



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 45 OF 2013 (O.S)

IN THE MATTER OF THE ADVOCATES REMUNERATION ACT CAP 16 LAWS OF KENYA

BETWEEN

INVESCO ASSURANCE COMPANY LTDPLAINTIFF/APPLICANT

VERSUS

J.G. KARIUKI T/A GACHIRI KARIUKI & CO. ADVOCATES 2ND DEFENDANT

R U L I N G

1. The originating summons dated 25/4/2013 and filed in court on the same day the plaintiff sought against the defendant orders that:-

“The Respondent (defendant) to render accounts for the deposits paid on account of each matter”.

2. The dispute as disclosed in the pleadings filed is that there was an advocate – client relationship between the parties which appears to have broken down and the advocate sought to tax his costs against the client. Several bills of costs were presented to court, the same were taxed, judgments entered and execution proceedings issued in various suits. It is the steps taken to execute those decrees by way of garnishee proceedings in the various suits that provoked the current suit.

3. When the parties attended court on the 26/7/2017, the court, as part of pre-trial directions, gave orders to the effect that at the hearing the parties would address the court on the applications of Section 34 of the Civil Procedure Act to this suit.

4. When the file came up for hearing on the 20/2/2018 the plaintiff was not ready to proceed prayed for an adjournment which when declined the counsel indicated that he had no instructions to proceed with the matter as a consequence the court closed the plaintiff’s case and ordered that the defence case proceed.

5. The suit then proceeded, with the defendant giving evidence while the plaintiff offered no evidence in support of its case. Strictly speaking, without evidence adduced, the allegations by the plaintiff in the plaint filed remained but mere allegations [1]. It matters not that there was an originating summons supported by an affidavit. The plaintiff does not escape the requirement that evidence be led. This is because evidence in a trial only meets the legal test when the evidence tendered is tested by cross examination in terms of Section 146 of the Evidence Act. By the time the plaintiff suit was closed without evidence led there was no burden passed on to the defendant to discharge.

6. However the defendant took the stand and gave evidence that he had a relation with the plaintiff spanning over some 15 – 20 years. He said that he did render professional services to the plaintiff and had not been paid hence he filed bills of costs, had suit costs taxed and was in the process of enforcing the ensuing judgment when the plaintiff filed this suit to question the execution process on the basis that there was need to take accounts for sums paid as interim fees.

7. To him this suit was merely intended to delay him from recovering his decretal sums with the hope that he could be engaged in negotiation. He termed the suit an abuse of court process which deserved being dismissed to allow him pursue his entitlement under the law. He also sought to be awarded the costs of the suit.

8. On cross examination, the defendant repeated that the relationship between him and the plaintiff was that an advocate and his client. On obligations to render accounts the witness said he was bound in law to give accounts but on specific matters only.

9. Upon close of the defense case parties were ordered to file and exchange submissions but once again only the defendant filed submission.

The plaintiff not only failed to file submissions but even absented self from the court on the date set for highlighting. Once again there is not even submissions on behalf of the plaintiff even to challenge the evidence led and the law cited in the defendants own submission.

10. The law is that he who desires a court be found from him on a question has the onus to prove the existence of that right and where a fact is neither proved or disproved the matter is deemed not proved. On the merits I do find that the plaintiff claim against the defendant has not been proved and it therefore cannot be allowed but must fail.

9. However, the court having read the pleadings filed and listened to parties in court did direct on 26/7/2017 and again on 11/4/2018 that parties address the court on the application of Section 34 of the Civil Procedure Act in this suit.

10. That provision says:-

Questions to be determined by court executing decree

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

11. It is common ground that prior to this suit the plaintiff had initiated proceedings for taxation of costs between the parties. Those proceedings as disclosed in the lists and copies of documents filed as well as the annexures to the Affidavits filed reveal that the proceedings were initiated as miscellaneous applications as dictated by Rule 13(3) Advocate Remuneration Order. To that extent such a proceeding is a suit as defined by Section 2 Civil Procedure Act.

12. Accordingly when those proceeding took place and ended in a judgment, the only way to challenge the same was by an appeal where the law allows but not by a separate suit. It matters not that the client wanted accounts in the originating summons. It is enough that the dispute on how much fee was due from the client to the advocate had been determined by the taxing officer who issued a certificate of costs which had itself become final pursuant to Section 51(2) of the Act.

13. To this court, this suit was barred by statute and may as well be a good example how a party chooses and proceeds to abuse court process. The questions of accounts were due from determination at taxation and ought to have been raised there. It is said in evidence and on affidavit that the plaintiff did participate at trial by counsel. Even if the same was not raised in the various bills taxed, it was a matter that properly belonged to be dealt with at taxation and when it was not raised, when it ought to have been raised, it became res judicata and not open to be litigated afresh^[2].

14. I do find that besides failure to prove the case, the suit did not lie at all and therefore order that it be dismissed with costs to the defendant.

Dated and at Mombasa this 19th day of June 2018.

P.J.O. OTIENO

JUDGE

^[1] Trust Bank Ltd vs Paramount Universal Bank Ltd, HCC No. 1243 of 2001

^[2] Section 7 Civil Procedure Act