



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
MISC. CIVIL APPLICATION NO. 9 OF 2015

PHILIP MUCHIRI MUGO.....APPLICANT

V E R S U S

MBEU KITHAKWA.....RESPONDENT

R U L I N G

The application before me is the Notice of Motion dated 3rd February 2017 supported by the affidavit of F. Wanjira Ndirangu.

It seeks orders *inter alia*

That judgment be entered for the applicant in favour of the respondent for the sum of Ksh.47,340 with interest at 14% p.a. from 14th November 2016. and the respondent be condemned to costs.

The reasons for this application is that on 14th November 2016 the bill of costs in this matter was taxed at Ksh.47,340, and since then the respondent has refused to pay. The respondent filed a replying affidavit opposing the application and making entirely new calculations.

Parties agreed to rely on written submissions to dispose of the application. These I have considered carefully.

The only contention the respondent raises is that he made some arithmetical errors in conceding to the bill at Ksh. 47,340, and that the bill should actually have been rated at Ksh. 13,390. This is what he says in his submissions

*‘Your Lordship/ Ladyship, I am praying that the amount of ksh. 47340 be calculated as follows;
Ksh 47340 less Ksh 33750 = Ksh 13590 less the amount ksh 3575 awarded to me in the same
application, which translates to Ksh 10015 and which should not earn interest’*

He also adds that the applicant owes him costs of Ksh 3,575 which he was awarded against them on 25th November 2016.

I have carefully considered the authorities cited by the applicant Owino **Okeyo & Co. Advocate Vs. Pelican Engineering & Construction Co. Ltd. [2006] eKLR** . The argument here was that the applicant was entitled to the judgment under s. 51(2) of the Advocates Act Cap 16 Laws of Kenya, and the respondent was not disputing the retainer.

Judgment under section 51(2) can only be entered where there is no dispute as to the retainer or

engagement of the advocate by the respondent. And contrary to the respondent's argument the applicant did not need to file a suit and the application is quite in order.

The court looked at other authorities which defined a retainer to mean the *engagement of counsel, the giving of instructions in the matter in which the costs have been taxed.*

Section 51(2) 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.

Azangala J (as he then was) stated;

That section in my understanding gives the court the jurisdiction to enter judgment for the taxed costs where two conditions are satisfied.

The first condition is that there must be a certificate of the taxing officer...which certificate has not been set aside or varied by the court. Secondly there must be no dispute as to the retainer. If those two conditions are met the court has discretion to enter the judgment for the sum due with costs.

In this case the certificate is annexed to the application. The retainer is not disputed.

The foregoing position is fortified in Evans **Thiga Gaturu vs. Apex Security Ltd HC (Milimani) Misc. cause 193/2010.**

In his affidavit sworn on the 9th June 2017, the respondent concedes the bill of costs as taxed, seeking only that he pays less the Ksh 3575 costs owed to him, and without interest, bringing it to Ksh, 43,765.

The issue he raises in his submissions about errors made in calculations could only be made in application for review or setting aside of the certificate in the appropriate forum. There is no counter application to which the applicant herein would have responded. I cannot make findings and grant orders from the air to rectify the alleged errors, not on the face of the record.

Hence the only that is relevant at this stage is that the costs also awarded to him, against the applicant in the same matter, remain unsettled.

I find therefore that the application is merited and allow it in the following terms.

1. Judgment be and is hereby entered for the applicant against the respondent for the sum of Ksh. 47,340 plus interest at court rates from the date of the certificate.
2. The same be paid less Ksh. 3,575 plus interest at court rates being costs awarded to the respondent against the applicant. from the date of the order.

Each party to bear its own costs for this application.

Dated, delivered, signed this 26th Day of January 2018 at Nyeri

Teresia M Matheka

Judge

Court Assistant Harriet

Respondent present.