



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

MISC. CIVIL APPLICATION NO 49 OF 2016

BETWEEN

OTIENO, RAGOT & COMPANY ADVOCATES.....ADVOCATE/RESPONDENT

AND

NATIONAL BANK OF KENYA LIMITED.....CLIENT/APPLICANT

JUDGMENT

1. By a notice of motion dated 07.03.17, brought under Section 51 of the Advocates Act Cap 16 Laws of Kenya; the Applicant prays for orders **THAT**: -

- 1) The certificate of costs dated 20.02.17 in respect of the taxation order made on 20.02.17 for the sum of Kshs. 1,032,418.46 be adopted as judgment and decree of this Honourable Court**
- 2) The applicant be awarded interest accrued on the costs at 14% per annum from 12.06.16 until payment in full**
- 3) The costs of this application be borne by Client/Respondent**

2. The motion is premised on the grounds on the body of the application and the supporting affidavit of David Otieno, Advocate of the High Court of Kenya, sworn on 8.3.17. He avers that the Applicant filed an Advocate-Client Bill of Costs which was taxed at Kshs. 1,032,418.46 and a certificate of taxation dated 20.02.17 was issued for the said sum on 24.02.17. That the Respondent has not paid the said amount and the Applicant requests for judgment for the entire sum.

3. The application is opposed by the Replying Affidavit of Steven Oigo, the Kisumu Branch Manager of the Respondent sworn on 3.3.17. He avers that a retainer agreement marked **SO-1 (a)** supported by letters marked **SO-1 (b), (c) and (d)** exchanged between the Applicant and the Respondent was not taken into account when the bill in issue was taxed. The agreement **SO-1 (a)** provides for payment of advocate client fees on contentious and non-contentious matters at 30% of scale fees subject to a limit of Kshs. 300,000/-. In support thereof, counsel relied on **D. NJOGU & CO. ADVOCATE v NATIONAL BANK OF KENYA LTD [2009] eKLR** where the court held that an advocate who had entered into an agreement with a client in regard to the payment of legal fees could not wriggle out of the agreement.

4. In a further affidavit sworn on 06.04.17, Mr. Otieno, advocate for the Applicant submits that the agreements referred to by the Respondent were not brought to the attention of the Taxing Master and did not form part of the bill that was for consideration and in support thereof relied on **Wanga & Company Advocates v APA Insurance Company Limited [2014] eKLR**. It was also argued that the Respondent has not filed a reference under Paragraph 11 of the Advocates (Remuneration) Order (ARO) which is a complete code and that the procedure the Respondent has adopted to challenge the certificate of costs is unknown in law. In support of this assertion, Mr. Otieno placed reliance on **Noor Khan vs. Ramji Kanji & Company and Others [1966] E A 506**.

5. Mr. Ojuro challenged items 26 and 27 of the bill of costs which he submitted were not taxed according to the retainer agreements asserted that to failure by the Respondent to raise the issue of retainer before the taxing master was a technicality. In support thereof reliance was placed on **Kenya Hotel Properties Limited v Willisden Investments Limited & 6 others [2013] eKLR**.

Analysis and Determination

6. I have considered the Notice of Motion in the light of affidavits on record and also on submissions on behalf of both parties.

7. It is common ground that the parties herein had a valid retainer agreement. It is also not disputed that the retainer agreement referred to by

the Respondent was not brought to the attention of the Taxing Master and did not form part of the bill that was taxed. In the case of **National Bank of Kenya Limited v Otieno Ragot & Company Advocates [2020] eKLR**, the Court of Appeal stated as follows:

“As with any other agreement, the onus of proving the existence of the retainer agreement lies with the party that wishes to enforce it as is indeed is the case of contract and the evidence in support thereof. (See Kenya National Capital Corporation Limited v Albert Mario Cordeiro & Another (2014) eKLR and Section 107 of the Evidence Act)”

8. At the hearing of the bill of costs, the Respondent did not refer to or allude to the existence of any retainer agreement. There was no objection at all raised in accordance with Section 45(6) of the Advocates Act or as was the case in **D. Njogu & Company Advocate** (above) and I therefore find that the bill of costs was rightly taxed.

9. It is trite that a challenge or objection to a decision of the Taxing Master from a Taxation under the Advocates Act to the High Court should be by way of a Reference.

10. The foregoing position was endorsed by the Court of Appeal in **Otieno Ragot & Company Advocates vs. Kenya Airports Authority [2015] eKLR** when it stated,

“Ringera, J (as he then was) in the Matter of Winding Up of Leisure Lodges Limited, Winding Up Cause No. 28 of 1996 expressed the opinion, correctly in our view, that a party aggrieved by a decision of a taxing officer “whether it be on the quantum awarded on the bill as a whole or any items thereof or on the validity of the bill as a whole or any items thereof” has recourse to the High Court by way of reference under Paragraph 11 of the Advocates (Remuneration)

Order and that that Order is a complete code”.

11. To date, the Respondent has not filed a reference and I entirely agree with the Applicant’s counsel that the procedure of challenging the certificate of costs, at this stage, by way of a replying affidavit is unknown to law.

12. The Advocate-Client Bill of Costs was taxed at Kshs. 1,032,418.46 and a certificate of taxation dated 20.02.17 was issued for the said sum on 24.02.17. Since retainer of the Applicant/Advocate to act for the Client/Respondent in **KISUMU HCCC NO.57 OF 2009 NATIONAL BANK OF KENYA LTD V ATTORNEY GENERAL & OTHERS** is not denied, the Advocate/Applicant is entitled to its costs.

13. Rule 7 of the Advocates Remuneration Order which provides: -

“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.”

14. The notice of taxation of the bill of costs was served on the firm of Otieno, Yogo & Ojuro & Company Advocates on behalf of the Respondent. The firm entered appearance on 06.06.16 and interest shall therefore accrue at 14% per annum from 07.07.16.

15. The upshot of this is that Notice of Motion dated Notice of Motion dated 07.03.17 succeeds and is allowed in the following terms:

a) Judgment is hereby entered for the advocate against the Respondent for Kshs. 1,032,418.46 (one million, thirty-two thousand, four hundred, eighteen shillings and forty-six cents)

b) Interest shall be paid at 14% from 07th July, 2016 till payment in full

c) The Advocate will also have the costs of this application.

DATED IN KISUMU ON THIS 22nd DAY OF September 2020

T.W. CHERERE

JUDGE

Court Assistants

- Ms. Amondi/Ms. Okodoi

For Client/Applicant/

- Mr. Ragot for Owiti, Otieno & Ragot Advocate

For Advocate/Respondent

- Ms. Namsubo for Otieno, Yogo, Ojuro & Co. Advocates

Order

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic.