



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 335 OF 2018
IN THE MATTER OF THE ADVOCATES ACT CAP 16 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE TAXATION OF BILL OF COSTS

BETWEEN

NYACHOTI & COMPANY ADVOCATES.....APPLICANT

VERSUS

METRO PETROLEUM TANZANIA LTD 1ST RESPONDENT

BILL KIPSANG ROTICH2ND RESPONDENT

FLORENCE CHEPKOECH3RD RESPONDENT

PREMIUM PETROLEUM CO. LTD4TH RESPONDENT

ARISING FROM

MILIMANI HCCC NO. 423 OF 2015

UNITED BANK OF AFRICA (TANZANIA) LIMITED VS. METRO PETROLEUM TANZANIA LIMITED & 3 OTHERS

J U D G M E N T

1. By a Notice of Motion dated 18/12/2020, the applicant has sought judgment against the respondents for Kshs. 1,056,229/05 as per the Certificate of Taxation dated 16/12/2020. The same is brought under *section 5(2) of the Advocates Act, Chapter 16 Laws of Kenya and paragraph 7 of the Advocates Remuneration Order and Order 51 Rule 1 of the Civil Procedure Rules, 2010.*
2. The Motion is predicated upon the grounds set out on the body thereof and the supporting affidavit of **Phillip Nyachoti** sworn on 18/12/2020.
3. The grounds are that; the applicant's bill dated 2/7/2018 was taxed on 4/12/2020 at Kshs. 1,056,229.05, a certificate of taxation for the said amount was subsequently issued on 16/12/2020, the same has not been reviewed, set aside or varied. Finally, that there is no dispute on retainer.
4. The application was opposed by the respondents vide the replying affidavit of **Bill Kipsang Rotich** sworn on 24/2/2021. They contended that they had given instructions to the applicant to oppose the proceedings for adoption of a foreign judgment rendered by the High Court of Tanzania. That he filed a Bill of Costs which was duly taxed as Kshs. 1,056,229.05/= vide a ruling of 4/12/2020.
5. They contended that the sum claimed and assessed by the Taxing master had already been paid to the applicant. That they had made cash payments to the applicant on various dates totaling Kshs. 1,100,000/=. That an additional cheque payment of Kshs. 200,000/= was made making the total payment to the applicant to be Kshs. 1,300,000/=. That no receipts or acknowledgment thereof were issued to them.

6. Where costs have been taxed, the applicable provision is *section 51(2) of the Advocates Act*. The same provides: -

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

7. From the forgoing, it is clear, that upon a bill of costs being taxed, an advocate applies for judgment for the certified amount. Judgment is to be entered for the said amount unless retainer is disputed. Once a certificate of costs is issued, it becomes final as to the amount of the costs due. What is left is for the Court to pronounce judgment on the amount so certified.

8. In the present case, retainer is not disputed. The respondents claimed that they had settled the entire amount with an overpayment of Kshs. 243,770/95. They alleged that they had made payment therefor on various days. The applicant denied that allegation.

9. The general rule of evidence is that he who alleges must prove. *See section 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya. Section 107* provides: -

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108) The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109) The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

10. The respondents case is that the monies were paid in cash without receipts being issued. There was no explanation given why a cash payment was not receipted. How would one make several cash payments and fail to demand for a receipt in respect thereof? Further, there was no correspondence that was exchanged to evidence that any payment had been made.

11. The view this Court takes is that when a person makes a cash payment and fails to demand for a receipt, such payment cannot be accounted to the tax authorities. The payer in such a case is aiding and abetting an illegality. He is assisting the payee to avoid paying tax for such payment. That is obviously an illegality and the loss will fall where it lies.

12. In this regard, this Court is satisfied that the respondents failed to discharge the burden upon them that the monies had been paid and received by the applicant. The copy of the cheque produced was not in the name of the applicant and there was nothing to show that it was cleared in his favour.

13. It was not enough for the respondent to allege that the cash payment done was with the monies withdrawn via cheque from his personal account. It was imperative that he demonstrates that the money was either deposited into the applicant’s account, or produce documents/evidence to the effect that the applicant acknowledged receipt of the same.

14. Accordingly, I find the application by the applicant merited. I allow the application and enter judgment for the applicant in terms of the certificate of taxation dated 2/7/2018 together with costs of the application. A decree shall issue accordingly

It is so ordered.

DATED and **DELIVERED** at Nairobi this 22nd day of April, 2021.

A. MABEYA, FCI Arb

JUDGE