



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS APPLICATION NO. 24 OF 2018

IN THE MATTER OF JAVAN KITOGHO MWAKIO (DECEASED)

IN THE MATTER OF ADVOCATE-CLIENT BILL OF COSTS IN HIGH COURT SUCCESSION CAUSE NO. 59 OF 2004

JOSEPH GATHUKU T/A JOSEPH GATHUKU & CO. ADVOCATES.....APPLICANT

VERSUS

JANE WAWUDA KITOGO.....1ST RESPONDENT

ESTHER SARU KITOGHO.....2ND RESPONDENT

RULING

1. The Applicant Joseph Gathuku t/a Joseph Gathuku & Co. Advocates by his Application dated 29.5.19 seeks the following orders against the Respondents Jane Wawuda Kitogo and Esther Saru Kitogho:

- 1. THAT the certificate of costs dated 30th November 2018 in the sum of Kshs. 835,388.40 be deemed as decree of this court.**
- 2. THAT costs awarded on the 22nd February 2019 and on 17th May 2019 be assessed and included in the decree.**
- 3. THAT interest at the rate of 14% be deemed to have accrued from the date of taxation until payment in full.**
- 4. THAT costs of this application be awarded to the applicant and the same be assessed and included in the decree.**

2. The Application is premised on grounds that his advocate-client bill of costs against the Respondents was taxed on 30.11.18 with full participation of the Respondents' counsel. A certificate of costs was on 23.1.19 issued by the Deputy Registrar. The Respondents have since not filed any reference nor made any effort to satisfy the certificate of costs. The Applicant now prays that the said certificate of costs be deemed to be a decree of this Court to enable execution against the Respondents.

3. The Respondents oppose the application by way of a replying affidavit sworn on 10.6.19. They claim that being dissatisfied with the Deputy Registrar's ruling on the bill of costs, they filed a reference before the Judge. The said reference was struck out on a technicality and they have filed a notice of appeal against the decision of Judge. They have also requested certified copies of the proceedings for the purpose of preparing a record of appeal. They contend that in view of the pending appeal, which they say has overwhelming chances of success, the Application is premature. They are likely to suffer immense financial loss if the Application is allowed as the appeal will be rendered nugatory and a mere academic exercise. They asked that the Application be dismissed with costs.

4. At the hearing, the Applicant submitted that this is a procedural application seeking a decree. The notice of appeal filed by the Respondents is not a bar to the Application. The Applicant prayed that the costs awarded on 17.5.19 in a dismissed application be included and that interest at 14% be awarded from date of taxation till payment in full. The Respondents have made no attempts to pay the costs awarded but have sought to delay justice by filing endless applications. He submitted further that Sections 1A and 1B of the Civil Procedure Act enjoin the Court to consider the efficacy of the matter before it within shortest time possible and least amount of cost. He submitted that the proposed appeal has no chance of success. He urged the Court to allow application.

5. For the Respondents, it was submitted that the Applicant moved to Court when stay was in place and the orders sought mean that the Applicant will proceed to execution. They have filed a notice of appeal and if the Application is allowed, it will prejudice the appeal which has overwhelming chances of success.

6. Section 51(2) of the Advocates Act under which the Application has been brought provides:

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.

7. The Applicant seeks that judgment be entered in his favour for the sum in the exhibited certificate of costs dated 30.11.18. Following taxation of the Applicant's advocate/clients bill of costs dated 14.8.18 certificate of costs dated was 30.11.18 for Kshs. 835,388.40 was issued. The Respondents being dissatisfied with the decision of the taxing officer filed an application dated 13.12.18 seeking, *inter alia*, review and setting aside of the same. They also sought that the decision of this Court be substituted for that of the taxing officer or in the alternative, an order that the bill of costs be remitted to another taxing officer for taxation. Upon considering the application, this Court did on 17.5.19 strike out the same for being incompetent. On the Respondents' application, the Court granted them stay for 30 days together with certified copies of the proceedings and ruling. The Respondents contend that because the Application was filed before the expiry of the period of stay granted, the Application is premature.

8. The Court notes that the Applicant filed this Application on 30.5.19 during the period of stay. Does this render the Application premature? I think not. The stay granted was in respect of execution to enable the Respondents appeal the decision of 17.5.19. It is further noted that the Application is not for execution. As such, nothing in that stay prevented the Applicant from filing this Application. In any event at the time the Application was heard on 20.6.19, the period of stay had expired. Further the Application poses no prejudice to the Respondents as it is not an application for execution. Judgment must be entered before the Applicant can commence execution proceedings. In this regard, I concur with Kamau, J in the case of Machira & Co Advocates v Arthur K. Magugu [2015] eKLR where she stated:

The court was not in agreement with the Advocates' contentions that the application herein was execution proceedings against the Client herein for the reason that, execution proceedings can only commence once judgment is entered. Indeed, the Certificate of Taxation could not be executed in its own right until after entry of judgment in accordance with Section 51 (2) of the Advocates Act Cap 16 (Laws of Kenya).

9. The Applicant contends that the Respondents have shown no willingness to pay the taxed amount but have instead filed numerous applications in this Court. The Respondents on the other hand argue that they are aggrieved by the ruling of this Court and have filed a notice of appeal dated 29.5.19 which they have exhibited. They have also requested typed proceedings. The Respondents claim that if the Application is allowed, they will be greatly prejudiced as their appeal has overwhelming chances of success.

10. It is to be noted that besides filing the notice of appeal, no memorandum of appeal has been shown to have been filed. Can this Court then proceed on the assumption that the intended appeal has overwhelming chances of success? I am duly guided by the holding in the case of Jacinta Wairimu Njoroge v Julia Wanjiru & 4 others [2008] eKLR where the Court of Appeal opined:

Of course it is now old hat that under that rule, the matters which the Court considers when deciding the issue of whether or not to grant an order are only two, namely, whether the appeal, if one has been lodged, or the intended appeal, where one has not been lodged, is an arguable one, i.e. one which is not frivolous, and secondly whether the success of such an appeal, were it to be successful, would have been rendered nugatory by the refusal to grant the order of stay. Of course, underlying the two principles is the assumption that the party applying for an order of stay has either appealed or intends to appeal. Even if an appeal is an arguable one and even if the success of the appeal would be rendered nugatory by a refusal to grant a stay, all those issues become irrelevant if no appeal is lodged or is intended to be lodged.

11. This Court cannot proceed on the assumption that the yet to be filed appeal has any chance of success or is indeed arguable. This Court can only make such a finding after considering the grounds of appeal that would be in a memorandum of appeal. It is not clear why the Respondents made no effort to demonstrate to the Court by means of a filed or draft memorandum of appeal, that the appeal is arguable and has overwhelming chances of success.

12. Further, as stated earlier, these are not execution proceedings. Execution can only be commenced upon entry of judgment in terms of the certificate of costs in accordance with Section 51(2) of the Advocates Act. Entry of judgment cannot in and of itself prejudice the Respondents or render the yet to be filed appeal nugatory.

13. The Applicant has prayed that the costs awarded on 22.2.19 and 17.5.19 be assessed and included in the decree. The Respondents had by an application dated 30.1.19 sought the reinstatement of their application dated 13.12.18 which had been dismissed for non-attendance. The Court did on 22.2.19 allow the said application but awarded costs to the Applicant. Thereafter, the Respondents prosecuted the reinstated application dated 13.12.18 which was on 17.5.19 dismissed with costs to the Applicant. It is these costs that the Applicant now seeks to have assessed and included in the decree.

14. Section 51(2) of the Advocates Act under which judgment may be entered on a certificate of costs refers to a bill that has been taxed. The costs that the Applicant asks to be included in the judgment that he seeks herein, were awarded by the Court after the bill of costs was taxed and certificate of costs issued. These subsequent costs awarded by the Court have not been taxed. As such they cannot be included in the judgment now sought. The entry of judgment contemplated under Section 51(2) of the Advocates Act must be premised on a certificate of costs that is issued following taxation of a bill of costs. In the circumstances, this Court is unable to grant the prayer sought by the Applicant and the same is declined.

15. I now turn to the prayer for interest at the rate 14% from date of taxation until payment in full. Paragraph 7 of the Advocates Remuneration Order provides for the charging of interest by an advocate as follows:

An advocate may charge interest at 14 per cent per annum on his disbursements and costs, whether by scale or otherwise,

from the expiration of one month from the delivery of his bill to the client, provided that such claim for interest is raised before the amount of the bill shall have been paid or tendered in full.

16. A reading of the above provision indicates that an advocate is entitled to interest of 14% per annum on the awarded amount on his bill of costs. The interest is applicable at the expiration of 1 month from the date of service of the bill of costs. In the instant case however, the Applicant has sought interest from the date of taxation which is long after 30 days after the bill was served upon the Respondents.

17. In the end, the Application dated 29.5.19 partially succeeds. Judgment is hereby entered in favour of the Applicant as against the Respondents in the sum of Kshs. 835,388.40, as per the certificate of costs dated 30.11.18 together with interest thereon at the rate of 14% per annum from the date of taxation being 30.11.18, until payment in full. Each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 27th day of September 2019

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondents**

..... **Court Assistant**