



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: HON. JUSTICE R. MWONGO, J.

MISCELLANEOUS CIVIL CASE NO. 1 OF 2018

KENYA COMMERCIAL BANK.....APPLICANT

VERSUS

KINANGOP RELIANCE CO. LTD.....1ST RESPONDENT

CHARLES MUTAHI MWANGLI.....2ND RESPONDENT

RULING

1. This is an application dated 16th January 2018, seeking that:

- a) A sum on Kshs 6,053,023/= for costs certified by the Taxing Officer Senior Resident Magistrate's, Court Engineer, be entered as a judgment.
- b) Further the applicant seeks that interest at 14% p.a. on the said sum be entered into the judgment, and
- c) That the applicant be at liberty to execute the same in such manner as a decree of the court.

2. The applicant annexed its bill of costs dated 27th June 2017, and a Certificate of Taxation for the said amount issued on 15th August, 2017.

3. In his Replying Affidavit deponed on 8th November 2018, the Respondent asserts that he is a director of the 1st Respondent which was doing business with the Applicant; that the Applicant had filed an application to tax costs in **Engineer Civil Suit No. 152 of 2016**, and that the same was taxed without his participation as his lawyer failed to enter appearance. He did not annex evidence to that effect.

4. The 2nd Respondent also stated that he had filed a case viz, **Nakuru Bankruptcy Cause No. 1 of 2018** in which he seeks to be declared bankrupt and unable to pay all his listed liabilities. He asserts that the bankruptcy cause should be heard first and determined before the application herein is heard.

5. In the said Bankruptcy cause filings, the 2nd Respondent herein depones that he trades as Kinangop Reliance trading firm; that as a result of bad business he is presently landless, has several suits claiming against him and seeks to be declared bankrupt; but in later documents he indicates that the 1st Respondent is in fact a limited liability company.

6. Amongst the annexures to the 2nd Respondent's affidavit is a Ruling by the Environment and Land Court in **Kinangop Reliance Co. Limited v Kenya Commercial Bank (K) Limited and Leakey's Auctioneers [2018] eKLR**. In the said suit the applicant therein sought suspension of the bank's statutory power of sale and extension of time to enable the applicant therein to redeem its charged land. The court, however, dismissed the application as unmerited. It appears that the bank exercised its power of sale.

7. In the present application, the only issue for determination is whether this court should issue a decree and enter judgment in respect of the Certificate of Taxation notwithstanding the alleged bankruptcy of the 2nd Respondent.

8. The existence of the Certificate of Taxation is not disputed by the Respondents herein. Their only complaint is that the Bill of Costs preceding it was taxed without their involvement. However, the Respondents have not provided any evidence to demonstrate that the taxation was done exparte. I am therefore unable to accept the Respondents' assertion in that regard.

9. The law is clear as to the nature and effect of Certificate of Taxation, as pointed out by the applicant herein. **Section 51 (2)** of the **Advocates Act** Provides as follows:

“(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.” (Underlining supplied)

10. In the present case, there is no evidence provided that the respondents have made any application for the setting aside or alteration of the Certificate of Costs herein. To that extent, the Certificate of Taxation exhibited by the applicant herein must be deemed to be final, and this court may make such order therein as it deems fit. The asserted bankruptcy has no effect on the present application. If bankruptcy is declared, the Applicant herein will be listed as one of the Respondent’s creditors.

11. The applicant has cited the cases of **Lubuleliah & Associates Advocates v N K Brothers Limited [2014] eKLR** and **Francis M.O. Kadima t/a Kadima & Company Advocates v Khunaiif Trading Co. Ltd [2016] eKLR**. In these cases the principle is affirmed that a Certificate of Taxation issued by a taxing officer is final unless it is set aside or altered by the court.

12. In the **Lubuleliah case** the applicant opted not to file a suit for recovery of its costs under **Section 48** of the **Advocates Act** and instead applied for taxation of its Bill of Costs under **Section 51 (2)** of the Act. The court, citing the finding in the case of **Sharma v Uhuru Highway Development Limited [2001] eKLR**, pointed out that:

“.....an advocate who files a Bill of Costs for taxation need not to file suit for recovery of its costs against its client.”

13. The court in **Lubuleliah** added that:

“Once judgment is entered in favour of the advocate under Section 51 (2) of the Advocates Act, the court is unable to see what other judgment should be re-entered after the filing of a suit by such an advocate. The interpretation that suit would again require to be filed for recovery of the advocates costs would appear superfluous bearing in mind that judgment would already be entered under Section 51 (2) of the Advocates Act.” (Underlining supplied)

14. From the foregoing, it is clear that a Certificate of Costs constitutes the last and final step designating the amount of costs recoverable the advocate. Under **Section 51 (2)** the court may make such order in relation to the certificate as it thinks fit. Having found that there has been no reference against the costs award, and that the Respondents have not at all demonstrated, or sought to demonstrate, that they were improperly excluded from the taxation process of the Bill of Costs. I thus conclude that the Certificate of Taxation is final.

15. Accordingly, I am satisfied that it is proper to order that a decree be issued in respect of the said Certificate of Taxation for Kshs 6,053,023/= issued on 15th August 2017 in favour of the Applicant, as prayed.

16. The applicant also prays that judgment be entered for interest on the certified amount of Kshs 6,053,023/= for the period one month after the date of service of the bill of costs on the respondents. I would state as follows in this issue. First, the respondents have not made any attempt to respond to this issue, and so it is technically uncontested. Second, however, I have not seen any conclusive evidence of service of the Bill of Costs on the Respondent. I have nevertheless seen the Applicant’s exhibit “VM04” a copy of a postage receipt which the Applicant says is the evidence of posting the Notice of Taxation on the Respondent.

17. I have carefully perused the said Exhibit “VM04” annexed to the Applicant’s affidavit of 15th January 2017. “VM04” comprises two receipts, both indicating letters sent to Kinangop. There is, however, nothing to indicate the content of the said letters, and it was for the Applicant to show actual service of the Bill of Costs. I am not satisfied that “VM04” discharges the requirement of service.

18. **Rule 7** of the **Advocates Remuneration Order** was relied upon by the Applicant. **Rule 7** provides:-

“An advocate may charge interest at 14% per annum on his disbursements and costs, whether by sale or otherwise, from the expiration of one month from the delivery of his bill to the client, providing such claim for interest is raised before the amount of the bill has been paid or tendered in full.” (Underlining supplied)

19. In light of the foregoing, I am of the view that service occurred when the present application was served on the Respondent. The Respondent appeared in court on 11th October 2018, after personal service of the application was ordered upon him by the court on 22nd February, 2018. I would therefore be prepared to allow interest at 14% on the Certificate of Costs from 11th October, 2018.

20. The appropriate orders in this matter are therefore as follows:-

a) Prayers No. 1 and 3 in the application are allowed.

b) Prayer No. 2 is allowed to the extent that judgment is entered for interest at 14% on the sum of Kshs 6,053,023/= from 11th October, 2018.

21. There are no orders as to costs. Orders accordingly.

Dated and Delivered at Naivasha this 19th Day of December, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Njihia holding brief for Odhiambo for the Applicant
2. Charles Mwangi - Respondent - in person
3. Court Clerk - Fred Kamau