



REPUBLIC OF KENYA



KENYA LAW

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Odhambo Owiti & Company Advocates v UAP Insurance Ltd (Miscellaneous Application 3 of 2021) [2024] KEHC 5325 (KLR) (29 April 2024) (Ruling)

Neutral citation: [2024] KEHC 5325 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS APPLICATION 3 OF 2021**

JN KAMAU, J

APRIL 29, 2024

BETWEEN

ODHIAMBO OWITI & COMPANY ADVOCATES ADVOCATE

AND

UAP INSURANCE LTD CLIENT

RULING

1. In its Notice of Motion dated 22nd June 2023 and filed on 30th June 2023, the Client herein sought that this court set aside and/or stay and/or vary and/or review the orders and proceedings of 22nd June 2023 and all consequential orders entered therein against it and reinstate the Advocate's application dated 16th September 2021 and filed on 17th March 2022 for disposal on merit.
2. Its advocate, Catherine Owiti, practicing in the firm of M/S Ogejo, Omboto & Kijala Advocates LLP swore an Affidavit on 24th June 2023 on its behalf in support of the said application herein.
3. It was its case that the aforesaid Catherine Owiti Advocate took over conduct of this matter from Quinter Pireh Advocate after she left employment of its said advocates' firm. The firm enquired from her on the status of the file and she indicated that the matter had come up on 21st April 2022 for hearing of the Advocate's application dated 16th December 2021 but the court file was missing. It asserted that its attempts and those of its advocates to follow up the tracing of the file proved futile.
4. It pointed out that its then advocate, Ms Faustine Osewe informed it that once the file was traced, they would set a date and serve or communicate the same. It averred that despite follow up with the Registry on numerous occasions to ascertain the status of the file for purposes of filing its Replying Affidavit in response to the aforesaid Advocate's application, the file could not be traced at the Registry.
5. It contended that the matter was never set down for disposal the whole of 2022 and that it was not until 22nd June 2023 when it came up for hearing of the Advocate's application and which was proceeded exparte and the court allowed the application as prayed.



6. It was emphatic that neither the Advocate nor the court effected service of the hearing notice upon it despite its advocates having been on record. It added that prior to the hearing date slated on 21st April 2022, it's advocates sent an email to the Advocate on 20th April 2023 (sic) with an attempt to record a consent to have the matter marked as settled and informing them that the amount sought in their application had long been settled.
7. It pleaded with court to allow it re-open the matter for the purposes of just and efficient disposal of the Advocate's application as the Advocate would not be prejudiced in any way in the event its application herein was allowed and the orders sought granted.
8. It added that there had been no delay in making this application and that it was in the interest of justice that the orders sought herein be granted as it would suffer irreparable loss in case the same were not granted.
9. It asserted that the absence of its advocate on 22nd June 2023 was inadvertent and that a counsel's mistake should not be visited on an innocent litigant. It feared that it stood to be condemned unheard if the orders prayed were not granted.
10. In opposition to the said application, on 2nd October 2023, Caren Chuchu, an advocate practicing in the firm of M/S Owiti, Otieno & Ragot Advocates filed a Replying Affidavit that she swore on 25th September 2023.
11. It was the Advocate's case that when its application came up for hearing on 22nd June 2023, one Mr Okwemba Advocate appeared on behalf of the Client. It stated that a search from the Advocates' search engine showed that the he was an associate in the firm of M/S Ogejo, Omboto & Kijala Advocates who had the conduct of this matter. It averred that the Client's averments that the matter proceeded ex parte were not true and were mere attempt to mislead the court and that the court records could confirm the same.
12. It was emphatic that the present application was misconceived because instead of the Client having sought an order for review of the bill against it or an order of the Learned Judge declining to adjourn the matter (sic) and grant it leave to put in a Replying Affidavit, it had opted to rely on issues of fact on false allegations that the Advocate who was previously handling the matter had since left the firm without handing over to the management.
13. It was its contention that the Client's assertion that the previous advocate left abruptly was not justifiable as it was the responsibility of a law firm to ensure a smooth transition of cases handled by an outgoing advocate to avoid leaving such matters unattended.
14. It further contended that the Client's averment that attempts to follow up and trace the file were unsuccessful was untenable since the file was retrieved and a Hearing Notice dated 3rd April 2023 indicating that a hearing date had been slated for 22nd June 2023 was issued by the court itself and served upon both parties. It stated that this was sufficient time for the Client to have filed its response but it failed to do so. It was categorical that its impugned application was served upon the Client which acknowledged it on 21st March 2022 and that despite having more than a year to respond to the said application, the Client did not make any attempts do so.
15. It stated that the omission on the part of the Client constituted unreasonable and undue delay for which it had not provided any justification in its application.



16. It was emphatic that this being an application seeking the court's discretion to set aside its orders, the Client was enjoined to act in good faith without over reaching by relying on false foundations of facts to justify the same and that its lack of candour should disentitle it the orders it had sought.
17. It pointed out that the Client would not be prejudiced if the orders sought were declined as the only issue it sought to present to the court was an allegation that an initial payment of KShs 144,690.50 had already been made which was a question of reconciliation of accounts at the point of execution as part payment of the decree that arose from taxation and certificate of costs was undisputed and there was no reference challenging it. It promised to endeavor reconciling the part payment issue upon execution and urged the court to dismiss the Client's application.
18. On 31st January 2024, James Mundia Okwemba, an advocate also practicing in the firm of M/S Ogejo, Omboto & Kijala Advocates LLP filed a Supplementary Affidavit. He swore the same on 27th January 2024.
19. The Client admitted that one Mr Okwemba Advocate was present in court on 22nd June 2023 but that he had attended another matter to wit Vihiga JR Petition No E004 of 2022 Okoba Michael Kantai vs IEBC & 4 Others. It stated that its said advocate proceeded to the Registry to follow up on some other matters and it was while he was there that one Mr Juma, a Court Assistant informed him that there was another matter from his firm that had been placed aside by the court.
20. It was its contention that its advocate was unaware that the instant file was coming up for hearing on the same date as the same was missing in their firm's master diary of matters of that day. It pointed out that it was in light of the said reason that the said advocate sought an adjournment to seek proper information concerning the case but which this court declined to grant and proceeded to allow the Advocate's application dated 16th December 2021 as drawn. It blamed the court for not affording it the opportunity to address the reason why it had not put in its response.
21. It denied ever having been served with the Hearing Notice as alleged and reiterated that the file herein had never been traced at the Registry nor had it been brought to court for hearing prior to 21st April 2022 when it had been previously set for hearing and that as such it could not file a response or leave a document at the Registry as there was no guarantee that the file would be found and the same be filed. It pointed out that the staff at the Registry were the ones that could verify that the file was missing and that service was effected upon it.
22. It was emphatic that the costs sought by the Advocate in its application dated 16th December 2021 as taxed in the certificate of costs were settled on 17th December 2021 as evidenced in its annexures on its application herein and that the orders sought herein ought not be granted as the Advocate had been unable to reconcile its accounts to date despite its request. It was categorical that it stood to suffer prejudice if condemned unheard.
23. On 28th September 2023, this court directed the parties to file their respective Written Submissions. However, when the matter was mentioned on 1st February 2024 to confirm compliance of the court's directions, both parties indicated that they would not be filing any Written Submissions but would instead be relying on their affidavit evidence. The Ruling herein is therefore based on the said affidavit evidence which both parties relied upon in their entirety.



LEGAL ANALYSIS

24. On 22nd June 2023, this court delivered its Ruling in respect of the Advocate's Notice of Motion application dated 16th December 2021 and filed on 17th March 2022 in which they had sought entry of judgment on the Certificate of Costs for the sum of Kshs 144,690.50. The Ruling read as follows:-

“The Advocate and Client were served with today's Notice for the hearing of the Advocate's Notice of Motion dated 16th December 2021 and filed on 17th March 2022. Although the Client's counsel had indicated that they were never served with today's Hearing Notice, counsel has not explained why they have never filed a response thereto or filed a reference since 17th March 2022 when they were served with the said application. Accordingly, I hereby reject the client's counsel's request to file a Replying Affidavit within the next fourteen (14) days. I have therefore looked at the said application and the supporting Affidavit of Faustine Osewe that was sworn on 16th December 2021 and the enclosures therein and noted that the same is technically unopposed. I therefore allow the said application as prayed. Orders accordingly.”

25. Notably, this was a matter that had been pending since 17th March 2022 when it was filed. There was nothing on the court record that showed that either of the parties had sought to prosecute the said application. On its own motion, the court issued a Hearing Notice dated 3rd April 2023 indicating the matter would be coming up for hearing on 22nd June 2023.

26. The aforesaid order of this court was clear that although the Client's Advocate had indicated that they were never served with the aforesaid Hearing Notice, he did not explain why they had never filed a response to the Advocate's application dated 16th December 2021 or a reference since 17th March 2022.

27. A reading of the Client's affidavit evidence did not also give a plausible reason for the delay in filing its response. It only focused on the fact that its advocates were never served with the impugned Notice. Judicial time is a scarce resource and the Kenya's Judicial System was constantly threatened with complaints about delays in resolving cases. Courts had therefore been urged to adopt a 'no adjournment policy' for cases that had been already set for hearing and where no good or plausible reason had been advanced for the court to grant an adjournment.

28. A delay of one (1) year three (3) months in determining a mere application such as one for adoption of certificate of costs could only be termed as inordinate.

29. While there was no indication in the court file indicating if the Hearing Notice dated 3rd April 2023 was sent to the Advocates and the advocates representing the Client herein, the said Hearing Notice was endorsed with the word "Send". Notably, both the Advocate and the Client attended court on the said date of 22nd June 2023. It was for that reason that this court took the view that the parties were aware of the said Hearing date.

30. There was no evidence that counsel representing the Client was informed that the matter had been set aside by the Court Assistant, one Juma. Indeed, the proceedings in the court file do not indicate that the matter had been placed aside as the proceedings were continuous. This court did not therefore find the Client to have been truthful or representing the correct state of affairs on the said date.

31. Be that as it may as the court's memory may not have been affected due to the passage of time, on the 22nd June 2023, this court addressed its mind to the issue of service of the Hearing Notice and found that the same was not very important and was inconsequential as its main concern was why the Client had not filed a response to the Advocates' Notice of Motion application dated 16th March 2021 and



filed on 30th June 2021 as of that date. It determined that there had been unexplained inordinate delay in the Client not having filed a response more than two (2) years later.

32. Going further, there was no evidence that the Client had filed a reference to set aside the taxed costs. In the absence of a reference, a client has very little choice at the stage of adopting the certificate of costs as judgment. It was for that reason that this court declined to adjourn the matter and instead entered judgment in favour of the Advocate herein for the sum of Kshs 144,690.50.
33. The Client attached a copy of a remittance slip for the sum of Kshs 438,691.70 for 15th December 2021 in respect of Miscellaneous Applications Nos 3, 5 and 7 of 2021 in respect of the Account of M/S Owiti Otieno & Ragot Advocates. This was new information that was not before the court when it allowed the Advocate's Notice of Motion application on 22nd June 2023.
34. Purely in the interests of justice, there was therefore need to reconcile the accounts. It would be a great travesty of justice if the Client effected payment twice for the same matter as that would amount to unjust enrichment on the part of the Advocate. There was therefore need for this court to review its orders of 22nd June 2023 so as to do substantive justice to the Client herein.
35. Having said so, the Client could not go scot free for having taken the court and the Advocate backwards in a very old matter. It had to compensate the Advocate for the time lost and the pain of re-litigating afresh.

DISPOSITION

36. For the foregoing reasons, the upshot of this court's decision was that the Client's Notice of Motion application dated 22nd June 2023 and filed on 30th June 2023 was merited and the same be and is hereby allowed.
37. The proceedings and orders of 22nd June 2023 be and are hereby set aside and/or vacated on condition that the Client be and is hereby allowed to file its response to the Advocate's Notice of Motion application dated 16th December 2021 and filed on 17th March 2022 within fourteen (14) days from the date of this Ruling.
38. The Advocate to file and serve a Supplementary Affidavit, if need be and Written Submissions by 20th May 2024.
39. The Client to file and serve Written Submissions by 10th June 2024.
40. The matter will be mentioned on 20th June 2024 to confirm compliance and/or for further orders and/or directions. The parties are at liberty to record a consent in this matter, if any will have been arrived at, on the said date with a view to bringing closure to this long outstanding matter.
41. The Client be and is hereby directed to pay throw away costs of Kshs 20,000/= to the Advocate within thirty (30) days from the date hereof. In the event the Client shall not pay the said monies as aforesaid, the Advocate will be at liberty to institute proceedings for the recovery of the same in the normal manner.
42. It is so ordered.

DATED and DELIVERED at VIHIGA this 29th day of April** 2024

J. KAMAU

JUDGE



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