



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CIVIL APPLN NO. 95 OF 2016

MWANGI GITAU & COMPANY ADVOCATESAPPLICANT

VERSUS

ESTHER WAMBUI NJOROGE.....RESPONDENT

RULING

1. In the Notice of Motion dated 21st October 2016, the law firm of *Mwangi Gitau & Company Advocates* which is the applicant herein seeks that judgment be entered in its favour against the respondent in the sum of KShs.362,052 being taxed costs in an Advocate/ Client Bill of costs dated 9th March 2016 together with costs and interest.

2. The motion is expressed to be anchored on *Section 51 (1) and (2) of the Advocate's Act and Order 50 Rule 1 of the Civil Procedure Rules*. It is based on grounds that the advocate/client bill of costs was taxed on 28th September 2016 for KShs.362,052; there is no alteration to the certificate of taxation and the retainer is not disputed. These grounds are reproduced in the averments made by the advocate *Mr. Joseph Mwaniki Gitau* in the supporting affidavit sworn on 21st October 2016. A copy of the certificate of taxation dated 10th October 2016 is annexed to the supporting affidavit.

3. The motion is opposed through grounds of opposition filed on 10th September 2018. The points taken in opposition to the application are that the application is defective, misconceived, and unmerited because the certificate of taxation dated 10th October 2016 is not certified as a true copy of the original and it is not a final determination of the costs due to the applicant; that this court lacks jurisdiction to enter judgment summarily as prayed through the application as the applicant's remedy lies in filing a formal suit for recovery of the sums claimed and finally, that the applicant's retainer to act for the respondent is disputed.

4. When the application came up for hearing on 9th October 2018, parties agreed to have it canvassed by way of written submissions. The applicant filed its submissions on 25th October 2018 while those of the respondent were filed on 8th November 2018.

5. I have carefully considered the application, the supporting affidavit and the annexure thereto, the grounds of opposition filed by the respondent, the rival written submissions filed by counsel on record for each party and all the authorities cited. Having done so, I find that the following three key issues emerge for my determination:

- i) Whether the court has jurisdiction to enter judgment as prayed under *Section 51 (2) of the Advocates Act*;
- ii) If the answer to (i) above is in the affirmative, whether the certificate of taxation dated 10th October 2016 is incompetent and whether it is final on the costs due to the applicant;
- iii) Whether the applicant's retainer by the respondent is disputed.

6. On the first issue, the respondent has submitted that this court lacks jurisdiction to enter judgment as sought in the instant application since in her view, *Section 51 (2) of the Advocates Act* does not make it mandatory for judgment to be entered in favour of an advocate on the basis of a certificate of costs issued by a taxing master. According to the respondent, the applicant's remedy lies in the filing of a substantive suit for recovery of the taxed amount as provided for under *Sections 48 and 49 of the Advocates Act* (the Act).

7. The applicant in response relied on the cases of *Ochieng Onyango Kibet & Ohaga Advocates V Adopt A Light K Limited, [2010] eKLR* and *Lubulellah & Associates Advocates V NK Brothers Limited [2015] eKLR* and submitted that the court has jurisdiction under *Section 52 (1) of the Act* to enter judgment as prayed and that the filing of a formal suit for the recovery of costs is not necessary.

8. To resolve this issue, it is important to reproduce the provisions of *Section 51 (2) of the Act* in order to appreciate its true import. The provision reads 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.”

9. From the above, it is clear that where an Advocate/Client bill of costs has been taxed and a certificate of taxation has been issued and the same has not been altered or set aside, the court has jurisdiction to enter judgment on the taxed costs provided that the retainer is not disputed. I agree with *Kamau J*'s holding in the *Lubullellah & Associates Advocates V NK Brothers Limited*, (*supra*) that a reading of the *Advocates Act* shows that an advocate who wishes to recover costs from his client can choose to either file a suit under *Section 48* or apply for taxation of his bill of costs and thereafter seek judgment under *Section 51 (2)* of the *Act*. It therefore follows that an advocate who has filed a bill of costs for taxation and the same is taxed and a certificate of taxation is issued does not need to file a suit against his client for recovery of his costs. In the circumstances, I find no merit in the claim that this court lacks jurisdiction to summarily enter judgment for the taxed costs claimed in the application.

10. Turning to the second issue itemized for determination, the respondent has claimed that the certificate of taxation dated 10th October 2016 is not competent and cannot form the basis of entry of judgment in favour of the applicant because it is not a certified copy of the original and secondly, it is not final as to the costs due to the applicant allegedly because it was not issued by the taxing officer who taxed the bill of costs in respect of which it was issued.

11. I have perused the certificate of taxation annexed to the applicant's supporting affidavit. I note that it is indeed true that it is a copy which is not certified as a true copy of the original certificate of taxation dated 10th October 2016. However, I have noted on perusing the court record that the original certificate of taxation aforesaid is part of the court record and is available for the court's perusal. In determining the application, the court will be guided by the said original certificate of taxation and not the copy annexed to the application.

12. Regarding the claim that the certificate of costs is not final as it was allegedly not issued by the taxing master who taxed the bill of costs in question, I can only refer to the ruling and reason for taxation which the respondent obtained from the taxing master before filing a reference challenging the award of the taxing master. The ruling and reason for taxation dated 28th September 2016 shows clearly that the bill of costs was taxed by *F. Rashid*, the court's Deputy Registrar who also issued the certificate of taxation dated 10th October 2016 though the initial to her first name is not included in the certificate. The omission of letter 'F' in the certificate of taxation does not by itself mean or prove that the certificate was issued by a different taxing officer. It is a settled principle of the law of evidence that he who alleges must prove. The respondent having alleged that the certificate of costs was issued by a taxing officer different from the one who taxed the bill of costs had the burden of proving that allegation. The respondent has not adduced any evidence to discharge that burden.

13. In view of the foregoing, there is no basis upon which this court can make a finding that the certificate of taxation issued in respect of the taxation of the applicant's bill of costs is incompetent. I also find no basis to make a finding that the certificate of taxation is not final within the meaning of *Section 51 (2)* of the *Act* for the following reasons; First, there is evidence on record to confirm that the reference filed by the respondent challenging the award of costs to the applicant was dismissed by *Hon. Mbogholi Msagha J* on 12th June 2016. The respondent has not availed any evidence to show that the same was ever altered or set aside as she has not availed any evidence to prove that she applied for a review of the said ruling or that she filed an appeal against it to the Court of Appeal.

14. Lastly, regarding the claim that the applicant's retainer is disputed, it is my view that whether or not an advocate's retainer is disputed is a question of fact which must be proved by evidence to that effect. In this case, the respondent did not annex any evidence to her replying affidavit to avail prove that the applicant's retainer to represent her in the primary cause was disputed. The claim was only made in the grounds of opposition. The ruling on taxation delivered by the taxing master on 28th September 2018 and the reference subject matter of this court's ruling dated 12th June 2016 did not have any indication that the applicant's retainer was challenged or disputed by the respondent in any way.

15. In the reference made by way of a Notice of Motion dated 2nd February 2017, the respondent only challenged the amount of costs taxed on instruction fees on grounds that the amount was manifestly excessive. If the applicant's retainer was disputed, one would have expected the respondent to raise the matter in her opposition to the bill of costs or in her reference objecting to the taxation of the bill of costs.

Given the foregoing and in the absence of any evidence to the contrary, I am unable to find that the applicant's retainer is disputed as alleged by the respondent.

16. For all the foregoing reasons and findings, I am satisfied that the applicant's Notice of Motion dated 21st September 2016 is merited and it is hereby allowed in terms of prayer 1 with the result that judgment is hereby entered for the applicant against the respondent in the sum of KShs.363,052 being the taxed costs certified in the certificate of taxation dated 10th October 2016. The amount shall attract interest at court rates from today's date until payment in full.

17. The applicant is also awarded costs of the application.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 20th day of December, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Ms Ambuko holding brief Mr. Kangethe for the respondent

No appearance for the applicant

Ms Kavata: Court Assistant