



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 338 OF 2016

MERCY NDUTA MWANGI T/A MWANGI KENG'ARA ADVOCATES.....APPELLANT

VERSUS

INVESCO ASSURANCE COMPANY LIMITED.....RESPONDENT

(Being an Appeal from the Ruling of the Chief Magistrate's Court at Nairobi delivered on 24<sup>th</sup> June 2016 by Hon. E.K. Usui, Senior Principal Magistrate in CMCC NO. 7692 of 2015)

#### JUDGMENT

The appellant is a firm of advocates that was instructed to defend several cases filed against the respondent's insured clients. The advocate/client relationship came to an end and the appellant filed several bills of costs. One of the several bills was taxed at Kshs.71,379 in Milimani High Court Civil Miscellaneous Application Number 834 of 2013. The bill was opposed by the respondent and did undergo the usual taxation process.

Upon taxation of the bill of costs the appellant filed Civil Case Number 7692 of 2015 seeking payment of the sum of Kshs.71,379 plus interest at the rate of 14% from 4<sup>th</sup> July 2013 until payment in full. The respondent entered appearance and filed its defence through the firm of Gichuki King'ara & Co. Advocates. The defence indicated that the respondent had paid the appellant a total sum of Kshs.20,018,330 as legal fees. A reply to the defence was filed denying the payment of the sum of Kshs.20,018,330 to the appellant.

The appellant filed a Notice of Motion dated 2<sup>nd</sup> February, 2016 seeking to have the statement of defence struck out and judgment be entered as prayed in the plaint. In its ruling delivered on 24<sup>th</sup> June 2016 the trial court dismissed the application and found that the defence raise triable issues. This appeal is against that ruling.

The grounds of appeal are:-

1. THAT the learned Trial Magistrate erred in law and in fact, when he failed to strike out the statement of defence dated 26/1/2016 for being scandalous, frivolous and otherwise an abuse of the court process.
2. THAT The Learned Trial Magistrate erred in law and in fact in failing to enter judgment for the liquidated claim of the Appellant's assessed costs of Kshs 71,379/= as evidenced by a certificate of a taxation issued on 14/12/2015,
3. THAT the Learned Trial Magistrate erred in law and in fact, in holding that allegations of previous payments advanced in the replying affidavit, which had no relevance to the suit herein were issues to proceed for trial despite there being no documentary proof of such payments before the Honorable Court.
4. THAT the Learned Trial Magistrate erred in law and in fact, in failing to consider the documentary evidence presented by the Appellant to the Honorable Court in support of the application for striking out the defence, which rendered the issue of accounts res judicata, and hence arrived at a wholly unjust decision.
5. THAT the Learned Trial Magistrate erred in fact and in law, by failing to evaluate submissions filed by the Appellant in support of the application for striking out defence.
6. THAT the Learned Trial Magistrate erred in fact and in law by failing to find that there was no competent replying affidavit filed by the Respondent for consideration by the court and misguided himself when he relied on the substantively defective affidavit to arrive at his decision.

7. THAT the Learned Trial Magistrate erred in fact and in law by failing to consider a previous High Court rulings MILIMANI H.C.C.C 504 OF 2013 (Originating Summons) INVESCO ASSURANCE COMPANY LIMITED VERSUS MERCY NDUTA MWANGI T/A MWANGI KENG'ARA & CO. ADVOCATES delivered on 26/9/2014 which had dismissed a previous application for accounting for the alleged payment of Kshs 20,000,000/- plus, which ruling rendered relitigating at the issue at the summary stage and afresh, *res judicata*.

8. THAT the Learned Trial Magistrate erred in law and in fact by failing to consider another previous ruling on the same subject matter namely: MILIMANI H.C.C.A. NO.65 OF 2015 INVESCO ASSURANCE COMPANY LIMITED VERSUS MWANGI - KEN'GARA & CO. ADVOCATES, which was delivered on 22/5/2015, whereby the court held that accounting for Kshs 20,000,000/= was to be done by filing of an Originating Summons and hence the trial court could not competently entertain a full bearing of the same issue.

9. THAT the Learned Trial Magistrate erred in law and in fact, in failing to award interest on the taxed costs at 14% per annum from 4/7/2013 until payment in full.

10. THAT the Learned Trial Magistrate erred in law and in fact by failing to find that the Respondent's admission of retainer rendered the purported defence a sham and therefore failed to raise any triable issue.

11. THAT the Learned Trial Magistrate erred in fact and in law, by failing to award the costs of the application to the Appellant.

12. THAT the Learned Trial Magistrate erred in law and in fact, by failing to enter final judgment for the Appellant and to award costs of the suit to the Appellant.

13. THAT the Learned Trial Magistrate misdirected himself by failing to uphold the overriding principles of the Court and the Law as embodied in Section 1A, 1B of the Civil Procedure Act, chapter 21 Laws of Kenya.

It is submitted for the appellant that the Notice of Motion seeking to have the defence struck out was made on the basis that the defence is scandalous, frivolous, vexatious and an abuse of the court process. The respondent raised an issue of payment of Kshs.39,320 as deposit but this was not true as the bill of costs gave credit for a sum of Kshs.35,000. The issues raised in the defence that part of the fees had been paid was not raised before the taxing officer. Further, that the issue of payment of over Kshs.20,000,000 to the appellant as fees had already been litigated upon and had been dismissed in HCCC No. 504 of 2013, vide a ruling delivered on 26<sup>th</sup> September 2014. It is also submitted the same line of defence was dismissed in Milimani HCCA 65 of 2015 involving the same parties when the respondent applied for stay of execution. The court held as follows:-

**“The Applicant complained and produced documents to show that it had paid the Respondent over the years fees deposit exceeding Kshs.20million, that unless the stay was granted until the Respondent accounted for the said sum, the Applicant may never have any recompense. On the other hand, the Respondent submitted that the application before court was not one for an account by an Advocate; that such an application should be by way of an Originating Summons under Order 52 of the Civil Procedure Rules.**

**I think I agree with the Respondent. If it be true that the Applicant paid over to the Respondent the alleged sum of Kshs.20million plus and the same has not been accounted for, the law has provided for a remedy by way of accounts. The Respondent cannot be hamstrung or prevented from enjoying the fruits of legally obtained judgments on the ground that there is money that had been received but not yet accounted for by her.”**

The appellant further referred to the decision in Machakos Misc. Application No. 51 of 2015, MWANGI KENG'ARA & CO. ADVOCATES –V- INVESCO ASSURANCE COMPANY LIMITED where in a ruling delivered on 11<sup>th</sup> May 2017, the court held:-

**“As noted in all the cases involving the Client and Advocate herein, the issue had been about the Client’s claim that a sum of Kshs.20 million had been paid to the Advocate which is denied by the Advocate. The Client had been using the issue of the Kshs.20 million to seek orders of stay but which were rejected by the courts and the Client directed to file suit for the taking of accounts. The issue of the payment of Kshs. 20 million by the Client to the Advocate as a ground for stay appears to have been substantially determined by the various courts. Hence the Client now raising the same is barred and or estopped by the doctrine of *Res judicata*.”**

According to the appellant, the dispute with the respondent had been litigated upon in other claims that had been taxed and the respondent’s defence that it had paid over Kshs.20 million to the appellant had already been dismissed. This made the same defence to be frivolous and an abuse of the court process. Counsel relies on the case of OWINO OKEYO & CO ADVOCATES –V- FUELEX KENYA LIMITED, Nairobi Misc. Civil Application number 382 of 2004 where Justice Fred Ochieng held:-

**“In my understanding of the provisions of Section 51 (2) of the Advocates Act, it enables an advocate to get judgement for the taxed costs, without having to sue for it, provided that his client did not dispute the fact that the advocate had been instructed (or retained) in the first instance.**

**First, it attests to the finality of a certificate of taxation which had not been set aside or altered by the court. Secondly, it confirms that the sum so certified is deemed to be due. And, finally, it states that the advocate was entitled to judgement in the taxed costs, provided only that the retainer was not disputed.**

**The trial court found that “it is true that the plaintiff offered legal services to the Defendant” and thereby in essence accepted that retainer was not in dispute. There is also no proof of the variation of the certificate of taxation by any court.**

The appellant also referred to the case of **INVESCO INSURANCE COMPANY LIMITED –V- GACHIRI KARIUKI & CO. ADVOCATES (2014)eKLR** where it was held:

**"I am of the view that even if the applicant had indeed entered into such agreement that cannot be used against them to deny them their rightful dues as per certificate of taxation. "I therefore, find no merit in the Respondents argument.....the only issue that the court would consider when an application such as the present one is before the court is whether there is in existence a certificate of taxation and whether or not there is a dispute on retainer."**

It is submitted that since the appellant has been denied its fees, the respondent should be condemned to pay costs of the appeal as well as interest on the taxed costs of Kshs.71,379 at 14% per annum.

Counsel for the respondent contend that the ruling of the trial magistrate should remain in force. The appellant is seeking to unjustly enrich herself as the money she is claiming has already been paid. The appellant is seeking a second payment. Counsel relies on the case of **CHASE INTERNATIONAL INVESTMENT CORPORATION & ANOTHER –V- LAXMAN KESHRA & 3 OTHERS (1978) eKLR** where the Court of Appeal observed as follows:-

In *Fibrosa Spolka*, Lord Wright (1943) AC at page 61

**"It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort and are now recognized to fall within a third category of the common law which has been called quasi contract or restitution"**

Counsel for the respondent further submit that the appellant's legal fees was paid in accordance with a "global fees" agreement between the appellant and the respondent. A total sum of Kshs.20,018,336 was paid to the appellant in line with the agreement. Counsel also referred to the case of **MORONGE & CO. ADVOCATES –V- KENYA RAILWAYS AUTHORITY, (2014) eKLR** where the Court of Appeal held:-

**"The advocate pays however must be commensurate to his otherwise it shall be what is termed as unjust enrichment. The same must be a reasonable compensation for professional work done"**

It is submitted that the appeal does not raise any new issues of law or facts that were overlooked by the trial court. The trial court exercised its discretion. The defence raised triable issues in that there was a global agreement schemed and the appellant's fees were duly paid.

The main issue for determination is whether the appellant is entitled to the taxed fees and whether the trial magistrate erred by not allowing the appellant's notice of motion dated 4<sup>th</sup> February, 2010.

It is the appellant's position that the respondent's defence was meant to delay her enjoyment of legal fees that had been taxed by the taxing master. Having the case fully heard would not have made any difference on his part. Counsel for the respondent contend that the defence on record does raise triable issues.

The trial court in its ruling made the following findings:-

**"I have considered the application, responses, parties' submissions and the defence filed herein. Guided by the decision in AALFRED KIOKO MURI VS TIMOTHY MIIRSO & ANOTHER [2011] EKLR find the defence cannot be said to be hopeless. Paragraph 4 and 5 raise triable issues. It is a reasonable defence. I find not justification in striking it out at an interim stage."**

Paragraphs 4 & 5 of the defence states as follows:-

**1. Without prejudice to paragraph 3 and 4 of the plaint, the defendant avers that it has already paid the legal fees payable for NAIROBI CMCC NO. 843 OF 2003 in accordance with a "global fees" agreement between the Plaintiff and the Defendant. The agreement provided that the advocate would be paid in accordance with a "global fee" agreement as opposed to a file by file basis.**

**2. The defendant avers that it paid the plaintiff a sum of Ksh. 20,018,336 in accordance with the "global scheme" arrangement, and although the Plaintiff admits the same, she has failed to account for it to date.**

The effect of the above two paragraphs of the defence is that the respondent fully settled the appellant's legal fees. In my view an advocate/client bill of costs is normally taxed for various reasons. These include:-

**1. To determine exactly how much is payable for the services already rendered by the advocate.**

**2. To find out if there is any amount due and payable to the advocate after taking into account part payment already made to**

the advocate.

**3. To find out if the client has overpaid the advocate by taxing the actual fees and deducting it from the amount already paid.**

It is normal for a client to make advance legal fees payment to its advocate. Whenever the advocate/client relationship ends and either party feel that there is either some legal fees still pending (on the part of the advocate) or that there was overpayment of the fees (on the part of the client), the following is normally the recourse for the two parties, namely:-

**a. The advocate to tax his bills and take into account what has already been paid.**

**b. The client to file a claim for accounts so that the advocate's dues are assessed and what has been paid accounted for.**

In my view once an advocate's bill of costs is taxed and the bill takes into account what has already been paid in relation to that specific claim, the taxing master's certificate can only be challenged by way of a reference to the High Court.

It is not open to a court to start evaluating the certificate and reach a conclusion that the fees had already been paid. The issue of full payment is supposed to be determined during the taxation. What comes out as taxed fees is the net balance payable to the advocate. There is no need to take further oral evidence and re-evaluate the certificate of costs through a full hearing. The client has the leeway of asking the advocate to render an account and this can only be done through the client's own suit. Such a claim will provide the payments made and the specific case or cases the payments were made for. The end result would be to know if there is any amount of legal fees payable or whether there is overpayment. Once such a claim is filed, the court can order for the taxation of all the advocate's bills of costs and thereafter have them deducted from what has already been made. This is a separate process involving a claim by the client and it cannot be the basis of objecting to payment for a separately taxed bill where no such claim for account has been filed.

In this case, the respondent was aware that its claim that it had already paid the legal fees via a "global agreement" had been dismissed in similar matters as referred to hereinabove. It was upto the respondent to file a claim for account so that the alleged payment of Kshs.20,018,000 could be accounted for.

Section 51(2) of the Advocates Act states 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 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."**

Under Section 51(2) the certificate of costs, if not disputed, can be adopted as a judgment by the court. The dispute, in my view, anticipated under Section 51(2) cannot be a claim that the fees had already been paid under a global agreement; such payments would have been included in the taxing process.

The record shows that the appellant was instructed by the respondent to defend about 300 cases. A list of those cases is part of the record. On 3<sup>rd</sup> June 2013 the appellant wrote to the respondent asking for her legal fees totaling Kshs.98,557/65. A sum of Kshs.18,000 was indicated to have been already paid by the client and was deducted from the total sum of Kshs.116,557/65. It appears that there was no response to that letter and on 27<sup>th</sup> August, 2013, the appellant filed Miscellaneous Civil Application Number 834 of 2013 which is a bill of costs. The bill was drawn at Kshs.162,166. A sum of Kshs.35,000 was discounted leaving a balance of Kshs.127,166. The discount of Kshs.35,000 is stated as "less amount paid by client."

The bill of costs was contested and the end result is the certificate of costs dated 14<sup>th</sup> December, 2015 for Kshs.71,359/- therefore having gone through the vigorous taxing process and the advocate having accounted for what had already been paid to her (Kshs.35,000) for this specific matter. It would be frivolous for the client to bring out a defence of "global agreement" or full settlement of the fees. Such defence ought to have been raised during the taxation. The client keeps copies of the payment vouchers, cheques and forwarding letters for specific files or cases. It would have been easy for the respondent to provide evidence that indeed what was paid was not Kshs.35,000 but more and proof showing that the specific case was fully paid for.

I am in agreement with the findings of Justice Fred Ochieng in the case of **OWINO OKEYO & CO. ADVOCATES V FUELEX KENYA LIMITED** (supra) that a taxed certificate of costs enables an advocate to get judgment for the taxed amount. I am equally in agreement with the findings by Justice Mary Kasango in **AHMEDNASIR ABDIKADIR & CO ADVOCATES -V- NATIONAL BANK OF KENYA LIMITED (2006) eKLR** where it was observed:-

**"The Respondent was not correct when it argued that the principles that ought to be used in respect of an application under Section 51(2) of the Advocates Act are the principles of an application for summary judgement. The only issue that the court would consider when an application such as the present one is before the court is whether there is in existence a certificate of taxation and whether or not there is a dispute on retainer. In this case there is a certificate of taxation. The so called dispute of retainer advanced by the Respondent is not a real dispute in retainer. The Respondent did not deny that it instructed the Applicant to represent it in respect of the action the subject of the taxation. Having not so denied, I find that a retainer has been proved and that there is no dispute in that regard. I therefore, find that there is no valid dispute on retainer and the Applicant is entitled to judgement as prayed. Even if the court was to reach a finding that there is a dispute in respect of retainer, it would be open to the Applicant to file a suit to recover the taxed costs. The Respondent having hired/retained the Applicant to act for it the costs in respect of that suit are properly recoverable by the Applicant. The Applicant did seek from this court judgement for the taxed costs plus interest."**

I do therefore find that the appellant's costs having been taxed and the deposit by the client having been taken into account, there was no valid defence to the appellant's notice of motion dated 4<sup>th</sup> February, 2016. The same defence had been raised in similar matters between the same parties and was not upheld as a bar to stop payment of taxed costs.

In the end, I am satisfied that the appeal is merited and is hereby allowed. The ruling of 24<sup>th</sup> June 2016 is hereby set aside and is replaced by an order allowing the appellant's notice of motion dated 4<sup>th</sup> February 2016 with costs. Costs of this appeal to the appellant.

**DATED AND SIGNED AT NAIROBI THIS 29<sup>TH</sup> DAY OF JULY, 2021**

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**S.CHITEMBWE**

**JUDGE**