



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. CIVIL APPLICATION NO. E091 OF 2019

IN THE MATTER OF THE ADVOCATES ACT

(CHAPTER 16 OF THE LAWS OF KENYA)

BETWEEN

TRIPLE A LAW LLP.....ADVOCATES/APPLICANT

AND

MARIANNE JEBET KITANYCLIENT/RESPONDENT

RULING

1. This matter arises from an advocate/client bill of costs dated 10th April 2019 in which Tripple A Law LLP (“the Advocates”), sought Kshs. 4,651,926.20 from Marianne Jebet Kitany (“the Client”) on account of fees, “to cover instructions to strategize, render opinion, taking instructions to file suit against the Respondent following the previous suit miscellaneous no. 1044 of 2018 having been dismissed and pending reinstatement but interim Orders having lapsed for the time being leading to the Applicant and her family being evicted from Runda Mae Residence in Miscellaneous 1260/2018 for the prosecution of the Applicant’s prayers for Orders against the Respondent for Protection Orders among others for Client’s and her dependant’s”

2. At the hearing of the matter, the Client raised a Preliminary Objection to the effect that the Advocates acted without instructions. The Deputy Registrar dismissed this contention in the ruling dated 3rd September 2019 and taxed the bill of costs at Kshs. 1,171,926.00. The Advocates have now filed the Notice of Motion dated 20th January 2020 under **section 51(2)** of the *Advocates Act (Chapter 16 of the Laws of Kenya)* seeking judgment for Kshs. 1,171,926.20 as certified by the Deputy Registrar.

3. The application is opposed by the Client through her replying affidavit sworn on 6th July 2020. The thrust of her deposition is that she did not give the Advocates written, oral or implied instructions to file **CM Misc. No. 1260 of 2018 (Marianne Jebet Kitany v Franklin Mithika Linturi)**. She only learnt that the Advocates had purported to file suit when they sent her a fee note for the matter.

4. In light of the response by the Client, the Advocates submitted that under **section 51(2)** of the *Advocates Act*, the Certificate of Costs is conclusive and the Client having failed to file a reference on the issue cannot contest the issue of a retainer at this stage. The Advocates relied on the case of *Muema Kitulu and Company Advocates v Obadiah Kuvivya HC Misc. No. 149 of 2011 [2011] eKLR* and *Lubulellah and Associates Advocates v N. K. Brothers Limited HC Misc. No. 52 of 2012 [2014] eKLR* where it was held that a Certificate of Costs is conclusive on the issue of costs and cannot be altered or re-opened without filing a reference under **Rule 11(4)** of the *Advocates Remuneration Order*.

5. On her part, the Client was emphatic and reiterated that there was no retainer; express or implied in respect of **CM Misc. No.1260 of 2018**. She cited the case of *Omulele Tollo and Company Advocates v Mount Holdings Ltd MSA CA Civil Appeal No. 75 of 2015 [2016] eKLR* where the Court of Appeal held that where the retainer is denied, the onus to prove the retainer whether express or implied lies on the Advocates. In this case, she urged that the Advocates had not discharged their burden.

6. There is a preliminary issue for consideration in this case. The Deputy Registrar determined the issue whether there was a retainer agreement. In *Wilfred N. Konosi t/a Konosi and Company Advocates v Flamco Limited NKU CA Civil Appeal No. 154 of 2014 [2017]*

eKLR, the Court of Appeal held that the taxing officer had jurisdiction to determine whether there was a retainer agreement as a preliminary issue. Once the Deputy Registrar made this determination, the party aggrieved by the decision has the right to file a reference under **Rule 11** of the **Advocates Remuneration Order**. In this case, the Client failed to file a reference within the time prescribed hence the decision of the Deputy Registrar on this issue is final. It cannot be reviewed through the backdoor as a response to an application for judgment on the Certificate of Costs.

7. A Certificate of Costs once issued is final and conclusive. This is the express enactment in **section 51(2)** of the **Advocates Act** which provides as follows:

51(2) 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 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.

8. Although the Client disputes the retainer, that issue has been determined by the Deputy Registrar, it can only be reviewed by filing of a reference and since no reference has been filed, the Certificate of Costs is now final and conclusive within the meaning of **section 51(2)** of the **Advocates Act**. The court is empowered to enter judgment thereon.

9. Under **Rule 7** of the **Advocates Remuneration Order**, an advocate may charge interest at 14% p.a. 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, provided that such claim for interest is raised before the amount of the bill shall have been paid or tendered in full. The delivery of the bill and the claim of interest at 14% p.a. is a question of fact and must be proved by the supporting affidavit. The claim for additional interest is not supported by the Advocates affidavit. The ordinary rule on interest shall therefore follow.

Disposition

10. The Notice of Motion dated 20th January 2020 is allowed on the following terms:

(a) Judgment be and is hereby entered for the applicant against the respondent for Kshs. 1,171,926.00 with interest at court rates from 3rd September 2019 until payment in full.

(b) Costs of the application shall be paid by the respondent and are assessed at Kshs. 10,000.00.

DATED and DELIVERED at NAIROBI this 24th day of AUGUST 2020.

D.S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Ms Kayungira instructed by MS Advocates LLP Advocates for the Advocates/Applicant

Ms Masake instructed by Musyoki Mogaka and Company Advocates for the Client/Respondent.