



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW

MISCELLANEOUS APPLICATION NO. 35 OF 2014

IN THE MATER OF THE ADVOCATE ACT CAP 16 OF THE LAWS OF KENYA

AND

NYABENA ALFED T/A NYABENA

NYAKUNDI & COMPANY.....ADVOCATE/APPLICANT

VERSUS

TOURISM PROMOTION LIMITED T/A

SERENA HOTEL.....RESPONDENT/CLIENT

IN

HIGH COURT CONSTITUTIONAL PETITION NO. 384 OF 2009

BETWEEN

TOURISM PROMOTION SERVICES LIMITED T/A

SERENA HOTEL.....APPLICANT

-VERSUS-

THE INDUSTRIAL COURT.....RESPONDENT

KENYA HOTELS AND ALLIED

WORKERS UNION.....1ST INTERESTED PARTY

KENYA HOTELKEEPERS AND

CATERERS ASSOCIATION.....2ND INTERESTED PARTY

KENYA UNION OF DOMESTIC HOTELS

EDUCATIONAL INSTITUTIONS HOSPITALS

JUDGMENT

1. By a notice of motion dated 18th January 2018, the applicant/advocate Nyabena Alfred T/A Nyabena Nyakundi & company Advocates seeks from this court as against the respondent tourism promotion Services Ltd T/A Serena Hotel the following orders:
 - a. That the certificate of taxation dated 5th January 2016 be and is hereby adopted as a decree of the court for purposes of execution.
 - b. That the respondent be ordered to comply with the certificate of taxation/decreed dated 5th January 2016 within 7 days from the date of the order.
 - c. That the Honourable Court do issue such orders and give such directions as it may consider appropriate to meet the ends of justice.
 - d. The respondent be condemned to pay the costs of this application.
2. The application is predicated on grounds and supported by the affidavit of Alfred Nyabena sworn on 10th January 2018.
3. According to the applicant, taxation of advocate/client bill of costs was done on 7th December 2015 by the Deputy Registrar R. Aganyo as presented in the sum of KShs 440,226 as shown by annexed certificate of taxation dated 5th January 2016 hence the certificate of taxation should be adopted as decree of the court to enable the certificate of taxation should be adopted as decree of the court to enable the certificate of taxation enforced as the respondent has withheld the payment of the costs for several years as the certificate of taxation has not been varied or set aside by the court.
4. The applicant's Counsel Mr Onenga argued orally, reiterating the contents of the application and urging that the preliminary objection filed is misconceived as no suit ought to be filed to recover taxed costs. He relied on Section 3A of the Civil Procedure Act and inherent jurisdiction of the court.
5. The respondent filed notice of preliminary objection to the motion. It is dated 26th February 2018 to the effect that the application offends the provisions of Section 48 as read with Section 51 of the Advocates Act Cap 16 Laws of Kenya and that this court lacks jurisdiction to grant the orders sought in the application.
6. In his arguments, Mr Angweny, counsel for the respondent/client submitted that there is no prayer for judgment despite the court advising the applicant to amend the application which they ignored.
7. Further, that the procedure for this kind of application is Sections 48 and 51 of the Advocates Act hence Section 3A of the Civil Procedure Act cannot override the Advocate Act. Counsel relied on the case of **L.N. Ngolya & Company Advocates vs Jackson Muthi Kilango [2008] eKLR**.
8. In a rejoinder Mr Onenga submitted that the application seeks that certificate of taxation be adopted as decree of the court hence the preliminary objection was misplaced.

Determination

9. I have carefully considered the application by the applicant. On 26th February 2018 when the matter came up for mention I directed the applicant's counsel to amend the application and serve in 7 days and the same to be heard on 8th March 2018. No such amendment was done. The court did not direct on what amendments were necessary. However, it was expected that the applicant being an advocate, would reexamine the motion in the line with the law and establish that which was necessary to amend the motion.
10. Often times, parties file very vague pleadings for the court to deduce what orders are appropriate in the circumstances. This is the case even where parties themselves are advocates who are officers of this court. However, the court has inherent power to order for amendment of pleadings for clarity purposes. In this case the court had observed that the application was brought under the provisions of the Civil Procedure Rules and that it was not clear on what the applicant was seeking.
11. The applicant's counsel never deciphered anything from the court's observation hence I shall proceed to determine the merits of the application as is it noting that citing wrong provisions of the law is not a fatal defect that cannot be cured as the court is deemed to know the law applicable in each matter.
12. However, parties are expected to know their cases and the law applicable and not to bring vague pleadings and where such parties are advocates they are deemed to know the law even better. It is therefore surprising that an advocate in such an application has no idea what law is applicable in such a simple matter.
13. Onto the motion and prayers sought, the respondent has raised what is considered to be a preliminary objection, that the applicant should have filed suit for recovery of the taxed costs and not seek for adoption of certificate of taxation and secondly, that the court lacks jurisdiction to grant the orders sought. However, the respondent did not make any arguments on what jurisdiction the court lacked. Mr Angweny advocate for the respondent/client cited the case of **L.N. Ngolya and Company Advocates vs Jackson Mithi Kilango (supra)**

where Lenaola J was faced with the question of whether, upon taxation of costs, an advocate can recover those costs by direct execution or filing suit, obtaining judgment and executing for the same in case of default. However, the respondent did not highlight what he considered salient features of that decision for this court's adoption, and counsel only submitted that the applicant should have filed suit and that there is no application for judgment. This latter aspect is found in paragraph 6 of the judgment in the **LN. Ngolya & Company Advocates** (supra) case where the court held that once costs are taxed, then Section 48 and Section 49 of the Act became operational and the advocate then should have followed the steps for instituting a suit for recovery of costs and thereafter proceed to obtain a judgment and decree capable of being executed.

14. The above **LN. Ngolya & Company Advocates** decision is a 2008 decision. There are plethora of decisions, on the question of whether advocates costs once taxed should be subject of filing of a fresh suit for recovery or whether an advocate can simply seek for judgment (or adoption of the certificate of costs as decree) of the court as was done in this case by the applicant.

15. It should be noted that the **L.N. Ngolya & Company Advocates** (supra) case only dealt specifically with Section 48 and 49 of the Advocates Act which apply in a matter before taxation of costs, not after taxation and a certificate of costs has been issued. Where costs have been taxed, the applicable provision is Section 51(2) of the Advocates Act which stipulate:

“ The certificate of a taxing officer by whom it 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.”

16. From the above provision, it is clear, and it a rule of practice for advocates to file applications by way of notice of motion moving the court to enter judgment after taxation of their bills of costs and issuance of certificate of taxation. This procedure ensures expedition since the certificate of costs once issued is final as to the amount of the costs covered and what then remains is for the court to pronounce itself, on an application for judgment, where there is no dispute as to retainer, and order that judgment be entered for the sum of as per the certificate of costs.

17. That procedure, in my view, is intended to cushion advocates from waiting for long periods of time and or undergoing the rigours of a full trial before payment of their costs which are already determined through taxation process by the taxing officer in exercise of special jurisdiction of the High Court.

18. Accordingly, it is my humble view that there is no obligation on the part of the advocate who has had his costs taxed by a taxing officer, to file a fresh suit for recovery of the taxed costs and where a certificate of taxation issued. The advocate is therefore under no obligation to comply with Sections 48 and 49 of the Advocates Act once he/she has a certificate of taxation which is final as far as the amount of costs covered thereby is concerned. Section 48 of the Advocates Act provides.

1) “Subject to this Act, no suit shall be brought for the recovery of any costs due to an advocate or his firm until after the expiry of one month after a bill for such costs, which may be in summarized form, signed by the advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause to be verified by affidavit filed with the plaint, for believing that the party chargeable therewith is about to quit Kenya or abscond from the local limits of the court’s jurisdiction, in which event action may be commenced before expiry of the period of one month.

2) Subject to Subsection (1), a suit may be brought for the recovery of the costs due to an advocate in any court of competent jurisdiction.

3) Notwithstanding any other provisions of this Act, a bill of costs between an advocate and a client may be taxed notwithstanding that no suit for recovery of costs has been filed.

19. In the above Section 48, there is no provision that a suit in which a request for judgment for costs is made must be instituted by way of a plaint, save in instances where there is reasonable belief on the part of an Advocate that a party who has not paid costs is about to quit Kenya or abscond from the court's jurisdiction.

20. There is therefore nothing wrong with a party seeking for judgment on the taxed costs, by way of a notice of motion on a certificate of taxation which has neither been set aside nor challenged by way of a reference against the Taxing Master's decision. In this case, the court file only reveals that there is a 'Notice of objection' which is unsigned as noted by the Deputy Registrar on a yellow sticker on 27th January 2016, purporting to objecting to taxing master's decision made on 7th December, 2015, but there is no reference filed. Furthermore, an unsigned Notice of objection is no notice at all. In **CA Nairobi Nos 13 & 19 of 2001 consolidated Vipin Maganlal Shah Alulkumar Maganlal Shah vs Investments & Mortgage Bank Ltd & 2 Others[2001]** the Court of Appeal held inter alia:

“.....There is of course the object the legislature had in mind in requiring that a plaint be signed either by counsel or party suing. The object must clearly be to make the party suing or filing any other pleading take ownership and responsibility for the contents of the plaint or pleading or as was said in the Australian case of Great Australian Gold Mining Company case, supra, to be:

“ a voucher that the case is not a mere fiction.”

Again, in Kenya Order VII Rule 1(e) now requires that a plaint shall contain.....

“ If a plaint is not signed either by the plaintiff in person or his recognized agent or his advocate, what is the use of requiring that it contains an averment by the plaintiff that there is no other suit pending and so on? If the plaint is not signed a required by order VI Rule 14, these other requirements clearly become meaningless.

Whatever may be the position in India or even in England, the position in Kenya seems to be that a party who files unsigned plaint runs a very grave risk of having that plaint struck out as not complying with the law. We shall go no further than that because as we said earlier, we must deal with the issue of whether or not there was on record a copy of the signed plaint when the summons to strike out was lodged in the superior court.”

21. In ELRC case No. 269/2014 Anthony Simiyu Kisiangani & another V Nzoia Out Growers Company Ltd & 2 Others [2015] e KLR citing Regina Kavenya Mutuku & 3 Others v United Insurance Company Ltd Nairobi Milimani HCC No. 1994/2000 [2002] 1 KLR 250 Ringera J (as he then was) held and I agree though persuasively:

“ An unsigned pleading had no validity in law as it is the signature of the appropriate person on the pleading which authenticates the same and an unauthenticated document is not a pleading of anybody. It is a nullity.”

22. The above case also cited the Court of Appeal decision in CA 13 & 19/2001 Vipin Maganlal Shah vs Investment & Mortgages Bank Ltd & 2 Others [supra] with approval on the effect of an unsigned pleading and stated:

“ Where a pleading is not signed the same would be struck out rather than being dismissed.....”

23. The advocate filed a bill of costs dated 2nd February 2015 against the client and served it upon the client for taxation but the client did not attend the taxation. The Taxing Master Mrs R. Aganyo taxed the bill on 7th December 2015 at kshs 440,226 after considering submissions from the advocate. The certificate of taxation was issued on 5th January 2016 but to date no reference was filed by the client challenging the taxation.

24. On 11th January 2018, two years after the taxation, the advocate filed a notice of motion seeking that this court adopts the certificate of taxation dated 5th January 2016 as a decree of the court for purposes of execution . There is no indication that the client is interested in moving the court on a reference against the certificate of taxation.

25. As earlier stated, what the advocate should have done is to apply for judgment to be entered on the basis of the certificate of taxation as stipulated in Section 51(2) of the Advocates Act. Instead, he applied for adoption of the certificate of taxation as decree of the court. The question therefore is whether adoption of the certificate of taxation as decree is synonymous with judgment being entered in favour of the advocate in terms of the certificate of taxation.

26. In my humble view, albeit the advocate vaguely drew the application and which the court attempted to have it corrected by way of an amendment, seeking for adoption of a certificate of taxation can be taken to be synonymous with seeking entry of judgment on the basis of certificate of taxation.

27. For the above reasons, I find and hold that this court has jurisdiction to adopt the certificate of taxation dated 5th January 2016 and enter judgment for the advocate upon which a decree shall be drawn for execution purposes.

28. Accordingly, I find the application by the advocate/applicant merited. I hereby enter judgment for the advocate in terms of the certificate of taxation dated 5th January 2016 and direct that decree be drawn in terms of the taxed costs for executions in the usual manner with an order that each party shall bear their own costs of the notice of motion dated 10th January 2018.

29. Those are orders of the court.

Dated, signed and delivered in open court at Nairobi this 26th day of March 2018.

R.E. ABURILI

JUDGE

In the presence of:

Mr Angwenyi advocate for the Respondent/client

N/A for the Applicant/Advocate

CA: Kombo