



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC. CIVIL APPLICATION NO. 200 OF 2019
IN THE MATTER OF: THE ADVOCATES ACT CAP 16

AND

IN THE MATTER OF: TAXATION OF COSTS BETWEEN ADVOCATE & CLIENT

BETWEEN

GEORGE MIYARE T/A MIYARE & COMPANY ADVOCATES.....ADVOCATE/APPLICANT

VERSUS

ELSEK & ELSEK CONSTRUCTION LIMITED.....CLIENT/RESPONDENT

ARISING FROM: MOMBASA HCCC NO. 109 OF 2011

BETWEEN

DIAMOND TRUST BANK KENYA LIMITED.....PLAINTIFF

AND

ELSEK & ELSEK CONSTRUCTION LIMITED.....DEFENDANT

RULING

1. The application before me is a Notice of Motion dated 10th February, 2020 brought under the provisions of Sections 51(1) and (2) of the Advocates Act, Cap 16 of the Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. The Advocate/applicant seeks the following orders-

(i) That the Honourable Court be pleased to enter judgment for the Advocate/applicant against the client/respondent in the sum of Kshs. 922,662.76 as appears in the Certificate of Taxation dated 7th February, 2020 together with interest at 14% per annum from the date of taxation until payment in full; and

(ii) Costs.

2. The application has been brought on the grounds on the face of it and is supported by an affidavit sworn on 10th February, 2020 by Sheilla Oriwo, an Advocate of the High Court of Kenya practicing as such with the firm of Miyare & Company Advocates. In opposition to the application dated 10th February, 2020, the respondent filed a Notice of Preliminary Objection dated 26th February, 2020.

3. The application and the Notice of Preliminary Objection were canvassed by way of written submissions. The applicant's submissions were filed on 13th March, 2020 by the firm of Miyare & Company Advocates, while the respondent's submissions were filed by Elsek & Elsek Construction Limited on 1st July, 2021.

4. Ms. Mutuku, learned Counsel for the applicant relied on the provisions of Section 51(2) of the Advocates Act and the case of **Musyoka & Wambua Advocates v Rustam Hira Advocate** [2006] eKLR, where the Court held that Section 51 of the Advocates Act provides for the

mode of recovery of taxed costs provided by law in addition to filing of a suit. She submitted that the present application was brought under Section 51(1) and (2) of the Advocates Act, Cap 16 of the Laws of Kenya which is the applicable provision of law when requesting for judgment after a Certificate of Taxation has been issued.

5. She referred to the case of **Menginya Salim Murgani v Kenya Revenue Authority** [2014] eKLR, where the Supreme Court held that it is a general principle of law that a Court after passing judgment becomes *functus officio* and cannot revisit the judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law. She submitted that the respondent is misguided in stating that the Honourable Court is *functus officio* since no judgment has been entered in the matter herein.

6. Ms. Mutuku further submitted that the Taxing Officer's ruling was delivered on 28th January, 2020 and a Certificate of Taxation dated 7th February, 2020 was issued. She indicated that in the absence of a reference against the Taxing Officer's ruling and/or an order setting aside and/or altering the said ruling as is the case herein, no other action would be required from this Court save to enter judgment. She also relied on Rule 7 of the Advocates Remuneration Order and submitted that 14% interest is applicable 30 days after the date of service of the bill of costs. She stated that the applicant was thus seeking interest from the date of taxation of the bill of costs which was done on 28th January, 2020.

7. She also submitted that costs follow the event and that since the applicant's client had engaged the Advocate in a protracted litigation for recovery of costs due to the Advocate on account of work done, it was only fair and just that the client be condemned to pay costs of the application herein.

8. In his submissions, Mr. Aziz, the respondent's representative relied on the provisions of Section 51(2) of the Advocates Act and the case of **Nyakundi & Company Advocates v Kenyatta National Hospital Board HCCC No. 416 of 2004** which was cited in **Ahmednasir Abdikadir & Company Advocates v National Bank of Kenya Limited** [2007] eKLR, where the Court held that there are three limbs to the subsection. That the first one relates to the certificate of costs per se, the second one to the jurisdiction of the Court in relation to the Certificate and the third one, the circumstances in which the Court may exercise its discretion to enter judgment in terms of the certificate of costs.

9. Mr. Aziz also relied on Section 48(1) of the Advocates Act and submitted that the respondent herein was not served with the Certificate of Taxation dated 7th February, 2020 by the applicant and neither was the same delivered to the respondent by registered post. He indicated that the respondent has been in Kenya with no cause of quitting or absconding the local limits of this Honourable Court's jurisdiction. He further submitted that the application herein is bad in law since it has been brought on provisions of the law which are not applicable.

10. It was submitted by Mr. Aziz that after the Court delivered its ruling on 28th January, 2020 it became *functus officio* in this matter. He added that the Court file herein is for taxation of the Advocate-Client bill of costs, thus no judgment can be entered in this file after taxation. He urged this Court to strike out the application herein, since the orders sought by the applicant are untenable and incapable of being granted.

ANALYSIS AND DETERMINATION.

11. This Court has considered the application filed herein, the affidavit filed in support thereof, the Notice of Preliminary Objection filed by the respondent and the written submissions by Counsel for both parties. The issues that arise for determination-

(i) Whether the preliminary objection dated 26th February, 2020 is merited; and

(ii) Whether the application herein is merited.

12. In the affidavit filed by the applicant, it was averred that on 16th October, 2017, the respondent instructed the applicant to institute proceedings on its behalf seeking the attachment of the decree in Nairobi Misc. No. 365 of 2015: Elsek & Elsek Construction Company Limited v Presbyterian University of East Africa Registered Trustees, which instructions were promptly and diligently executed but the client (respondent herein) failed to pay legal fees for services rendered prompting the applicant to lodge its bill of costs dated 15th May, 2019.

13. It was deposed by the applicant that on 28th January, 2020, the Taxing Officer delivered a ruling on the said bill of costs dated 15th May, 2019 taxing the same at Kshs. 922,662.76 and that the said decision had not been altered/varied and/or set aside. The applicant also deposed that the respondent has refused to settle the taxed amount which is due and owing to the applicant.

14. The applicant averred that the application herein has been brought in good faith and it would be in the interest of justice for the orders sought herein to be issued to enable the applicant to be remunerated for the services rendered to the respondent.

15. The respondent opposed the application herein vide a Notice of Preliminary Objection dated 26th February, 2020 on the following grounds-

(i) That the application is bad in law and an abuse of the process of law;

(ii) That the application is brought on a provision of the law which is not applicable;

(iii) That by the Court delivering its ruling on 28th January, 2020 it became *functus officio* in this matter;

(iv) That the Court file before this Court is for taxation of Advocate-Client bill of costs and no judgment can be entered in the file

after taxation; and

(v) No provision provided (sic) for the prayers sought under an Advocate (Remuneration) Rules.

Whether the Preliminary Objection dated 26th February, 2020 is merited.

16. In expounding on the *functus officio* doctrine, the Supreme Court of Kenya in **Raila Odinga & Others vs. IEBC & others** [2013] eKLR cited with approval an excerpt from an article by Daniel Malan Pretorius, in **“The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law”** (2005) 122 SALJ 832, which is in the following words-

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

17. The application before this Court seeks for entry of judgment for the applicant against the respondent as it appears in the Certificate of Taxation dated 7th February, 2020 together with interest at 14% per annum from the date of taxation until payment in full. The respondent contended that by virtue of the ruling that was delivered on 28th January, 2020 by the Taxing Officer, this Court became *functus officio*. The applicant on the other hand contends that this Court is not yet *functus officio* since no judgment has been entered in the matter herein.

18. It is evident that the ruling that was delivered on 28th January, 2020 was by the Deputy Registrar, Hon. J.M Nyariki, sitting in his capacity as a Taxing Officer and not a judge of the High Court. The respondent is therefore misguided in asserting that this Court is *functus officio* by virtue of the said ruling. The Court in **Lesinko Njororge & Gathogo Advocates v Invesco Assurance Co. Ltd** [2021] eKLR when dealing with a similar application held as hereunder-

“The Certificate of Costs provides the basis for exercise of jurisdiction by the court to enter judgment for the taxed costs in accordance with Section 51(2) of the Advocates Act below:

“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.”

19. It is therefore the finding of this Court that the Preliminary Objection dated 26th February, 2020 is devoid of merit and the same is hereby dismissed.

Whether the application dated 10th February, 2020 is merited.

20. The bill of costs dated 15th May, 2019 was taxed on 28th January, 2020, at Kshs. 922,662.76. Subsequently, a Certificate of Taxation was issued on 7th February, 2020. It is not in dispute that the said decision by the Taxing Officer has not been set aside and/or altered, neither is there a reference that has been filed by the respondent herein against the said decision.

21. In **Lubulellah & Associates Advocates v N K Brothers Limited** [2014] eKLR the Court stated as follows-

“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 25th November 2012.”

22. The holding **Lubulellah & Associates Advocates v N K Brothers Limited** (supra) was reiterated by the Court in the case of **Lesinko Njororge & Gathogo Advocates v Invesco Assurance Co. Ltd** (supra) where it was stated thus:

“The procedure provided in section 51(2) of the Advocates Act aids expeditious disposal of cases relating to recovery of advocate-client costs as long as: (1) the costs have been taxed by and certified under the hand of the taxing master by a Certificate of Costs; (2) the Certificate of Costs has not been set aside or stayed or appealed against on a reference filed upon it; and (3) there is no dispute on retainer. In such case, judgment is ordinarily entered in the sum in the Certificate of Costs upon application by the advocate. The application may be commenced by way of a Notice of Motion which in law is potent tool for originating a suit.”

23. The applicant herein has also sought interest at 14% from the date of taxation until payment in full pursuant to Rule 7 of the Advocates Remuneration Order which states as hereunder-

“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”.

24. In light of the fact that there is no dispute on retainer, no reference has been filed and that the certificate of Taxation has not been set aside, it is my finding that the application dated 10th February, 2020 is merited and the applicant is entitled to the costs as per the Certificate of Taxation and interest as claimed.

25. The upshot is that judgment is hereby entered in favour of the applicant as against the respondent in the sum of Kshs. 922,662.76 as per the Certificate of Taxation dated 7th February, 2020 together with interest at 14% per annum from 7th February, 2020 until payment in full. The applicant is also awarded costs of the application herein.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 17TH DAY OF DECEMBER, 2021.

In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

IN THE PRESENCE OF -

MS MUTUKU FOR THE APPLICANT

MR. AZIZ FOR THE RESPONDENT

MR. OLIVER MUSUNDI - COURT ASSISTANT