REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL MISC. APPLICATION NO. 19 OF 2018

NDUNGU GITHUKA AND COMPANY ADVOCATES.....APPLICANTS

-VERSUS-

GEOFFREY MORIASO OLE MAILOY.....RESPONDENT

RULING

1. On 28th May 2019, **Ndung'u Githuka & Company. Advocates**, the Applicants, took out a motion on notice seeking two principal orders. One, to to set aside the judgment entered on 13th March 2019, on grounds that the impugned judgment was entered without jurisdiction. Two, to enter judgment on the certificate of costs dated 4th December 2019 for **Kshs. 7,583,506/=**. The motion is based on the grounds on its face and on the depositions of Ernest Ndung'u Githuka of the same day.

2. The basis of the application as can be deciphered from both the grounds and affidavit, are that the advocates filed their advocate-client bill of costs dated 19th July 2018; the bill was taxed by the taxing master of this court on 5th November 2018 and allowed in the sum of **Kshs.7, 583, 506/=** and a certificate of taxation issued to that effect on 4th December 2019.

3. That certificate of costs was not challenged or set aside. By an application dated 14th December 2018 the advocates sought to have the certificate of costs adopted as judgment. The application was heard and allowed by the Deputy Registrar on 13th February 2019. A decree was there after issued to that effect on 18th February 2019.

4. The firm of advocates has now moved this court to set aside that judgment and the decree on the basis that the Deputy Registrar did not have jurisdiction to hear that application and to adopt the certificate of costs as judgment of the court. they term the judgment and decree a nullity. These arguments are reiterated in the supporting affidavit.

5. Though the application was duly served on the respondents and an affidavit of service filed, he did not file a response to the motion. The respondent did not also attend court during the hearing of this application. The application therefore proceeded unopposed.

6. Mr. Githuka counsel, for the applicant, moved the motion and urged the court to set aside the judgment and the resultant decree. He also asked the court to enter its own judgment in terms of the certificate of costs dated 4th December 2018 for **Kshs. 7,583,506**/= and issue its own decree in that respect.

7. I have considered the application and the grounds in support. I have also considered submissions by counsel for the applicant. The facts of this matter are straight forward. The advocates filed their advocate-client bill of costs dated 19th July 2018 for taxation and determination of their fees. The bill of costs was taxed by the Taxing Officer of this court and allowed in the sum of **Kshs. 7,583,506**/=. A certificate of costs was issued and is dated 4th December 2018. That certificate has not been set aside thus the issue of the advocates cost is conclusive.

8. The advocates sought to have the certificate of costs adopted as a judgment through an application dated 14th December 2018. As it turned out, the application was placed before the Deputy Registrar who heard and allowed it as prayed. Subsequently a decree issued giving rise to the present application.

9. I agree with the applicant's counsel that the Deputy Registrar did not have jurisdiction to hear the application to adopt the certificate of costs as judgment of the court. The application had been brought pursuant to the provisions of section 51(2) of the Advocates Act, sections 1A, 1B, 3A and 63 of the Civil Procedure Act and Order 51 rule 1 of the Civil Procedure Rules, 2010.

10. Section 51 of the Advocates Act provides:

"(1) Every application for an order for the taxation of an advocate's bill or for the delivery of such a bill and the delivering up of

any deeds, documents and papers by an advocate shall be made in the matter of that advocate.

(2) 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."

11. It would appear from the section that whereas sub section (1) refers to applications for an order of taxation of advocate's bill and therefore determination of the advocates costs, subsection (2) is clear that the certificate of costs once issued by the Taxing officer is final unless set a side or altered by the court. The court may also make an order that judgment be entered in terms of the amount in the certificate of costs.

12. It follows that whereas section 51(1) talks of taxation, which is the mandate of the Taxing Officer, section 51(2) is to the effect that only the "court" can alter the amount in the certificate or enter judgment upon it. Section 2 of the Act defines **"Court"** to mean the "High Court". That means, therefore, that only the High Court has jurisdiction to set aside or alter the certificate or enter judgment for the amount ascertained by the Taxing Officer and contained in the certificate of costs. The Taxing Officer's mandate ends after taxation and signing of the certificate of costs.

13. The above view is supported by the Civil Procedure rules which provide for the powers of Deputy Registrars to hear some applications. Order 49 rule 2 provides the circumstances under which a Deputy Registrar may enter judgment in a certain matter. It states:

"Judgment may, on application in writing, be entered by the registrar or, in a subordinate court, by an executive officer generally or specially thereunto empowered by the Chief Justice by writing under his hand, in the following cases:

(a) under Order 10: (consequence of non-appearance, default of defence and failure to serve);

(b) in all other cases in which the parties consent to judgment being entered in agreed terms; or

(c) under Order 25, rule 3 (costs, where suit withdrawn or discontinued).

14. Rule 7(1) thereof provides for the sort of applications the Deputy Registrars may hear, stating:

(1) The Registrar may—

(a) give directions under Order 42 rule 12 and Order 51 rule8;

(b) hear and determine an application made under the following Orders and rules —

(i) Order 1, rules 2, 8, 10, 17 and 22;

(ii) Order 2, rules 1 and 10;

(iii) Order 3,5 and 9;

(iv) Order 6;

(v) Order 7, rules 16 and 17 (2);

(vi) Order 8;

(vii) Order 10, rules 1 and 8;

(viii) Order 20;

(ix) Order 21, rule 12;

(x) Order 22 other than under rules 28, and 75;

(xi) Order 23, 24, 25, 26, 27, 28, 30,31 and 33; and

(xii) Order 42, rule 14.

15. The applications listed above are routine; are mainly administrative in nature and are not substantive in effect and, therefore, Deputy Registrars have jurisdiction to hear them and give directions as the case may be. The rules do not give the Deputy Registrars power or jurisdiction to hear any other applications including those brought under section 51(2) of the Advocates Act.

16. From the above exposition of the law, it is clear that the Deputy Registrar did not have jurisdiction to hear an application brought under section 51(2) of the Advocates Act and entered judgment which could only be done by a judge. The Deputy Registrar acted without jurisdiction. Where a court acts without jurisdiction just like the Deputy Registrar did in this matter, that action amounts to nothing. It is a nullity. (***See Owners of Motor Vessel "LILIAN S" v Caltex Oil (Kenya) Limited*** [1989] KLR 1)

17. In that regard, the judgment by the Deputy Registrar and the resultant decree is null and of no effect. It is a candidate for setting aside as a matter of course.

18. I now turn to address the second limb of the application, that is; the applicant's request to enter judgment in terms of the certificate of costs. Ideally, this should not be the normal course of things. This court's mandate should have been to consider the application to set aside the impugned judgment as well as the decree, and if satisfied, proceed to do so. That would then allow the applicant to move the court with a new application to enter judgment as per the certificate of costs.

19. However, the applicant filed a composite application to serve both ends. The applicant sought to have the judgment set aside and thereafter, to enter judgment for the amount in the certificate of costs. I have perused the record and noted that although taxation was done in December 2018 and the certificate of costs issued 10 days later, there has not been a challenge to the Taxing Officer's decision and the certificate of costs. This is so despite the fact that the respondent had been served with the notice for taxation and the application for setting aside the judgment.

20. From the record, it is almost a year since the issue of the advocate's costs was determined. That certificate having been issued and not challenged, it became conclusive as to the amount ascertained by the taxing officer. I take into account the principle in Article 159(2)(b) and (d) that justice should not be delayed and that justice should be administered without undue regard to procedural technicalities. I am also alive to the principles in sections 1A and 1B of the Civil Procedure Act, that the court's overriding objective should be to facilitate just, expeditious, proportionate and affordable resolution of disputes. For those reasons I find it necessary to determine the limb for entry of judgment in order to bring this matter to a conclusion rather than ask the applicant to move the court a fresh which will not only be against the interests of justice but also a waste of precious judicial time.

21. As I have already explained herein above, the advocate /client bill of costs was taxed in December 2018 and a certificate of costs issued. That certificate was not challenged and has not been set aside or altered. The respondent was served with the present application but did not respond to it. he also failed to attend court during the hearing despite being served which leaves the application unopposed.

22. That being the case, and there being no challenge to the certificate of costs, this court has no option but to allow the application. Consequently, the application dated 28th May 2019 is allowed as follows;

a) The judgment entered on 13th February 2019 resulting into the decree issued on 18th February 2019 is hereby set aside.

b) Judgment is hereby entered against the respondent in favour of the applicant for Kshs. 7, 583, 219/= as more particularly ascertained by the Taxing Officer of this Court and contained in the certificate of taxation dated 4th December 2018.

c) Interest at court rates from the date of this judgment to the applicant.

d) Costs of the application to the applicant

Dated Signed and Delivered at Kajiado this 27th Day of September 2019

E C MWITA

JUDGE