REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 337 of 2016

MERCY NDUTA MWANGI T/A MWANGI KENGA'RA & CO. ADVOCATE...ADVOCATE

VERSUS

INVESCO ASSURANCE COMPANY LIMITED.....CLIENT

JUDGMENT

The appellant is a firm of advocates while the respondent was the client. After some work done at the instance of the client, the appellant filed a bill of costs which was taxed and a certificate of taxation issued. Subsequently, the client did not settle the said sum which necessitated the filing of the application to enforce the payment.

It is not clear why the appellant opted to file a suit instead of filing an application for judgment. This may be based on the fact that the retainer was disputed. Whatever the case, a suit was filed claiming the sum of Kshs. 153,307 with interest at 14% from 26th April, 215 until payment in full, costs of the suit and interest.

The respondent filed a defence denying the claim, followed by the appellant's reply to the defence. The appellant then filed an application to strike out the defence and entry of judgment in terms of the plaint. That application was dismissed by the lower court and that is the basis of this appeal.

The reason for dismissing the appellant's application is contained in the last paragraph of the ruling of the lower court dated 24th June, 2016 which reads as follows,

> **"I find paragraphs 4 and 5 of the defence raise reasonable defence with triable issues. I find no merit in the application. It is dismissed with costs to the respondent."**

In a lengthy memorandum of appeal comprising 13 paragraphs, the appellant faulted the lower court for failing to enter judgment, notwithstanding the documentary evidence presented and for relying on matters that had already been determined by courts of competent jurisdiction. The previous litigation between the parties is contained in HCCC No. 505 of 2013 and HCCA No. 65 of 2015 which have been cited in paragraphs 7 and 8 of the Memorandum of Appeal.

As required of me, I have evaluated the record with a view to arriving at independent conclusions. Parties were required to file submissions to address the appeal but only the appellant complied, notwithstanding service of the Mention notice upon the respondent's counsel as confirmed by the affidavit of service sworn on 23rd November, 2020. The bill of costs was taxed and the certificate issued accordingly. Where party is aggrieved by the outcome of the of taxation, the process of addressing any dissatisfaction is provided in the Advocates Act. The most common being the filing of a reference to the High Court.

This the respondent did not do.

The respondent had filed a defence in the lower court stating that the money being claimed by the appellant had been paid under global fee agreement. There is then a schedule of payment set out in the said defence. I pause to observe that fees are made of figures and it is very easy to show the said figure, when it was paid and the sum paid. Nowhere did the respondent show when and how this sum was settled. That would have been the easiest way to dislodge the appellants claim.

At some point the respondent referred to the list of cases handed over to the appellant and in particular serial No. 14 at page 32 but that entry alone is not sufficient to prove any payment.

The paragraphs the lower court referred to in its ruling as forming triable issues had been litigated upon between the parties and specific finding made which invited the doctrine of *res judicata*. It was therefore not open for the lower court to fall back onto the said paragraphs as forming the basis of dismissing the appellant's claim. In any case, it has been held in the case of **Kithi & Co. Advocates vs. Menengai Downs Limited (2015) e KLR** as follows,

> **"The court can't go behind the certificate of costs to inquire if there are other monies that had been paid but not taken into account at the taxation. Section 51 of the Advocates Act presumes that by the time a certificate of costs is issued all necessary and relevant matters must have been considered by the taxing master before arriving at the taxed amount and certificate of costs arising therefrom."**

I add to the foregoing that, an order on taxation is an order in finality, subject only to a reference or review which was not the case before the trial court.

The refusal of the respondent to settle the appellant's fees based on a certificate of taxation is not only against the established norms in the relationship of counsel and client but, in my view, also oppressive.

The denial of the respondent in the statement of defence filed on 26th January, 2016 was intended to delay the settlement of the appellant's claim. The issues raised in paragraph 5, 6 and 7 in the said statement of defence had already been determined and therefore could not constitute triable issues. The lower court ought to have struck out the defence and enter judgment in favour of the appellant.

Having evaluated the material presented in the Record of Appeal, I have come to the irresistible conclusion that the appeal should succeed. It follows therefore that the lower court ruling of 24th June, 2016 is hereby set aside and in place thereof an order is hereby made that the respondent's defence is struck out. There shall be judgment in favour of the appellant as prayed in the original plaint. The appellant shall have the costs of the suit in the lower court and also of this appeal.

Dated, signed and delivered at Nairobi this 23rd Day of March, 2021.

A. MBOGHOLI MSAGHA

JUDGE