



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 22 OF 2018

IN THE MATTER OF THE ADVOCATES-CLIENT BILL OF COSTS

BETWEEN

ATAKA, KIMORI & OKOTH ADVOCATES.....APPLICANT/ADVOCATE

AND

SURESTEP SYSTEMS AND SOLUTIONS LTD.....RESPONDENT/CLIENT

RULING

The Application

1. Ataka, Kimori & Okoth Advocates (hereinafter “the Applicant), were instructed by Surestep Systems and Solutions Ltd (hereinafter “the Respondent” to represent it in a number of judicial review applications before this Court. One of the said applications was Judicial Review Application Number 37 of 2018, where a dispute arose as to the fees payable to the Applicant, necessitating the Applicant to file its Advocates-Client Bill of Costs dated 21st March 2018. The said Bill of Costs was taxed and a taxation ruling delivered thereon by the Taxing Officer on 9th August 2018.

2. The Applicant now seeks the following orders in an application filed herein by way of a Notice of Motion dated 11th December 2018:

a) That this Court be pleased to enter judgment in favour of the Applicant for the sum of Kshs. 438,958/= being the sum of costs taxed by the taxing officer and contained in the Certificate of Taxation herein dated 21st November 2018.

b) That this Court be pleased to order that the taxed sum do attract interest at court rate from the date of taxation until payment in full.

c) That the costs of this Application be awarded to the Applicant.

3. The Applicant filed a Supporting Affidavit and Supplementary Affidavit sworn on 11th December 2018 and 8th May 2019 respectively by Sheila Kaburu, an Advocate practising in the Applicants’ firm. According to the Applicant, the Respondent instructed its firm to represent it in Judicial Review Application Number 37 of 2018, which it did and secured a decision in favour of the client. The Applicant contends that the Respondent deliberately refused to participate in the taxation proceedings despite being severally notified of the same, and that the said Bill of Costs was taxed at Kshs 438,958/=, and a Certificate of Taxation dated 21st November 2018 issued with respect to this taxed amount.

4. Thereafter, that the Applicant by way of a letter dated 23rd November 2018, requested the Respondent to settle the taxed sum of Kshs 438,958/=, and that the Respondent has not made any payment to the Applicant towards settlement of the taxed sum, neither has the Certificate of Taxation dated 21st November 2018 been set aside or varied. The Applicant annexed a copy of the Certificate of Costs dated 21st November 2018, the Ruling on the Bill of Costs delivered on 9th August 2018 by the Deputy Registrar, and the letter dated 23rd November 2018.

5. The Applicant in its supplementary affidavit highlighted the status of payments and/or taxation of fees in the other matters in which it was representing the Respondent and had filed Bill of Costs, namely JR. Misc. Application No. 22 of 2018, JR. Misc. Application No. 23 of 2018, JR. Misc. Application No. 31 of 2018, and JR. Misc. Application No. 32 of 2018 JR. Misc Application No. 23 of 2018. The Applicant averred that the merits of the Bill of Costs in all of those matters were considered and determined by the Taxing Officer, including taking into account amounts paid by the Respondent as fees, save for JR. Misc Application No. 23 of 2018 which is still in taxation stage. The Applicant also denied that it offered *pro bono* services in JR application No. 37 of 2018, which is the genesis of the instant application.

6. The Respondent responded to the said application by way of a replying affidavit sworn on 17th April 2019 by Jackson Kiio, its Chief Executive Director. According to the Respondent, it engaged the Applicant for legal representation in four suits: i) PPARB Application No. 42 of 2017; ii) JR Misc. Application No. 281 of 2017; iii) PPARB Application No. 7 of 2018; and iv) JR Misc. Application No. 37 of 2018. The Respondent contends that the fourth suit, namely JR Misc. Application No. 37 of 2018, was to be handled by the Applicant on a *pro bono* basis. It is the Respondent's case that it made good the required payment in the other suits, albeit with a late settlement of payment with respect to JR Misc. Application No. 281 of 2017. That, the said delay occasioned bad blood between the parties herein, with the Applicant subsequently opting to file Bill of Costs demanding fresh payments over and above what was earlier agreed.

7. It is averred that the Applicant filed four Bills of Costs for taxation in this Court thus: i) JR Misc. Application No. 22 of 2018 arising from JR. Misc. Application No. 37 of 2018; ii) JR Misc. Application No. 23 of 2018 arising from PPARB Application No. 7 of 2018; iii) Application No. 31 of 2018 arising from JR. Misc. Application No. 281 of 2017; and iv) JR Misc. Application No. 32 of 2018 arising from JR. Misc. Application No. 42 of 2017. The Respondent states that it delayed in defending some of the Bill of Costs for various reasons, including the engagement in processes of recruiting a legal counsel to represent it.

8. It is contended that the Respondent however honoured and continues to honour all the various Bill of Costs as directed by the Court, and the Respondent gave details of the payments so far made. The Respondent added that no fee note has to date been issued by the Applicant with respect to JR Misc. Application No. 37 of 2018, the subject matter herein, since the Applicant had agreed to represent the Respondent on a *pro-bono* basis. In the circumstances, the Respondent contends that the Applicant is out to unjustly enrich themselves and this Application ought to be dismissed with costs.

The Determination

9. The parties were directed to file submissions on the application. The Applicant filed submissions dated 10th June 2019, while TLO Law Associates Advocates filed submissions dated 25th June 2019 on behalf of the Respondent.

10. The Applicant in their submissions refuted the contents of the Respondent's Replying Affidavit filed on 17th April 2018. The Applicant submits that the issue for determination in the instant matter is whether the Advocates have satisfied the necessary requirements set out under Section 51(2) of the Advocates Act for an order that judgment be entered for the sum certified to be due with costs. It is also submitted that the allegation that the matter would be handled *pro bono* is unsubstantiated. It was also contended that the Respondent has dragged before this Court the issue of legal representation in other suits whose taxations are either *sub judice* or *res judicata*.

11. The Applicant further submitted that the Respondent is mischievously attempting to argue a Reference in the Advocate's application, despite deliberately choosing not to participate in the proceedings before the Taxation Officer and failing to file a reference. In this regard, the Applicant submits that the Respondent's Replying Affidavit is challenging not only these Taxation but Taxations arising from legal representation in other matters.

12. The Respondent on the other hand submits that under paragraph 12 of the Advocate's Act, this Court's jurisdiction to a reference is strictly limited to determination on questions of law and does not extend to ascertaining facts of a dispute arising out of taxation of Bill of Costs. That, a dispute as to retainer is a factual question which calls for consideration and evidence. Further, that there is a dispute with regard to retainer in this matter, as the Respondent and Applicant mutually agreed that would be *pro bono*, yet the Applicant went back on his word and proceeded to tax its costs.

13. According to the Respondent, to brought the fact of the disputed retainer to the attention of this Court through its replying affidavit filed herein. The Respondent in this respect relied on the decisions in **Makumi, Mwangi Wangonde & Company Advocates vs Invesco Assurance Company Limited (2018) e KLR**, **Ahmednasir Abdikadir & Company Advocates vs National Bank of Kenya Limited, (2007) e KLR** and **Omulele & Tollo Advocates vs Mount Holdings Limited (2016) e KLR** for these propositions.

14. The issue for determination in the instant application is whether judgment should be entered against the Respondent for the taxed costs due to the Applicant. Under section 51(2) of the Advocates Act, this Court has power to enter judgment in an Advocates' favour on taxed costs as follows:

“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”.

15. It is an established position of law that the only reason that a court of law cannot enter judgment on a Certificate of Costs is if the same has been set aside or altered, or where there is an issue with retainer. This position has been upheld in various cases including **Ahmednasir Abdikadir & Company Advocates vs National Bank of Kenya Limited (supra)**, **Dally and Figgis Advocates vs Homelex Limited (2013) eKLR** and **Evans Thiga Gaturu Advocate vs Kenya Commercial Bank Ltd (2012) eKLR**. In addition Rule 7 of the Advocates Remuneration Order provides for interest on the said costs at 14 % until payment in full.

16. In the present application, it is not in dispute that the Applicant was engaged to provide legal representation to the Respondent in **JR. Misc. Application No. 37 of 2018 - Republic v PPARB ex parte Industrial & Commercial Development Corporation & Another**. It is also not refuted that the Applicant represented the Respondent to the matter's final conclusion. It emerges from the record that the Applicant filed an itemized Advocates-Client Bill of Costs for taxation against the Respondent arising, being JR. Misc. Application No. 22 of 2018 in respect of **JR. Misc. Application No. 37 of 2018 - Republic v PPARB ex parte Industrial & Commercial Development Corporation & Another**. The record also shows that the Applicant filed an Affidavit of Service dated 9th May 2018 sworn by one Stephen K Muoki and filed on 17th May 2018, as evidence that it served the Respondent with the Bill of Costs together with a Notice of Taxation.

17. It is noteworthy that the Respondent failed to attend Court when the matter came up for taxation on 22nd May 2018, on which date the Court ordered that the matter be handled by way of written submissions and scheduled the same for a mention on 20th June 2018. The Applicant filed an Affidavit of Service sworn by one Stephen K Muoki wherein it emerges that the Applicant notified the Respondent of the court orders through a letter and Mention Notice both dated 22nd May 2018, which were received by the Respondent on 29th May 2018. The Applicant produced the letter dated 22nd May 2018 as “Annexure SK” attached to the Applicant’s Supplementary Affidavit.

18. The Applicant also produced a copy of a letter dated 30th May 2018 from received from the Respondent, wherein the Respondent acknowledged receipt of the letter, and confirmed that it was aware of the mention date. The said letter also requested the Applicant to withdraw the Bills of Costs and indicated the Respondent’s willingness to settle the matter. Lastly, the Applicant also produced a letter dated 5th June 2018, wherein the Applicant requested the Respondent to indicate when they would make the payments and informed the Respondent that it would be proceeding with the Taxation in the event that the Respondent defaulted..

19. The Applicant states in that the Respondent neither filed submissions nor attended the mention on 20th June 2018, following which the Applicant prayed for a Ruling date which was placed at 2nd August 2018. The Applicant avers that it served the Ruling. Notice upon the Respondent who nevertheless did not participate. In this regard, the Applicant produced a copy of the Affidavit of Stephen K. Muoki dated 10th July, 2018 and filed On 11th July 2018, attesting to the service in the annexure marked “SK” annexed to the Applicant’s Supplementary Affidavit.

20. Therefore, from the record before this Court, it is apparent that the Respondent neither participated in the taxation proceeding nor responded to the numerous correspondence relating thereto. It is also important to state that the Respondent never challenged the Certificate of Costs by way or a Reference or otherwise. The explanation accorded by the Respondent for not participating in the taxation proceedings is that it was unsettled and surprised by the Applicant’s move instituting the proceedings for reasons that the Applicant had been retained on a *pro-bono* basis as hereinbefore stated. Further, that the Respondent had preferred an out of court settlement. However, there is nothing on record to demonstrate that the Respondent attempted an out of court settlement.

21. Whereas the Respondent submits that the Respondent acted for it on *pro-bono* basis, this issue never arose in the correspondences between the Applicant and the Respondent. Considering the foregoing, it is my view that the Respondent ought to have raised the question on the dispute as to the retainer within the taxation proceedings. This was the finding by Waweru J. in the case of **Kenneth Kiplagat t/a Kiplagat & Associates vs National Housing Corporation (2005) eKLR** where the learned Judge held:

“Bearing in mind that there was no objection before the taxing officer when the party/party bill of costs was taxed, and further, that there was no objection before the taxing officer when the advocate/client bill of costs was taxed, what objection can now be raised before the High Court that could not have been raised before the taxing officer? I consider that the reference contemplated or intended by the Defendant has absolutely no chance of success. It would therefore be unjust to encumber the Plaintiff by the order of stay sought.”

22. This position was cited in affirmation by Njuguna J. in the case of **Omulele & Tollo Advocates vs Magnum Properties Limited [2016] eKLR** where it was held:

“According to the Applicant, the Application herein has been overtaken by events and counsel referred the court to the case of Kenneth Kiplagat Vs National Housing Corporation where it was stated that all objections must be raised at the hearing of the bill of costs. The counsel for the Applicant contended that the Application was filed belatedly after the hearing of the Bill of Costs had concluded and a ruling date given and that the objection should have been raised before. On this issue, I have looked at the case of Kiplagat referred to and its circumstances are different from the case before me. In the Kiplagat case, no objection was raised until after the bill had been taxed by the taxing officer while in the case herein, the same was done before the taxing officer could finalize with the taxation. The objection was raised when the bill was pending ruling and it is at that point that it was referred to a Judge for determination of the issue of the “retainer”. I find that though the Application came a bit late in the day, it is in the interest of justice that the Respondent is heard on the issue of the retainer which in any event will determine the fate of the Bill of Costs.”

23. I am also guided by the legal definition of the term retainer, which is “the client’s authorization for a lawyer to act in a case, or “a fee that a client pays to a lawyer simply to be available when the client needs legal help during a specified period on a specified matter” See the **Black’s Law Dictionary, Tenth Edition** at page 1509. In the present case as previously noted, it is not disputed that the Respondent did instruct the Applicant to represent it in **JR. Misc. Application No. 37 of 2018 - Republic v PPARB ex parte Industrial & Commercial Development Corporation & Another**, and the Respondent expressly admitted as much. In addition, based on the record before the Court and the conduct of the Parties in this matter, it is evident that there existed an Advocate/Client relationship at all material times.

24. The arguments the Respondent has raised are in my view not issues disputing retainer, but of its willingness or ability to pay a fee for the said retainer. This is an issue which this Court to deal with within the context of this application as found in the foregoing, as it is being raised in the wrong forum and late in the day. In addition, if the Respondent is disputing the terms of the said retainer, he needed to file a separate suit for the said issue to be canvassed, considered, and determined with finality. As of now, there is no such pending suit filed by the Respondent pointing to such disputed terms of the retainer.

25. As the taxed costs and Certificate of Costs issued to the Applicant on 21st November 2018 has not been challenged, and there is no demonstrated dispute on the Applicant’s retainer, the Applicant is thus entitled to judgment. In the premises I find merit in the Applicant’s Notice of Motion dated 11th December 2018 and grant the following orders:

I. Judgment is entered for the Applicant against the Respondent for taxed costs of Kshs. 438,958/=, as certified in the Certificate of Taxation dated 21st November 2018, with interest at 14% per annum from the date of taxation until payment

in full.

II. The Applicant shall have costs of the Notice of Motion dated 11th December 2018 of Kshs 20,000/=.

26. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF JULY 2019

P. NYAMWEYA

JUDGE