



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS APPLICATION NO. 240 OF 2014 CONSOLIDATED WITH MOMBASA HIGH COURT MISCELLANEOUS APPLICATION NO. 241 OF 2014

V. CHOKAA & CO. ADVOCATES.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF MOMBASA as the successor of the

MUNICIPAL COUNCIL OF MOMBASA.....RESPONDENT

RULING

1. Mombasa High Court Miscellaneous Application No. 240 of 2014 was consolidated with Mombasa High Court Miscellaneous Application No. 241 of 2014 on 7th February, 2018, with the lead file being Mombasa High Court Miscellaneous Application No. 240 of 2014. The two applications are dated 23rd January, 2017

2. In Mombasa High Court Miscellaneous Application No. 240 of 2014, Ms. Kimuli, Learned Counsel for the applicant prayed for Judgment to be entered against the respondent in the sum of Kshs. 120,819.80 with interest at 14%. She relied on the certificate of taxation attached to the affidavit in support of the application. In Mombasa High Court Miscellaneous Application No. 241 of 2014, the applicant's Counsel sought entry of Judgment against the respondent in the sum of Kshs. 115,472.60 together with interest at 14%. She relied on the certificate of taxation dated 10th January, 2017 attached to the applicant's affidavit.

3. Counsel submitted that the certificates of taxation had not been set aside, altered or any reference filed against them which would be the only bar to Judgment being entered or if there was a dispute on the retainer. She added that the said certificates were final. She relied on the case of **Lubullelah & Associates Advocates vs N.K. Brothers Limited** [2014] eKLR where the court held that it would not enter Judgment if a certificate of taxation had been set aside or altered. She indicated that the applicant had pursued the claim under Section 51(2) of the Advocates Act and it would be absurd for the applicant to file another suit to claim his costs.

4. Mr. Mwangunya, Learned Counsel for the respondent opposed the applications and relied on the grounds of opposition filed on 17th October, 2017 in respect to Mombasa High Court Miscellaneous Application No. 240 of 2014 and on 6th February, 2018 in respect to Mombasa High Court Miscellaneous Application No. 241 of 2014. He submitted that there was no legal basis to request for entry of Judgment in the same file where the application for taxation was filed. In his view, a fresh cause or suit should have been filed. He relied on the case of **Cyrus Minda t/a Minda & Co. Advocates vs Yunes Kerubo Oruta**, Kisii Environment and Land Court Miscellaneous Application No. 247 of 2012, where the court held that once a certificate of taxation is finalized, the application becomes spent.

5. Counsel submitted that the doctrine of *stare decisis* is important as pronouncements of law should be similar. He emphasized that the case of **Cyrus Minda** (supra) was the first pronouncement on the issue. He added that between equal equities, the first in time prevails. He therefore urged the court to make a finding based on the **Cyrus Minda** case (supra) and dismiss the applications.

6. In response to the submissions by Counsel for the respondent, Ms Kimuli distinguished the authority of **Cyrus Minda** (supra) and the present application by stating that applicant in the former case had moved the court under the provisions of Sections 48 and 49 of the Advocates Act. She stated that the authorities cited by her and Counsel for the respondent were of persuasive value to this court.

ANALYSIS AND DETERMINATION

7. I have perused the proceedings before the Deputy Registrar and noted that the bills of costs herein were taxed on 24th October, 2016 and rulings thereof delivered on 15th December, 2016.

8. Inasmuch as Sections 48 and 49 of the Advocates Act require that a suit be filed and a decree issued before an Advocate can execute for

his costs, Section 51(2) of the said Act provides that 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 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 a Judgment be entered for the sum certified to be due with costs.

9. The present applications are anchored on the provisions of Section 51(2) of the Advocates Act. It is therefore my finding that the applicant has properly moved this court for entry of Judgment in the same files wherein the Deputy Registrar taxed the bills of cost. There is no dispute as to the retainer herein, no reference has been filed and none of the certificates of taxation have been set aside. I am persuaded by the decision in **Lubullelah and Associates Advocates vs N.K. Brothers Ltd** (supra).

10. I am not persuaded by the authority cited by Counsel for the respondent that the applicant should have filed fresh suits to recover his costs on applications that are clearly grounded on the provisions of Section 51(2) of the Advocates Act.

11. The sum total of the foregoing is that I allow the said applications and make the following orders:-

(i) In Mombasa High Court Miscellaneous Application No. 240 of 2014, I enter Judgment in favour of the applicant as against the respondent in the sum of Kshs. 120,819.80 with interest at 14%. Costs are awarded to the applicant; and

(ii) In Mombasa High Court Miscellaneous Application No. 241 of 2014, I enter Judgment in favour of the applicant as against the respondent in the sum of Kshs. 115,472.60 with interest at 14%. I also award costs to the applicant.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 14th day of June, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the applicant

No appearance for the respondent

Court Assistant- Bancy