



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 114 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.W. Kabaria (Ms.)

(Resident Magistrate) on 1st March, 2016 in CMCC No. 3891 of 2015)

JUDGEMENT

1. The appellant instituted the suit against the respondent vide CMCC NO. 3891 OF 2015 by way of the plaint dated 3rd July, 2015 and amended on 19th August, 2015 seeking the sum of Kshs.115,160/= together with interest at the rate of 14% p.a. from 28th February, 2015 until payment in full as well as costs of the suit and interest thereon.

2. The appellant pleaded in her plaint that the respondent had at all material times instructed her to defend its interests in CMCC No. 3250 OF 2005 (*Joshua Njogu Thiong'o v Henry Mathembu & Co. Advocates*) and that sometime on or about 28th January, 2015 the appellant submitted an itemized Bill of Costs to the respondent for settlement but which the respondent failed to honour, hence the Bill of Costs was taxed on 14th April, 2015 at Kshs.115,160/= and a Certificate of Taxation issued.

3. It was pleaded that the failure of the respondent to settle the Bill of Costs prompted the appellant to file High Court Misc. Application No. 159 of 2015 in a bid to recover her legal fees.

4. Upon being served with the summons to enter appearance and the suit documents, the respondent entered appearance on 13th August, 2015 and filed its statement of defence on 26th August, 2015 largely denying the sums owed to the appellant and averring *inter alia*, that it had settled the entire sum in the Bill of Costs vide a cheque in the sum of Kshs.109,402/= forwarded to the appellant on 10th July, 2015 hence terming the suit as an abuse of the court process.

5. The appellant then filed the Notice of Motion dated 20th August, 2015 seeking the entry of judgment against the respondent as prayed in the plaint together with interest on the sum of Kshs.5,758/= at the rate of 14% p.a. from 10th July, 2015 until payment in full.

6. The Motion was opposed by way of the replying affidavit sworn by *Paul Gichuhi* on behalf of the respondent.

7. The parties thereafter exchanged written submissions on the Motion, following which the trial court allowed the appellant's application in part and entered judgment on admission in the sum of Kshs.109,402/=.

8. The aforementioned ruling now constitutes the subject of the appeal. The appellant's memorandum of appeal dated 14th March, 2016 is premised on six (6) grounds of appeal namely:

i. THAT the learned trial magistrate erred in law and in fact by failing to enter judgment for the balance of the taxed costs of Kshs.5,758/= as per the certificate of taxation dated 10th June, 2015 which had not been varied or set aside.

ii. **THAT the learned trial magistrate erred in law and in fact by holding that the non-payment of the balance of the taxed costs was an issue which needed to go to trial.**

iii. **THAT the learned trial magistrate erred in fact and in law and misdirected herself in entertaining the plea of payment of withholding tax which fact did not form part of the evidence adduced by the respondent.**

iv. **THAT the learned trial magistrate erred in law and in fact by failing to award interest on the taxed amount at the rate of 14% p.a. from 28th February, 2015 in spite of overwhelming evidence placed before the court.**

v. **THAT the learned trial magistrate erred in law and in fact by failing to enter final judgment in the matter and ordering that the issue of interest and costs proceeds for trial.**

vi. **THAT the learned trial magistrate erred in law and in fact by failing to enter judgment on admission for the total costs as awarded in the certificate of taxation.**

9. The appeal was dealt with through the exchanging of written submissions. The appellant first submits that the learned trial magistrate was wrong in failing to enter judgment pursuant to the certificate of taxation on record, which certificate was the result of a taxation process that had been undertaken by consent of the parties.

10. The appellant urges this court to consider the provisions of Section 51(2) of the Advocates Act in finding that she was entitled to the costs sought in the judgment on the premise that the same were taxed costs.

11. It is also the appellant's view point that she is entitled to the interest sought pursuant to Rule 7 of the Advocates (Remuneration) Order.

12. The respondent on its end contends that the subject matter of the dispute is far from straight forward hence summary judgment could not have been sought before the trial court.

13. The respondent went further to argue that the appellant is only

seeking to unjustly enrich herself by demanding payment afresh despite the fact that she received payments in settlement of the legal fees, adding that its statement of defence raises triable issues which ought to be considered at trial.

14. I have considered the rival submissions on appeal and re-evaluated the evidence tendered before the trial court in regard to the application and the replying affidavit. I have also revisited the parties' submissions presented before the trial court and had a look at the resulting ruling. It is well noted that the grounds of appeal revolve around the issue of the balance of Kshs.5,758/= and the interest of 14% p.a. which were not granted by the learned trial magistrate. The grounds of appeal shall be determined together.

15. As earlier indicated, the appellant through her Notice of Motion sought the entry of judgment on admission against the respondent in the manner set out hereinabove on the basis that the respondent did not pay the claimed amount despite having been informed of the taxation.

16. In response thereto, *Paul Gichuhi* being a former Legal Officer at the respondent company essentially challenged the appellant's capacity to bring the Motion on the premise that she had not taken out a valid practicing certificate and further deponing that the amount indicated in the certificate of taxation had been paid in full.

17. In her ruling, the learned trial magistrate rejected the respondent's argument on the appellant's lack of capacity to file the application and went ahead to address its merits. She adopted the reasoning that while the sum of Kshs.115,160/= was indeed owing to the appellant, the respondent's argument that the balance of Kshs.5,758/= amounted to withholding tax was equally valid. Resultantly, the learned trial magistrate found that the unequivocal admission was made in respect to Kshs.109,402/= and thus went ahead to enter judgment for the said amount.

18. Returning to the appeal before me, I will begin by addressing the issue of the Kshs.5,758/= which constitutes the balance upon payment of the sums taxed. I am able to ascertain from the record that the appellant filed the Bill of Costs dated 7th April, 2015 claiming the sum of Kshs.125,840.16/= against the respondent. The same was taxed at Kshs.115,160/= on 28th May, 2015 and a certificate of taxation was issued on 10th June, 2015.

19. Going by the account given by the parties and supported by the record, the respondent paid to the respondent the sum of Kshs.109,402/= as settlement of the sums. It is clear that this was not the entire sum taxed. The respondent's position is that the balance of Kshs.5,758/= went into withholding tax.

20. The law is crystal clear that once a Certificate of Taxation is issued, it 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 restated in the case of **Lubulellah & Associates Advocates v N K Brothers Limited [2014] eKLR** in the following manner:

“The law is very clear that once a taxing master has taxed the costs, issued a Certificate of costs and there is no reference

against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment. An applicant is not required to file suit for the recovery of costs. The certificate of costs is final as to the amounts of the costs and the court would be quite in order to enter judgment in favour of the Applicant against the Respondent herein.”

21. In the present instance, there is nothing to indicate that the Certificate of Taxation has either been varied or set aside by way of a reference to the High Court which is to say that it is the final determinant of the costs payable to the appellant.

22. Moreover, there is nothing in the certificate of taxation to show that the balance was to apply as withholding tax, which discounts the position taken by the respondent. There is no doubt in my mind that the respondent was obligated to pay to the appellant the sum of Kshs.115,160/= and nothing short of that.

23. In fact, the respondent admitted that the sums taxed were payable to the appellant, which then goes to show that its argument that it has a triable defence is untenable.

24. On that premises, the appellant had every right to seek her costs pursuant to **Order 13, Rule 2** of the **Civil Procedure Rules** which expresses thus:

“Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court admissions for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.”

25. To reinforce my analysis above, I turn to **Owino Okeyo & Company Advocates v Fuelex Kenya Limited [2005] eKLR** cited in the appellant’s submissions where the court rendered that:

“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.”

26. The above was confirmed by the court 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.”

27. Taking this approach, I am convinced that the learned trial magistrate’s view that the issue of the balance could only be determined at trial holds no water. This is a straight forward case in the sense that there is in place an unchallenged certificate of taxation which indicates the amount taxed in specific terms.

28. In any event, it is noted that the issue of withholding tax was not raised before the trial magistrate in the course of hearing the application hence she had no basis to discuss the same. In this sense, I am satisfied that the learned trial magistrate misdirected herself in adopting the reasoning she did.

29. As concerns the subject of interest, whereas the certificate of taxation did not make provision for interest, **Rule 7** of the **Advocates (Remuneration) Order, 1962** pursuant to the **Advocates Act, Cap.16** allows for the charging of interest at 14% p.a. by an advocate on taxation. Going by the record, it is evident that the Bill of Costs lodged against the respondent provided for interest at 14% p.a. and the same was never refuted.

30. In view of the foregoing, I am persuaded that the learned trial magistrate truly erred in not awarding interest on the taxed amount. In that case, I find merit in grounds (iv) and (v) of the appeal.

31. Accordingly, the appeal succeeds on merit and is therefore allowed. Consequently, the following orders are made:

a. The ruling and order of the learned trial magistrate made on 1st March, 2016 is hereby set aside and substituted with an order allowing the appellant’s Notice of Motion dated 20th August, 2015.

b. Judgment is hereby entered in favour of the appellant as follows:

i. The sum of Kshs.115,160/= plus interest at the rate of 14% p.a. from 28th February, 2015 to 9th July, 2015.

ii. The sum of Kshs.5,758/= plus interest at the rate of 14% p.a. from 10th July, 2015 until payment in full.

iii. The costs of both the Notice of Motion dated 20th August, 2015 and the suit in CMCC NO. 3891 of 2015 are awarded

to the appellant.

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

Dated, signed and delivered at Nairobi this 27th day of September, 2019.

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J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent