



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**FAMILY DIVISION**

**MISCELLANEOUS APPLICATION NO. 33 of 2016**

**OMOLLO ONYANGO & COMPANY ADVOCATES.....APPELLANT**

**VERSUS**

**NZINGO MAURER aka ZENA.....RESPONDENT**

**RULING**

1. By an application dated 8.2.18, Omollo Onyango & Company Advocates the Applicant seeks that judgment be entered in its favour against Nzingo Maurer **aka Zena, the Respondent** in the sum of Kshs. 2,053,805.80 as per the Certificate of Costs dated 22.11.17.

2. The Certificate of Costs was issued pursuant to the taxation of an Advocate/ Client bill of costs dated 10.10.16 in respect of Citation No. 1 of 2015 and Succession Cause No. 43 of 2014, estate of Anthony Paul Pape. No reference has been filed by the Respondent in respect of the Certificate of Costs nor has the same been set aside.

3. The Application is opposed by the Respondent through her grounds of opposition dated 17.10.18. According to the Respondent the Application is misconceived, fatally defective, bad in law, incompetent and a gross abuse of the Court process. The orders sought cannot be granted as the Applicant ought to have moved the Court vide a suit against the Respondent. The Respondent prayed that the Application be dismissed with costs.

4. It was submitted for the Applicant that the bill of costs was defended by counsel for the Respondent. In a ruling of 27.11.17, the taxing officer awarded to the Applicant the sum of Kshs. 2,053,805.80. To date the bill has not been challenged by way of reference or by setting aside of the same. The Applicant thereafter obtained the certificate of costs The Applicant has not been able to proceed with execution as there is no decree and hence the Application for judgment in terms of the certificate of costs.

5. For the Respondent, it was submitted that as per Section 51(2) of the Advocates Act, once a certificate of costs is issued, it is a final pronouncement of the taxing officer. The Applicant should rely on Section 48 and 49 of the Act. To the Respondent, the Applicant ought to have filed a suit to obtain a decree executable against the Respondent. The orders sought in the Application as presently drawn under the laws cited cannot be granted.

6. It is not disputed that a bill of costs was filed, heard and determined and a certificate of costs in respect thereof issued in favour of the Applicant. The Application is expressed to be brought under the provisions of Sections 1A, 1B, 3A and 5(2) of the Civil Procedure Act. To begin with, there is no Section 5(2) in the Civil Procedure Act. Further, the law on taxation of bills of costs is contained in the Advocates Act and the Advocates Remuneration Order. The Applicant seeks that judgment be entered in its favour in terms of the certificate of costs issued pursuant to the bill of costs filed against the Respondent. Does failure to cite the provisions of the Advocates Act render the Application incompetent? In my view, the omission is a procedural technicality which can be cured by Article 159(2)(d) of the Constitution of Kenya 2010 which enjoins this Court to administer substantive justice without undue regard to procedural technicalities;

7. Section 51(2) of the Advocates Act provides as follows:

***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.***

8. The certificate of costs issued by the taxing officer in favour of the Applicant herein has neither been set aside nor altered by the Court. As per the foregoing provision, the certificate of costs is final as to the amount covered thereby. The provision empowers the Court to make such order as it thinks fit, including an order that judgment be entered for the sum certified to be due with costs.

9. The Respondent argued that the Applicant ought to have filed a suit for the recovery of its costs under Section 48 of the Advocates Act. It

is clear that the Applicant elected to file a bill of costs and seek judgment in terms of the Certificate of Costs dated 22.11.17. Having so elected, the Applicant cannot be compelled to file a suit under Section 48 of the Advocates Act. In M/S Lubulellah & Associates Advocates v N.K Brothers Limited [2015] eKLR, Kamau, J. had this to say on this issue and I concur:

*The Applicant herein opted not to file a suit for recovery of its costs as provided for under Section 48 of the Advocates Act. It applied for taxation of its Bill of Costs in accordance with Section 51(2) of the said Act. The Applicant was therefore under no obligation to comply with the provisions of Section 48 of the Act by filing a suit for the recovery of its costs against the Respondent herein.*

10. In the premises, this Court finds that the Application dated 8.2.18 has merit. Judgment is hereby entered in favour of the Applicant as against the Respondent in the sum of Kshs. 2,053,805.80 as per the Certificate of Costs dated 22.11.17. Each party to bear own costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 30<sup>th</sup> day of November 2018**

\_\_\_\_\_

**M. THANDE**

**JUDGE**

In the presence of: -

.....for the Appellant

.....for the Respondent

.....Court Assistant