



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 450 OF 2016

MERCY NDUTA MWANGI

T/A MWANGI KENG'ARA & CO. ADVOCATES.....APPELLANT

VERSUS

INVESCO ASSURANCE COMPANY LIMITED.....RESPONDENT

(Being an appeal from the ruling delivered by Honourable G. M'masi (Mrs.) (Senior Principal Magistrate) on 1st July, 2016 in CMCC NO. 6113 OF 2015)

JUDGEMENT

1. The Appellant filed a suit against the Respondent by way of a plaint dated 30th September, 2015 seeking entry of judgment in the sum of Kshs. 161,579/= plus interest at 14% p.a. together with costs and interest thereon on the basis of non-payment of legal fees pursuant to the Advocate-Client Bill of Costs dated 27th May, 2014 and taxed on 13th May, 2015.

2. The record shows that upon being served with summons and a copy of the plaint, the respondent entered appearance on 4th November, 2015 but did not file a defence within the stipulated statutory timelines, prompting the appellant to apply for summary judgment to be entered against it through filing a Notice of Motion dated 5th November, 2015. The same was opposed by way of a replying affidavit sworn by *Paul Gichuhi* on behalf of the respondent.

3. Parties thereafter filed written submissions in respect to the application. In the end, the trial court dismissed the said application with no order as to costs.

4. The appeal now before this court is against the abovementioned ruling. The memorandum of appeal dated 5th July, 2016 raises 12 grounds in the following order:

(i) THAT the learned trial magistrate erred in law and in fact by failing to enter summary judgment for the liquidated claim of the appellant's assessed costs of Kshs.161,579/= with interest thereon at 14%p.a. from 29th May, 2014 until payment in full.

(ii) THAT the learned trial magistrate erred in fact and in law by holding that the issue for determination in the action herein was whether or not the appellant had been paid for legal services rendered, thereby misdirecting herself and arrived at a wholly unjust decision.

(iii) THAT the learned trial magistrate erred in law and in fact by holding that allegations of payments made prior to the taxations advanced in the respondent's replying affidavit were issues to proceed to trial despite there being no documentary proof of such payments before the trial court or a counter claim or set off by the defence, in total disregard of the principle of res judicata.

(iv) THAT the learned trial magistrate erred in law and in fact by failing to consider the documentary evidence presented by the appellant to the trial court in support of the application for summary judgment, which rendered the issue of the accounts res judicata, and hence arrived at a wholly unjust decision.

(v) THAT the learned trial magistrate erred in law and in fact by failing to evaluate the submissions filed by the appellant in support of the application for summary judgment.

(vi) THAT the learned trial magistrate erred in law and in fact by failing to find that there was no competent replying affidavit filed by the respondent for consideration by the trial court and misguided herself when she relied on the substantively defective

affidavit in arriving at her decision.

(vii) THAT the learned trial magistrate erred in law and in fact by failing to consider a previous High Court ruling in MILIMANI HCCC NO. 504 OF 2013 (O.S.) IMVESCO ASSURANCE COMPANY LIMITED-VS-MERCY NDUTA MWANGI T/A MWANGI KENG'ARA & CO. ADVOCATES) delivered on 26th September, 2014 which had dismissed a previous application for accounting for the alleged payment of Kshs.20,000,000/= plus, the ruling rendered re-litigating the issue at the summary stage afresh res judicata.

(viii) THAT the learned trial magistrate erred in law and in fact by failing to consider another previous High Court ruling on the same subject matter in MILIMANI HCCA NO. 65 OF 2015 IMVESCO ASSURANCE COMPANY LIMITED-VS-MERCY NDUTA MWANGI T/A MWANGI KENG'ARA & CO. ADVOCATES) delivered on 22nd May, 2015 whereby the court held that accounting for Kshs.20,000,000/= was to be done by filing an Originating Summons (O.S.) and hence the trial court could not competently entertain a full hearing on the same issue.

(ix) THAT the learned trial magistrate erred in law and in fact by failing to find that the respondent's admission of a retainer rendered the purported defence a sham and therefore failed to raise any triable issue.

(x) THAT the learned trial magistrate erred in law and in fact by failing to award the costs of the application to the appellant.

(xi) THAT the learned trial magistrate erred in law and in fact by failing to enter final judgment and award costs of the suit to the appellant.

(xii) THAT the learned trial magistrate misdirected herself by failing to uphold the overriding principles of the court and the law as embodied in Sections 1A and 1B of the Civil Procedure Act, Cap. 21.

5. Parties consented to having the appeal dispensed with through written submissions. In her detailed submissions filed on 11th March, 2019 the appellant contends inter alia, that since the advocate-client bill of costs had been taxed and a Certificate of Taxation issued, the respondent could only challenge the same by way of a reference, but this was not done.

6. It is further the appellant's submission that in view of the above, the learned trial magistrate's decision to dismiss her application seeking the entry of a judgment pursuant to the Certificate of Taxation in essence amounted to varying the said Certificate. That in so doing, the said magistrate acted wrongly and in turn arrived at an erroneous decision.

7. The appellant also argues that the defence sought to be relied upon by the respondent does not raise triable issues but instead constitutes mere denials, adding that the issues being raised therein regarding the disputed payments ought to have been raised before the taxing master as opposed to being addressed then. The long and short of it all is that the appellant was of the view that the trial court lacked jurisdiction to vary the Certificate of Taxation.

8. On its part, the respondent maintains that the subject of fees owing to the appellant is disputed and was in fact pleaded in its defence, which according to it raises triable issues. Riding on this argument, the respondent supports the decision by the learned trial magistrate.

9. I have cautiously considered the rival submissions filed and authorities cited respectively. I have also perused the record of appeal in addition to studying the application, affidavits in support of and in opposition thereto, and the impugned ruling.

10. I deem it necessary to address a crucial issue which was noticeably overlooked by the parties as well as the trial court. The record of appeal discloses on page 33 that the appellant had filed a request for judgment on 3rd November, 2005 on the basis that the respondent had not put in a defence within the statutory timelines.

11. The record of appeal and more particularly, the typed proceedings, also disclose that judgment was entered on 4th November, 2005 as prayed in the plaint.

12. A critical examination of the plaint shows that the claim filed by the Appellant is liquidated in nature. In further understanding of what is meant by the term 'liquidated claim' I will borrow from the accurate definition offered in the case of *Cimbria East Africa Limited v Kenya Power & Lighting Company Limited [2017] eKLR* as follows:

"Black's Law Dictionary defines Liquidated Claim thus:

"1. A claim for an amount previously agreed upon by the parties or that can be precisely determined by operation of Law or by the terms of the parties' agreement.

2. A claim that was determined in a judicial proceedings" "

13. The Certificate of Taxation dated 25th September, 2015 and found on page 14 of the record of appeal indicates that the appellant's advocate-client Bill of Costs was taxed on 13th May, 2015. As of yet, there is nothing to show that the said Certificate has been challenged by way of a reference or set aside in any manner.

14. It is worth noting that the issuance of the aforesaid Certificate of Taxation preceded the filing of the appellant's suit. This goes to show

that the amount claimed therein had already been ascertained by the taxing master and could thus be termed as a liquidated claim.

15. Going by this reasoning, I am satisfied that judgment was regularly entered in favour of the appellant on the abovementioned 4th November, 2015.

16. However, the appellant went ahead to file the Motion dated 5th November, 2015 similarly seeking the entry of summary judgment against the respondent pursuant to *Order 36, Rule 1* of the *Civil Procedure Rules*. In my reasoned view, this was improper given that there was a judgment already in place and a final judgment for that matter. This is evident from the court record.

17. It therefore follows that the trial court had no basis whatsoever for entertaining the said application and making a finding on the same.

18. Consequently, I am of the considered view that the filing of the Motion and subsequent proceedings, including the delivery of the ruling, are irregular and therefore null and void.

19. Having made the above finding, there is no reason for this court to address the grounds of appeal raised.

20. The upshot is that the appeal lacks both basis and merit, and is dismissed on the above grounds. Parties shall bear their own costs.

Dated, signed and delivered at NAIROBI this 27TH day of JUNE, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent