



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**MISC CIVIL APP NO 52 OF 2012**

**LUBULELLAH & ASSOCIATES ADVOCATES.....APPLICANT**

**VERSUS**

**N.K. BROTHERS LIMITED.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. Before the Court is the Applicant's Notice of Motion application dated 29<sup>th</sup> January 2014 brought pursuant to the provisions of Section 51(2) of the Advocates Act, Rule 13A of the Advocates Remuneration Order, Sections 3A and 63(e) of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules. The Applicant seeks the following orders inter alia:-

1. **THAT the Court be pleased to order that the amount certified on the certificate of taxation herein dated 29<sup>th</sup> November 2012 be entered as judgment against the Respondent.**
2. **THAT the taxed costs do attract interest at the rate of 14% per annum from the date of delivery of the Bill of Costs being the (sic) 22<sup>nd</sup> July 2011 until payment in full.**
3. **THAT a Decree be issued in respect of the Certificate of Taxation dated 29<sup>th</sup> November 2012 and that the Applicant be at liberty to execute for recovery of the same in such manner as a Decree of this Honourable Court.**
4. **THAT the costs of this Application be provided for.**

2. The application was predicated upon the grounds that the said Applicant's Bill of Costs had since been taxed and that it sought to proceed with and realise the costs taxed by way of execution. It averred that it would be just and fair for the orders sought to be granted.

**AFFIDAVIT EVIDENCE**

3. The application was supported by the Affidavit of Wilfred Akhonya Mutubwa sworn on 29<sup>th</sup> January 2014. It was contended by the deponent that the Bill of Costs of Kshs 41,228,724/= was allowed by the taxing master. He deposed that the Applicant had since issued a Notice under Rule 7 of the Advocates Remuneration Order and prayed that the orders sought be granted in the interests of justice and fairness.
4. The application was opposed. In the Replying Affidavit sworn on 24<sup>th</sup> February 2014 by Pravin

Mavji Khoda, he deposed that the application was untenable in law as there was no provision for judgment and decree by way of Notice of Motion; there having been no suit that had been filed as was required by the law.

5. He averred that no credit was given for the sums that the Respondent had already paid to the Applicant amounting to Kshs 53,224,180/= and that there was an overpayment amounting to Kshs 11,995,456/=.
6. In the Supplementary Affidavit sworn on 12<sup>th</sup> March 2014 by the said Wilfred Akhonya Mutubwa, he contended that the Bill of Costs as assessed had not been challenged and there been no reference having been filed herein by the Respondent herein, the Respondent was estopped from prevaricating its position as regards the taxed costs.
7. In respect of the claim by the Respondent that it had paid Kshs 53,224,180/- to the Applicant, he stated that the same amounted to approbation and reprobation by the Respondent, who having sworn an affidavit in objection to an earlier reference stating that they had paid a fee agreement of Kshs 20,000,000/= in full and final payment had now turned and claimed to have paid Kshs 53,224,180/=.
8. It was his contention that in demonstration of good faith, the Applicant had given the Respondent credit for Kshs 15,080,000/= whereupon the taxing master found that a sum of Kshs 41,228,728/= was due to the Respondent. He averred that the matters of deposit, fee agreement and taxation were *res judicata* having been substantively determined by the taxing master.
9. It was his further contention that the documents claimed by the Respondent to have been statements of account were fictitious, unsigned and not on its letter heads and that the Respondent was inviting the court to tax the Bill of Costs afresh without filing a reference.

#### **LEGAL SUBMISSIONS BY THE APPLICANT**

10. In its written submissions dated 12<sup>th</sup> March, 2014 and filed on the same date, the Applicant submitted on two grounds, namely:-

- i. **whether the application was untenable in law and;**
- ii. **whether the Respondent paid a sum of Kshs 53,224,180/- as claimed.**

11. On the first ground, the Applicant submitted that the only two (2) grounds that could cause a court not to enter judgment on a Certificate of Costs was where the said certificate had been set aside and/or altered and/or where the retainer had been disputed, none of which had happened in the instant case. It was therefore its contention that in view of the fact that the said Certificate of Costs had not been impeached by the court, the same was thus final.

12. He referred the court to Section 51(2) of the Advocates Act which stipulates as follows:-

**“The certificate of the taxing officer by whom any bill has been taxed shall unless it is set aside or altered by the court, be final as to the amount of the costs recovered thereby; and the court may make such order in relation thereto as it thinks fit, including where the retainer is not disputed, an order that judgment be entered (sic) entered for the sum certified to be due with costs.”**

13. It relied on the case of **Daly & Figgis Advocates v Homelex Limited (2013) eKLR** in which Havelock J agreed with the aforesaid interpretation of Section 51(2) of the Advocates Act as did Njagi J in the cases of **HCCC No 1029 of 2002 Macharia Njeru vs Communications Commission of Kenya** (unreported) and **HCCC No 416 of 2004 Nyakundi & Co Advocates vs Kenyatta National Hospital** (unreported) that Havelock J referred to in his ruling in respect of the provision the instant application was predicated upon. It submitted that Havelock J had been

emphatic that to allege a dispute at the summary stage would amount to a contradiction of express and mandatory provisions.

14. With regard to the second ground, the Applicant submitted that the Respondent had not adduced any evidence before the court verifying the authenticity of the document that had been submitted as a statement of accounts, and that in any event, that issue as well as that of deposit, fee agreement and taxation were *res judicata*, having been heard and finally determined by the Deputy Registrar in taxation and reference by the court. It reiterated what it had stated in its Supplementary Affidavit that the Respondent was seeking to have the Bill of Costs taxed afresh.

#### **LEGAL SUBMISSIONS BY THE RESPONDENT**

15. The Respondent filed its submissions dated 8<sup>th</sup> May, 2014 on the same date. It submitted that it had made payments to the Applicant but the same had not been credited. It was its argument that there was an issue as to what amount was actually due and that the amounts it had paid ought to be credited before judgment was entered. It contended that it paid the Applicant more than what was due to it and therefore wanted the sums paid over and above the taxed amount be returned to it.
16. It was its further submission that the application herein had not been properly filed as the Applicant could not seek a judgment on taxed amounts by way of a miscellaneous application. It contended that a proper suit had to be filed so that parties could ventilate the issues that had arisen. It was its argument that as the said application was incompetent and not in compliance with Section 48(2) of the Advocates Act, the same ought to be dismissed with costs to it.
17. It relied on the cases of **HC Misc Civil App No 76 of 2006 Rustam Hira vs Oriental Bank, HC Misc App No 81 of 1999 M.G Sharma vs Uhuru Highway Development Ltd, Civil Appeal No 127 of 2003 South Nyanza Sugar Company Ltd vs Samuel Osewe Ochiko, HC Misc 12 of 2005 L. Ngolya & Co Advocates vs Jackson Muithi Kilango** and **E & L Misc. App. No. 274 of 2012 Cyrus Minda vs Yunes Kambo Oruta** to buttress its submissions. It did not, however, set out in its written submissions, the holdings it was relying upon. What the court gathered was that the common thread of the said cases was that under Sections 48 and 49 of the Advocates Act, it was mandatory that a plaint be filed and a decree issued before an advocate could execute for its costs.
18. While the court noted the highlighted parts in the authorities that had been attached to the Respondent's written submissions, it wishes to discourage this style of submitting on legal issues. This short cut adopted by parties leaves the court with the task of grappling to decipher what a party's arguments are. Every party must at all times bear in mind that the court is merely an arbiter between disputing parties and ought not to prosecute or appear to prosecute a case on behalf of one (1) party to the detriment of the other.

#### **LEGAL ANALYSIS**

19. The law is very clear that once a taxing master has taxed the costs, issued a Certificate of costs and there is no reference against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment. An applicant is not required to file suit for the recovery of costs. The certificate of costs is final as to the amounts of the costs and the court would be quite in order to enter judgment in favour of the Applicant against the Respondent herein for the taxed sum indicated in the Certificate of Taxation that was issued on 25<sup>th</sup> November 2012.
20. The aforesaid position has been held by this court in **HC Misc 486 of 2012 E.W. Njeru & Co Advocates vs Zakhem Construction (K) Limited** and **HC Misc 487 of 2012 E.W. Njeru & Co Advocates vs Zakhem Construction (K) Limited** and several other courts regarding the entry

of judgment upon issuance of a Certificate of Costs that had not been set aside or impugned.

21. This position is based on the provisions of Section 51 (2) of the Advocates Act Cap 16 (laws of Kenya) cited hereinabove and Section 48 (3) of the Advocates Act, the latter which as follows:-

**“Notwithstanding any other provision of this Act, a bill of costs between an advocate and a client may be taxed notwithstanding that no suit for recovery of costs had been filed.”**

22. While the court has noted the Respondent’s submissions that Sections 48 and 49 of the Advocates Act demand that a suit be filed and a decree issued before an advocate can execute for its costs, it is important to note that those are not the only sections under which an advocate can claim for its costs. An advocate has either the option of filing a Bill of Costs for taxation whereupon a Certificate of Costs is issued pursuant to Section 51 (2) of the Advocates Act or to file suit under Section 48 (1) of the Advocates Act.

23. Section 48(1) of the Act provides as follows:-

**“ Subject to this Act no suit shall be brought for the recovery of any costs due to an advocate or his firm until the expiry of one month after a bill for such costs, which may be in a summarised form signed by the advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause to be verified by affidavit filed with the plaint, for believing that the party chargeable therewith is about to quit Kenya or abscond from the local limited of the Court’s jurisdiction, in which event action may be commenced before the expiry of the period of one month.”**

24. It is abundantly clear that the Applicant proceeded under Section 51 (2) of the Advocates Act and not Sections 48 or 49 of the Advocates Act, as was alluded to by the Respondent, where the Applicant would have been required to file suit and obtain judgment and decree against the Respondent before it could proceed with execution proceedings to recover its costs. The authorities relied upon by the Respondent, though noted, were not relevant in the circumstances of this case.

25. In its submissions in respect the Applicant’s Chamber Summons application dated 28<sup>th</sup> January 2013 and filed on 4<sup>th</sup> February 2013 seeking to set aside the Taxing Master’s taxation, the Respondent averred that the decision of 27<sup>th</sup> November 2012 was the one that was valid and that the court could not proceed to review the said decision without being moved to do so by the Applicant.

26. The Respondent did not file a reference. In fact it was the Applicant that filed a reference after the costs were taxed. The Respondent cannot therefore approbate and reprobate. Having admitted that the decision that had been given by the taxing master was final, the Respondent cannot therefore be heard to say that amounts it had paid had not been credited. Once a reference had been determined, the court can do nothing more than to enter judgment as indicated in the Certificate of Costs. The matters raised by the Respondent herein do not obtain in this case and were for all purposes and intent, *res judicata*. The court cannot re-open the arguments of what or was not paid at this stage.

27. The court agrees with the Applicant that so long as the Respondent did not provide the court with any proof that the Certificate of Costs issued on 2<sup>9th</sup> January 2014 was set aside and/or altered or that there were any proceedings pending before a court of competent jurisdiction, the court has no option but to be persuaded by the Applicant’s submissions that it was entitled to entry of judgment under Section 51(2) of the Advocates Act as it had prayed for in its application. The Applicant ought not to be barred from enjoying the fruits of its hard work.

28. This court also has jurisdiction under Section 51(2) of the Advocates Act to make any order that it deems fit. Entry of judgment and award of interest at court rates is within the ambit of what this

court can do. The Applicant has claimed for interest on the taxed amount at the rate of 14% per annum.

29. Rule 7 of the Advocates Remuneration Order provides as follows:-

**“ An advocate may charge interest at 14% per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, providing such claim for interest is raised before the amount of the bill has been paid or tendered in full.”**

30. It is clear that the said Rule 7 deals with interest charged by an advocate of its claim for disbursements and costs which is chargeable from the expiration of one (1) month from the date of his delivery of its bill to its client. This interest is distinguishable from the interest that this court can award.

31. As this court held in the cases of **HC Misc No 486 and 487 of 2012 E.W. Njeru & Co Advocates** (Supra), if an advocate files his Bill of Costs without raising the issue of interest, then he forfeits interest as provided for under Rule 7 of the Advocates Remuneration Order. The court can only award the interest at court rates.

32. Accordingly, having considered the pleadings, the written and oral submissions and the case law relied upon by the parties, the court finds that the Respondent did not satisfy the court that the Applicant should to be denied its fees or that the application was not merited.

#### **DISPOSITION**

33. For the aforesaid reasons, the Applicant's Notice of Motion dated 29<sup>th</sup> January 2014 was merited and the same is hereby allowed in terms of Prayer Nos (1) and (3) therein. Interest on the taxed amount will be at court rates with effect from 24<sup>th</sup> January 2014 when this court made its determination of the Applicant's reference that was dated 28<sup>th</sup> January 2013 and filed on 4<sup>th</sup> February 2013. It is also ordered that the Respondent will bear the costs of this application.

34. It is so ordered.

**DATED and DELIVERED at NAIROBI** this 10<sup>th</sup> day of July 2014

**J. KAMAU**

**JUDGE**



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