



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NO.13 OF 2018

IN THE MATTER OF THE ADVOCATES' ACT CHAPTER 16 OF THE LAWS OF KENYA

AND

IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE AND CLIENT

AND

IN THE MATTE OF THE TRANSFER OF BUSINESS AGREEMENT DATED 29TH MAY 2013

STEPHEN KITHI NGOMBO

T/A STEVE KITHI & CO. ADVOCATES.....PLAINTIFF

VERSUS

BEZAKEN LIMITED.....RESPONDENT

MICHIRA MESSAH & CO. ADVOCATES.....APPLICANT

VERSUS

KATANA KALUME NDURYA.....1ST RESPONDENT

KALUME KENGA KATANA.....2ND RESPONDENT

RULING

1. The applicant Stephen Kithi Ngumbo an advocate of the High Court filed and issued a notice of motion against Bezaken Limited, in terms of **order 10 Rule 4** of the Civil Procedure Rules, **section 51(1) (3)** of the Advocates **Act Rule 71** of the proviso, **Rule 15 (1) (b)** of the **Rule 6** of the Advocates Remuneration order herein against as the respondent seeking judgment in the sum of Kshs.6,202,529 as per the duly filed bill of costs dated 27th August, 2018.

2. The claim arises from professional legal services rendered to the respondent in the transfer of Business Agreement in respect of Salama Beach Resort Maridadi Restaurant. The applicant claims in instructions fees of 5,000,000 and other disbursements to bring the total bill due and payable to Kshs.6,202,529.

3. The applicant served the bill of costs through the last known postal address of the Respondent. The main grounds in support of the notice of motion are contained in the affidavit of the applicant dated 13th December, 2018.

4. The respondent is stated to have been served through registered post but failed to give any answer to the bill of costs. The matter came up before me for an application of summary judgment in terms of the provisions of **part 1 Rule 6** of the Advocates Remuneration order.

Determination

5. The vexed question in this notice of motion is whether the applicant in the circumstances of Advocate-client bill of costs would be entitled to summary judgment under **part 1 Rule 6** of the Advocates Remuneration order.

6. The general principle and policy framework under the Advocates Act and subsidiary legislation which provides for the Advocates Remuneration scales is either an amount claimed is either agreed upon or is ascertained through taxation of costs procedure. On perusal of the affidavit evidence. The applicant claim in question does not fall within the category of agreed fees between counsel and the respondent.

7. The affidavit itself paints a picture that the bill of costs and professional services rendered are of a nature which must involve an inquiry as to the extent of instructions and reasonable fees chargeable. From the affidavit evidence and annexed material it appears that the applicant bill of costs on account of professional services provided to the respondent on the period under review ought to be determined by the taxing master.

8. The principle enumerated under **rule 6** is not a license for ignoring the well held legal position that a bill of costs is not a mere matter of Mathematical calculations and additions.

9. In the instant motion the applicant has not shown any written agreement with the respondent on fees payable. It is clear from the notice of motion and affidavit evidence that given the fact that there was no written agreement the taxing master would have been accorded an opportunity to examine the bill of costs to ascertain the work done and determine the amount due for the applicant. The applicant in his motion claims that under **rule 6** of the Advocates Remuneration Order, Judgment be entered in absence of any objection from the respondent. Whether such items are to be regarded in a way as a final judgment as pleaded in the notice of motion is moot.

10. I have considered the argument urged on behalf of the applicant and also the respective affidavit. I am persuaded that in the circumstances and in the interest of justice it's not open to the court to grant Judgment against the respondent, which by so doing would prejudice him in the process.

11. I am unable to exercise discretion under **rule 6** of the Advocates Remuneration order as asked by the applicant on the basis that each case involving an advocate-client bill of costs there should be taxation to be undertaken by the taxing master to assess the measure of the professional costs incurred.

12. This is also borne out in my view that no agreement has been presented specifically to exclude the procedure of taxing the bill of costs, as required by Law. I reject the suggestion from counsel that summary judgment be entered against the respondent on the presumption that the bill of costs having been served through registered post and being there no objection it be confirmed as actual costs incurred by the applicant.

13. It follows then that the notice of motion dated 13th December, 2018 lacks merit and is therefore dismissed. Costs should lie where they fall.

14. The applicant be at liberty to file his Advocate-client bill of costs before the Deputy Registrar for taxation.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF JUNE, 2019.

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REUBEN NYAKUNDI

JUDGE