates v East Land Hotel Ltd* [2016] eKLR and *James Francis Kariuki v Savings & Loans (K) Limited & another* [2007] eKLR. He asserted that the Applicant/Respondent failed to tender any proof of written instructions from the said counsel, authorising him to proceed with execution of the order in the 1st suit. Counsel maintained that no such instructions were ever given, whilst reiterating that the 2nd suit touches on similar issues as those being raised in the impugned Bill of Costs, thus terming the Bill an abuse of the court process. Reference was made to the decision in *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018] eKLR in that regard. On those grounds, the court was urged to grant the Motion by striking out the Bill of Costs.
 6. On the part of the Applicant/Respondent, his counsel's submission is that the instant Motion lacks merit, in view of the instructions previously given by the Respondent's/Applicant's advocate. Counsel further submitted that if at all the Respondent/Applicant refuted the claim on instructions, the same ought to have been raised in the 1st suit. He contended that the 2nd suit amounts to an abuse of the court process. That the Applicant/Respondent is entitled to recover his costs and related charges, and hence the Bill of Costs.
 7. The court has considered the rival material canvassed in respect of the Motion. The Applicant seeks the striking out of the Bill of Costs dated 26th October 2022 for want of instructions. While the Respondent/Applicant denies issuing any instructions to the Applicant/Respondent, for the attachment and sale of the subject motor vehicles listed in the 1st suit, the Applicant/Respondent maintains that the requisite instructions were issued by the advocate for the Respondent/Applicant.
 8. Various correspondences between the parties were exhibited in the replying affidavit of the Applicant/ Respondent. Included are the letters dated 19th January 2022; 21st January 2022; and 27th January 2022. It is apparent from reading these letters that the Respondent/Applicant instructed the Applicant/ Respondent regarding the attachment of the motor vehicles in question. Further, the Applicant/ Respondent similarly exhibited a copy of the letter dated 26th July, 2019 and written by the Respondent's/Applicant's advocate to the Deputy Registrar of this Court, requesting for issuance of warrants of attachment specifically to the Applicant/Respondent. The letters bear the said advocate's letterhead. His denial of issuance of instructions and his firm's preparation of the said application for execution, without more, seem to be bare denials, therefore.
 9. In the circumstances, it appears more plausible than not that the Applicant/Respondent received instructions from the Respondent's/Applicant's advocate in respect of the 1st suit.
 10. Besides, judging from the contents of the ruling delivered on 6th May, 2022 in the 1st suit, and which ruling triggered the subject Bill of Costs, the Respondent/Applicant being the plaintiff in the 1st suit, was ordered by the court to bear the execution costs upon the court setting aside the warrants of attachment and sale. This further goes to support the averments made by the Applicant/Respondent



as to who ought to bear the requisite costs. Regarding the 2nd suit the Respondent/Applicant, merely annexed a copy of the plaint therein, but did not demonstrate how the issues arising therein would render the Bill of Costs in dispute liable for striking out.

11. In the result, the court finds that the Respondent/Applicant has failed to demonstrate viable grounds justifying the striking out of the Bill of Costs herein. The Notice of Motion dated 26th January 2023 is without merit and is hereby dismissed, with costs to the Applicant/Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 31ST DAY OF JANUARY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Respondent/ Applicant: Mr. Njagi

For the Applicant/ Respondent: N/A

C/A: Carol

