



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

MISCELLANEOUS CIVIL APPLICATION NO. 284 OF 2016

CHRIS N. MUTUKU ADVOCATE.....APPLICANT

VERSUS

BENSON NJUI KARIGI.....RESPONDENT

RULING

1. I have two applications before me that are scheduled for ruling and as such I will address them chronologically.
2. By a notice of motion dated 10.4.18 and filed the same day, brought under Section 51(2) of the Advocates Act Cap 16 Laws of Kenya, Order 51(1) of the Civil Procedure Rules and Sections 1, 1A, 3 & 3A of the Civil Procedure Act and all other enabling provisions of the law, Chris N Mutuku (hereinafter referred to as the Advocate) prays for Orders:-
 - 1. THAT the Honourable Court be pleased to enter Judgment for Kshs 2,128,600 against the Respondent together with costs and interest from 23.8.2016 until payment in full.**
 - 2. THAT the costs of this Application and the taxation cause be awarded to the Applicant.**
3. The application is premised on the grounds set out in the application and supported by the affidavit of the advocate dated 10.4.17 to which is annexed the certificate of taxation that is unmarked.
4. There was no opposition by Benson Njui Karigi (hereinafter referred to as the client) to the application.
5. Under Certificate of Urgency by a notice of motion dated 16.11.2017, and filed on 29.11.17 brought under Section 48 of the Advocates Act and all other enabling provisions of the law the Benson Njui Karigi (hereinafter referred to as the client) sought for orders to set aside, review and or vacate any order issued against him until the hearing and determination of the instant application.
6. The application is based on two grounds on the face of the application and supported by the affidavit of Benson Njui Karigi. According to the client the taxation of the Party and Party Bill of Costs was done without any notice to him. That the client got to know of the taxation ruling vide a certificate of taxation that was sent via the company's email. He avers that he had an interest in buying a parcel Donyo/Sabuk/Komarock Block 1/48365 from Moreen Ndunge Nzioka who referred her to Chris N. Mutuku (hereinafter referred to as the advocate). The client averred that he paid a deposit and the advocate refused to subdivide the plot and excise his portion whereupon the advocate sold the suit land to another company in 2018 and this culminated in the client filing a constitutional petition that is pending ruling. The client avers that it is unfair for him to be taxed for the services of an advocate whose services are incomplete. He also avers that the advocate knows his physical address and ought to have served him properly instead of sending an email, and further, the advocate ought to have sent a fee note instead of rushing for taxation.
7. In opposing the application, the advocate filed a replying affidavit sworn on 19th November, 2018. According to the advocate, the client has not laid basis for interference with the decision of the taxing master; the taxation was lawfully done on 23rd March, 2017 and the client did not attend and there is an affidavit of service on record sworn on 7th February, 2017 to that effect. The advocate averred that he received instructions from the client whereupon he prepared a sale agreement and the client defaulted in payment of the commitment amount and the advocate demanded for payment of his professional fees but no settlement was done and hence he moved to court to secure payment. He averred that the client lodged a caveat against the property after the transaction failed so as to prevent the advocate from locating another buyer but however the advocate was able to sort the mess. The advocate averred that after the certificate of costs was taxed and served on the client who filed an application to set it aside and the court gave him time to amend his application for the same was defective and the same was not served on him.
8. I directed that the parties file submissions and there are no submissions on record as at the time of writing this ruling despite court

directions to file the same.

9. I have considered the applications before me, the grounds and the averments in the affidavit. The issues for determination are firstly, whether this Court should grant the application for entry of judgment on taxed costs; secondly, whether the client has raised sufficient grounds to deny the advocate the taxed costs; finally, who is entitled to costs.

10. A reading of the pleadings indicates that there are applications under Section 48 and Section 51 (1) of the Advocates Act. Section 51 mentions the nature of orders the court may make in relation to the certificate of the taxing officer, while section 48 deals with a situation where a suit based on an untaxed bill of costs is filed.

11. In addressing the first issue, an advocate armed with taxed or assessed costs and the relevant certificate of taxation should make a formal demand of the assessed amount from the client and whatever amount the client fails to pay, the advocate should proceed pursuant to Section 49 and Section 51 (2) of the Advocates Act, and this is the path the Advocate has taken.

12. When the taxation came for hearing on 9.2.17, the client was absent, the taxing officer was satisfied with service of process because she was notified of the affidavit of service on record. There is also a taxation notice on record addressed to the client and as such the taxing officer was satisfied with the service. A ruling date was given as 23.3. 2017. It appears that the ruling was delivered in open court on the said date and there is no evidence of a notice issued to the parties or evidence of service of any notice. It can therefore be concluded that the said ruling was delivered ex-parte.

13. Section 51 Sub-rule (2) of the Advocates Act provides that due notice of the date fixed for such taxation must be given to both parties and that both parties shall be entitled to attend and be heard. It states that

“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.”

14. From the record, a Certificate of Taxation dated 27.3.17 was issued and as it stands now, the same has not been set aside or altered. I find that the client has not raised any grounds to oppose the application for judgment and there may be no reason to deny the Advocate the Judgment as sought. I am guided by the case of Musyoka & Wambua Advocates Vs Rustam Hira Advocate (2006) eKLR where it was held:-

“Section 51 of the Act makes general provisions as to taxation, as the marginal note indicates. One of those provisions is that the Court has discretion to enter Judgment on a Certificate of Taxation which has not been set aside or altered, where there is no dispute as to retainer. This in my view is a mode of recovery of taxed costs provided by law, in addition to filing of suit.....”

15. The client herein on the other hand wants any order against him to be stayed, set aside, reviewed and vacated. The application is brought under Section 48 of the Advocates Act that provides that

1) “Subject to this Act, no suit shall be brought for the recovery of any costs due to an advocate or his firm until after the expiry of one month after a bill for such costs, which may be in summarized form, signed by the advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause to be verified by affidavit filed with the plaint, for believing that the party chargeable therewith is about to quit Kenya or abscond from the local limits of the court’s jurisdiction, in which event action may be commenced before expiry of the period of one month.

2) Subject to Subsection (1), a suit may be brought for the recovery of the costs due to an advocate in any court of competent jurisdiction.

3) Notwithstanding any other provisions of this Act, a bill of costs between an advocate and a client may be taxed notwithstanding that no suit for recovery of costs has been filed.”

16. The relevant law in relation to the client’s grievance is Paragraph 11 of the Advocates Remuneration Order and not Section 48. The said Paragraph 11 provides that:

“Where a party is aggrieved by the decision of a taxing officer, he is required to object in writing by requesting the taxing officer to give reasons for the items of taxation that he is objecting to and thereafter file reference to this Court.”

17. From the record there is no objection to the taxation that was filed by the client. On the record is no reference that was filed by the client challenging the decision of the Taxing Officer. What is there is an application under Section 48 of the Advocates Act. Even if for argument’s sake I were to consider the application, in view of my reasoning on the first issue, there is evidence of service and the taxing officer was satisfied with service and therefore I find that there is no reason to set aside the Certificate of taxation dated 27th March, 2018. I note that application dated 16.11.17 is too vague as it is brought under the wrong provisions of the law and it is not clear what the client seeks from the court and the court cannot cure the defect therein. The application dated 16.11.17 fails and is dismissed.

18. On the third issue, it is trite law that the costs follow the event but due to the nature of the parties herein, it is fair and just to order that each party shall bear their own costs.

19. The upshot of the foregoing is that the following orders are made namely:-

(a) **THAT the application dated 10th April, 2017 is allowed except for costs thereof.**

(b) **THAT the application dated 16th November, 2017 fails and is dismissed.**

(c) **THAT each party shall bear their own costs of the respective applications.**

Orders accordingly.

Dated and delivered at Machakos this 22nd day of May, 2019.

D. K. KEMEI

JUDGE