



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 245 OF 2012

TAIB ALI TAIB ADVOCATE.....APPLICANT

VERSUS

JUBILEE INSURANCE CO. LTD.....RESPONDENT

J U D G M E N T

Introduction

1. On 7/8/2012 by a bill of costs dated 17/5/2012, the Advocates/Applicant Sought to have the advocate/clients costs taxed. That bill of costs claimed an aggregate sum of Kshs.229,192/=
2. The record reveal that the bill was argued on the 28/11/2018 by the Advocate/Applicant in the absence of the client/Respondent and ruling reserved to be delivered on notice. The record does not reveal when the notice was ever issue but there is a ruling by the taxing officer dated 13/7/2017.
3. Based on that ruling, the court issued a certificate of taxation dated the 3/11/2017 upon which the Advocate/Applicant premised his application dated 26/2/2018 seeking judgment in the sum certificate pursuant to Section 51(2) of the Advocates Act.
4. That provision provides:-
 - (1) **Every application for an order for the taxation of an advocate's bill or for the delivery of such a bill and the delivering up of any deeds, documents and papers by an advocate shall be made in the matter of that advocate.**
 - (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.**
5. The grounds disclosed on the face of the Application is largely that the certificate of taxation has not been challenged, disputed, set aside or varied. The Application was served upon the Respondent/Client on 17/5/2018 with a hearing date of 19/7/2018. When the matter was called out, no papers had been filed on behalf of the Respondent but one Mr. Okelo Advocate, addressed the court and said that he had just been instructed the previous day and needed time to file his papers including a preliminary objection on the competence of the Application. He was however unable to explain the delay by the respondent in issuing instructions to him. That may not be taken against Mr. Okelo because if an advocate is to explain a default by client the explanation must come from the client.
6. Having considered the application, the adjournment was declined for lack of reasons to enable court exercise its discretion in favour of the client/respondent and matter ordered to proceed at 11.30am.

7. When the court resumed at 12.35, Mr. Okello had filed, not only his notice of Appointment of advocates but also notice of preliminary objection and grounds of opposition. The two documents contended as follows:-

GROUNDS OF OPPOSITION

“TAKE NOTICE that the respondent shall oppose the application dated the 26th of February 2018 on the following grounds and/or reasons:-

1. The application is incurably defective and is a blatant and egregious abuse of the court process.
2. The application is bad in law.
3. The application seeks orders which cannot be granted”.

NOTICE OF PRELIMINARY OBJECTION

“TAKE NOTICE that the respondents shall at the hearing of this application raise a preliminary objection to the application dated the 26th of February, 2018 on the following ground:

The application seeks a final decree, which cannot be granted except by way of suit”.

8. Before Mr. Okelo could address the court, Mr. Lutta counsel for the Advocate /Applicant seized the first opportunity and informed the court that even though he had just been served in court, he was prepared to proceed with his application provided the preliminary objection and Grounds of Opposition were taken and deemed as opposition to the Application for judgment. The Respondent/Clients, readily accepted that proposal and the court therefore proceeded with the matter on the basis that the same was opposed on the grounds revealed in the Notice of preliminary objection and the grounds of opposition.

Analysis of the matter

9. The law on recovery of costs by advocate against a client is that a bill of costs is filled in a miscellaneous application. Once bill is taxed and a certificate issued, the certificate is by Section 51 Advocates Act, ordained final on the quantum of the costs between advocate and client until and unless set aside and is due for conversion into a judgment at the instance and application of the advocate only subject to retainer being in dispute.

10. The procedure of upsetting a certificate of taxation once issued is provided under Rule 11 of the Advocate, Remuneration Rules. In this matter therefore, it is not undisputed that a Bill was presented in the manner prescribed, taxed and a certificate of costs issued. That certificate has become final on the question of quantum or measure of the costs between counsel and his client unless an appropriate reference be lodge and determined to the contrary.

11. I understand the law to provide that once a certificate of costs has become final then unless there be disclosed a dispute as to retainer, the advocate is entitled to judgment.

12. The client/Respondent through Mr. Okelo Advocate however contended otherwise. In his submissions the counsel contend that the Application as presented is not a way of commencing a suit and relied on the provisions of section 2 Civil Procedure Act, which defines a suit as:-

“suit” means all civil proceedings commenced in any manner prescribed”.

13. That position cannot be right on two grounds. The first ground is the fact that Section 51 Advocates Act provide for the mode of instituting a suit for recovery of costs where there is no agreement on remuneration. It thus cannot be denied that a filling a bill of costs is a miscellaneous application is one of the ways prescribed by statute.

14. The second reasons is that the Advocates Act is a complete code on matters of dispute between advocate and client and

concerning issues of costs and there is no room to invite the general provisions under the Civil Procedure Act. In *Machira vs Arthur K. Magugu, [2012] eKLR*, the Court of Appeal said:

“With regard to advocates bills of costs, we agree with Ringera J in Machira vs Magugu (1) that the Advocates Remuneration Order is a complete code which doesn’t provide for appeals from the taxing masters decisions. Rule II thereof provide for ventilation of grievances for such decisions through references to a judge in chambers”.

15. In the context of this matter I do find that the suit was properly filed by a miscellaneous application and there being a certificate of costs which has become final the proper way to seek judgment is by an application under Section 51(2) and not by a separate suit.

16. I do find that the objection that the Advocate needed to file a fresh suit to recover taxed costs where retainer has not been contested is not supported by any law cited or known to me and I refuses to accept that argument.

17. That having been the only basis of resisting the application, and without any attempt to dispute instructions to the Advocate/Applicant, the application passes as unopposed and I accordingly allow it as prayed. I enter judgment for the Advocate/Applicant in the sum of Kshs.200,481.04 with interest thereof at 14% in terms of Rule 7, Advocate Remuneration Rules from the 16/9/2012 till payment in full.

18. Noting that this is a determination on judgment on costs and further that additional costs have been incurred after taxation, and in order to avoid any attempt at further requests for taxation on the costs of the Application, I award to the Advocates/Applicant costs of the application in the sum of Kshs.10,000/= all inclusive.

19. That should rest the matter but, I owe it to the profession to try and pronounce myself on when an advocate must file a suit for recovery fees due from a client under the Act and the Order. Having read PART IX of the Advocates Act and the Advocate (Remuneration) Order, my view is that an advocates is only obligated to file a suit in the following circumstances:-

- **Where there is an agreement on remuneration under section; 45 in which event the suit is for a liquidated sum**
- **Under section 48 and 49 of the Act where there is no remuneration agreement, costs have been taxed but the client disputes having retained the advocate in the matter. In this situation, the suit would be largely to establish whether or not there existed a retainer.**

20. Orders accordingly.

Dated and delivered at Mombasa this 27th day of July 2018.

P.J.O. OTIENO

JUDGE