REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 451 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 L.P Kassan (Mr.) (Senior Principal Magistrate) on 14th June, 2016 in CMCC NO. 5167 OF 2015)

J U D G E M E N T

1. By way of a plaint dated 25th August, 2015 the appellant instituted a suit against the respondent, claiming the sum of Kshs. 72,788/= together with interest at the rate of 14%p.a. plus costs of the suit and interest thereon.

2. In a nutshell, the appellant pleaded in her plaint that pursuant to instructions for legal representation given by the respondent in LIMURU SRMCC NO. 19 OF 2004, the appellant submitted an Advocate-Client Bill of Costs dated 8th September, 2014 for settlement.

3. It is further pleaded that the aforementioned Bill of Costs was taxed by the taxing master on 11th June, 2015 at Kshs.72,788/= and a Certificate of Taxation issued on 19th August, 2015. The appellant claims that the taxed amount is yet to be paid by the respondent despite notice and demand from the appellant.

4. The respondent entered appearance and filed a statement of defence on 9th October, 2015 in essence alleging that it has already paid the appellant the sum of Kshs.20,018,336/= which includes all legal fees payable from the abovementioned suit in accordance with an agreement on global fees entered into between the parties. Consequently, it is the respondent's position that it does not have any outstanding debts owing to the appellant, to which the appellant responded with a reply to defence filed under protest.

5. Thereafter, the appellant filed a Notice of Motion dated 28th October, 2015 supported by the affidavit sworn by herself, seeking to have the statement of defence struck out on the basis that it is, inter alia, an abuse of the court process and that it addresses an issue which has already been determined by way of taxation and which taxation has not been varied or set aside.

6. The parties filed written submissions on the said Motion and eventually, the trial court in dismissing the application, concluded that striking out the defence would be draconian and that the appellant had not demonstrated the manner in which she stands to be prejudiced if the suit proceeds for hearing as is.

7. The aforementioned ruling is the subject of the appeal. The appellant's memorandum of appeal dated 5th July, 2016 raises the grounds hereunder:

> **i. THAT the learned trial magistrate erred in law and in fact by failing to strike out the statement of defence dated 8th October, 2015 for being scandalous, frivolous and otherwise an abuse of the court process.**
>
> **ii. THAT the learned trial magistrate erred in law and in fact by failing to enter judgment for the liquidated claim of the appellant's assessed costs of Kshs.72,788/= as evidenced by the certificate of taxation issued on 19th August, 2015.**
>
> **iii. THAT the learned trial magistrate erred in fact and in law by holding that the allegations of previous payments advanced in the replying affidavit were to proceed for trial despite there being no documentary proof of such payments.**

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, which rendered the issue of 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 her application.

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 and thus misguided himself when he relied on the substantively defective affidavit.

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 award interest on the taxed costs of Kshs.72,788/= at 14% p.a. from 9th October, 2014 until payment in full.

x. 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.

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

xii. 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.

xiii. 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.

8. The parties consented to having the appeal canvassed through written submissions. The appellant in her submissions attacked the respondent's defence that it had paid her legal fees in full on the basis that this issue was not raised before the taxing master at the point of taxation. In close reference to this, the appellant submits that if at all the parties had entered into a retainer agreement, it is strange that the respondent did not bar the taxation proceedings under Section 45(6) of the Advocates Act or at least provide evidence of such payments, citing the *res judicata* doctrine. In the circumstances, the appellant has taken the position that the certificate of taxation, having not been set aside, is final pursuant to Section 51(2) of the Advocates Act. Various authorities have been cited to buttress the point.

9. Further to the above, the appellant claims interest at 14% on the basis of Rule 7 of the Advocates Remuneration Order.

10. It is also the appellant's submission that the defence filed is clearly an abuse of the court process, vexatious, frivolous and intended to delay the fair trial of the main suit.

11. Essentially, the appellant contends that the ruling by the learned trial magistrate is erroneous and ought to be set aside and substituted with an order striking out the defence and entering judgment in favour of the said appellant as prayed in her plaint. The appellant also urges this court to award her the costs of the Motion and main suit.

12. On its part, the respondent has earnestly urged this court not to interfere with the impugned ruling for the following reasons: firstly, that summary judgment can only be entered in line with Order 36 of the Civil Procedure Rules, more specifically, where a matter is straightforward which is not the case here. Secondly, it is the respondent's argument that the appellant is merely seeking to unjustly enrich herself yet the monies owed have since been paid; reliance was placed on various judicial precedents addressing the subject. Thirdly, the appellant submits that it has in place a defence which raises triable issues and as such, this court should strive not to interfere with the trial court's decision in the circumstances.

13. I have taken into consideration the rival submissions and authorities cited in support thereof. This being a first appeal, I am expected to re-evaluate the evidence presented before the trial court. I have similarly re-looked at the impugned ruling.

14. It is my observation that whereas the memorandum of appeal raises a total of 13 grounds of appeal, the same can be collapsed into four grounds and I will address them as such.

15. Grounds (i), (iii), (iv) and *(x)* of appeal touch on the defence filed before the trial court. As earlier indicated, the appellant sought to have the respondent's defence struck out for inter alia being an abuse of the court process, it does not raise triable issues and on the basis that the

issue of accounts has been rendered *res judicata.* The parties' submissions echo their respective positions set out hereinabove. In the end, the trial court reasoned that the issue of payment was in dispute and hence it would not be proper to have the respondent's defence dismissed.

16. I have perused the record of appeal and established that the appellant indeed filed a Bill of Costs dated 8th September, 2014 and served the same upon the respondent on 9th September, 2014. The Bill of Costs was taxed on 11th June, 2015 and a Certificate of Taxation issued on 19th August, 2015 appearing on *page 140* of the record of appeal. The record also confirms that during this time the respondent was represented by the firm of Maina Njuguna & Associates Advocates vide a Notice of Appointment of Advocates dated 12th February, 2015.

17. There is nothing from the record of the lower court to indicate that the taxation was in any way contested by the respondent. That being the case, the Certificate of Taxation; once issued; shall be deemed final pursuant to *Section 51(2)* of the *Advocates Act (the Act)* unless and until the same is either set aside or varied by the court. This was reinforced in the case of ***Lubulellah & Associates Advocates v N K Brothers Limited [2014] eKLR.***

18. The respondent has not brought forth any argument or evidence to indicate that it sought to have the Certificate of Taxation either varied or set aside by way of a reference to the High Court. Equally, whereas it is the respondent's argument that payments had been made in line with an agreement, the same was not raised at the taxation stage in a bid to apply the provisions of *Section 45(6)* of *the Act* which read as follows:

> **"…the costs of an advocate in any case where an agreement has been made by virtue of this section shall not be subject to taxation…"**

19. Going by the reasoning that the respondent has not filed a reference against the taxation proceedings, it is safe to state that the issue of the amount of fees owed has already been laid to rest and I would thus agree with the appellant that the *res judicata* rule would come into play to deter the respondent from disputing the amount claimed unless there is evidence to show that the amounts claimed to have been paid was paid after the certificate of taxation had been issued. The respondent has not tendered such evidence. My sentiments were shared in ***Lubulellah & Associates Advocates*** *(supra)* thus:

> **"The Respondent did not file a reference. In fact it was the Applicant that filed a reference after the costs were taxed. The Respondent cannot therefore approbate and reprobate. Having admitted that the decision that had been given by the taxing master was final, the Respondent cannot therefore be heard to say that amounts it had paid had not been credited. Once a reference had been determined, the court can do nothing more than to enter judgment as indicated in the Certificate of Costs. The matters raised by the Respondent herein do not obtain in this case and were for all purposes and intent, res judicata. The court cannot re-open the arguments of what or was not paid at this stage."**

20. In view of the foregoing, can it then be said that the statement of defence is an abuse of the court process *et al*? I would answer in the affirmative, given that the respondent was all along aware of the taxation proceedings and the fact that there is now a Certificate of Taxation which has not been challenged in any way. It is surprising the learned trial magistrate did not take into account the unique legal principles surrounding taxation proceedings and in not doing so, arrived at an erroneous finding.

21. It is my considered view that the respondent is simply trying to evade its legal responsibility of paying to the appellant the sums owed and taxed. In any event, the respondent did not avail any evidence before the trial court as confirmation of payments made. For the above reasons, I find no relevance in the argument that the defence raises triable issues.

22. Turning to *grounds (ii), (ix), (xi), (xii)* and *(xiii)* of appeal regarding entry of judgment, it is well settled that the certificate of taxation has not been challenged by the respondent. It therefore follows that upon filing of the appellant's suit, the trial court's sole obligation was to enter judgment pursuant to the taxed amount; this was not done. It cannot be emphasized enough that a certificate of taxation is final unless set aside or varied and hence, the learned trial magistrate ought not to have taken into account the respondent's statement of defence at this point as it has not raised any triable issues.

23. To support my findings, I will make reference to ***Owino Okeyo & Company Advocates v Fuelex Kenya Limited [2005] eKLR*** where the court held as follows on the subject:

> **"In my understanding of the provisions of Section 51 (2) of the Advocates Act, it enables an advocate to get judgment for the taxed costs…provided that his client did not dispute the fact that the advocate had been instructed (or retained) in the first instance."**

24. The above position was reaffirmed in the case of ***Ochieng, Onyango, Kibet & Another v Adopt A Light Limited [2007] eKLR*** in these words:

> **"In my view where an Advocate has fulfilled the conditions set out under Section 51(2) of the Advocates Act, the court has no discretion but an obligation to enter judgment as prayed."**

25. Going by the evidence presented before me, it is not in dispute that the respondent had retained the services of the appellant. It is also not disputed that the respondent participated in the taxation proceedings through its advocates on record at the time but did not contest the Bill of Costs or challenge the certificate of taxation by way of a reference. In the circumstances, the trial court had no option other than to enter judgment as prayed.

26. In view of the foregoing, I am convinced the learned trial magistrate erred in not entering judgment for the appellant as prayed and thus

find merit in the grounds raised.

27. The upshot is that the appeal succeeds and is hereby allowed. That being the case, I make the following consequent orders:

a. The ruling delivered by the learned trial magistrate on 14th June, 2016 is hereby set aside and substituted with an order striking out the respondent's statement of defence dated 8th October, 2015.

b. Judgment is hereby entered in favour of the appellant in the sum of Kshs.72,788/= plus interest at the rate of 14% p.a. from 9th October, 2014 until payment in full.

c. The costs of both the Notice of Motion dated 28th October, 2015 and the suit in CMCC NO. 5167 OF 2015 are awarded to the appellant.

d. The costs of this appeal are similarly awarded to the appellant.

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

…….

L. NJUGUNA

JUDGE

In the presence of:

……. for the Appellant

……. for the Respondent