



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL AND COMMERCIAL DIVISION
HC. COMM. MISC. NO. 417 OF 2016

O.M ROBINSON & CO. ADVOCATES.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT

RULING

1. Through an application dated 9th December 2016 brought under the provisions of Section 51 (2) of the Advocates Act and Order 51 rule 1 of the Civil Procedure Rules, the applicant seeks the following orders:-

(i) That judgment be entered for the applicant against the respondent for Kshs.417,117.96/= being the sum taxed and certified by the Deputy Registrar on 31st August, 2016 as due to the applicant together with interest thereon; and

(ii) Costs of the application.

The application is supported by the grounds on the face of it and the affidavit of Robinson Onyango Malombo sworn on 9th December, 2016. The respondent on 8th March, 2017 filed a replying affidavit sworn by Jimmy Waliaula on 7th March, 2017 to oppose the application.

2. Mr. Malombo Advocate, appeared in person and urged the court to enter Judgment for the sum of Ksh. 417,117.96 as taxed and certified by the Deputy Registrar. This was pursuant to instructions by the respondent to the applicant to represent it in HCC. Miscellaneous application No. 2580 of 2011, Alice Karuko Kava vs Municipal Council of Mombasa & Another.

3. He sought to amend the "certificate of costs" issued on 8th September, 2016 attached to his affidavit to read "certificate of taxation". On the issue of retainer addressed in paragraph 7 of the replying affidavit, Mr Malombo submitted that Section 59 of the Urban Areas and Cities Act provides that any legal right accruing to any local authority will continue and as such, any proceedings commenced during the existence of defunct local authorities will be sustained by the County Governments.

4. Counsel also addressed the issue raised by the respondent's Counsel as to whether a certificate of taxation can be enforced by way of a Notice of Motion or through the filing of a plaint. He argued that Section 51 (2) of the Advocates Act provides for finality of a certificate of taxation unless altered or set

aside. Mr Malombo informed the court that he opted to go by way of filing a Notice of Motion. He referred the court to the annexure marked "A" attached to his supporting affidavit wherein the Deputy Registrar states that she was satisfied that the Bill of costs was duly served. He prayed for the application to be allowed with costs.

5. Mr. Mohammed, Learned Counsel for the respondent opposed the application. He submitted that the provisions of Section 51 (2) of the Advocates Act should be read together with Section 48 of the said Act. Thus the reason he were submitting that the application was incompetent and that the applicant ought to have filed a plaint. Counsel further stated that the issue of a retainer under Section 51 of the Advocates Act is applicable as the applicant was instructed by the defunct Mombasa Municipal Council.

6. The court was referred to the provisions of Section 35 of the Transition to the Devolved Government Act which provide that all liabilities should be addressed to the Transition Authority which should instruct the relevant body to take up the said liability. He prayed for the application to be dismissed with costs.

7. In response to the foregoing, Mr Malombo submitted that the Transition Authority's role was to undertake on audit of all assets and liabilities of local authorities. He submitted that the Urban Areas and Cities Act is the operative Act and all assets and liabilities of the defunct local authority befall the current county Government.

ANALYSIS AND DETERMINATION

The issue for determination is if the respondent is liable to pay the sum in issue.

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

“The certificate of a taxing officer by whom it 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. Section 48 of the Advocates Act states as follows:-

"1. Subject to this Act, no suit shall be brought for the recovery of any costs due to an Advocate or his firm until after the expiry of one month after a bill for such costs, which may be in summarized form, signed by the advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause to be verified by affidavit filed with the plaint, for believing that the party chargeable therewith is about to quit Kenya or abscond from the local limits of the court's jurisdiction, in which event action may be commenced before expiry of the period of one month.

2. Subject to subsection (1), a suit may be brought for the recovery of the costs due to an advocate in any court of competent jurisdiction.

3. Notwithstanding any other provisions of this Act, a bill of costs between an advocate and a client may be taxed notwithstanding that no suit for recovery of costs has been filed.”

10. The provisions of Section 48 do not provide that a suit in which a request for Judgment for costs is made must be instituted by way of a plaint, save in instances where there is reasonable belief on the part of an Advocate that a party who has not paid costs is about to quit Kenya or abscond from the court's jurisdiction. Section 2 of the Civil Procedure Act provides that **a suit "means all civil proceedings commenced in any manner prescribed."**

11. It is a rule of practice for Advocates to file applications by way of Notices of Motion moving the court to enter judgment after taxation of Bills of costs and issuance of a certificates of taxation. The

foregoing ensures that the process is expeditions or else Advocates would have to wait for long durations of time if they were to undergo the rigours of a full trial before payment of their costs. There is therefore nothing amiss in the applicant moving the court as he has by way of a Notice of Motion. In this case, the certificate of taxation was neither set aside nor was a reference filed to challenge the decision of the Taxing Master.

12. On the issue of whether the County Government of Mombasa should be held responsible for the liability incurred by the defunct Municipal Council of Mombasa, the answer lies in Section 59 of the Urban Areas and Cities Act which provides as follows:-

“Any legal right accrued, cause of action commenced in any court of law or tribunal established under any written law in force, or any defence, appeal or reference howsoever filed by or against any local authority shall continue to be sustained in the same manner in which they were prior to the commencement of this Act against a body established by law.”

13. The foregoing provisions cannot stand on their own and be of meaningful effect without reference to the provisions of Section 33 of the Sixth Schedule of the Constitution of Kenya which provides:-

“An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same name or a new name.”

14. Section 6 of the said Schedule provides that all rights and obligations of the Government or the Republic and subsisting immediately before the effective date shall continue as rights and obligations of the national government or the Republic under the Constitution. Section 33 of the 6th Schedule of the Constitution is however an exception to the provisions of Section 6. As such, legal rights and liabilities that befell the defunct local authorities are sustainable against their successors who are unmistakably, the County Governments.

15. Mr. Mohammed made reference to Section 35 of the Transition to the Devolved Government Act when submitting that liabilities should be addressed to the Transition Authority. This court notes that the Transition Authority had an obligation to determine the transfer of functions from the national to county governments and to ascertain the assets and liabilities held by the defunct local authorities. The said Authority is no longer in existence as its term elapsed and even if it was in existence, it would have no powers to settle the liability herein. Its powers were very specific and time bound.

16. In the case of **Republic vs Town Clerk of Webuye County Council & Another** HCC 448 of 2006, Majanja J., after considering the provisions of Section 59 of the Urban Areas and Cities Act as read with section 33 of the Sixth Schedule of the Constitution stated thus:-

“the County is the legally established body unit contemplated under the law that takes the place of local authorities unless there is a contrary enactment. I therefore find and hold that the proceedings against Webuye Town council and its officers must continue against Bungoma County which must now bear the burden of the judgment. The court cannot grant orders incapable of enforcement as the Town Council and Town Clerk no longer exist.”

17. Kasango J., cited the above decision with approval in **Argos Furnishers Ltd vs Municipal Council of Mombasa**, HCCC No. 13 of 2008, where she stated as follows:-

“Pursuant to the provisions of the said Section 33 of the sixth schedule to the Constitution of Kenya, 2010 County Governments are therefore the natural and presumptive legal successors of the defunct local authorities.”

18. The respondent’s counsel has not submitted on any new factor that was not considered in the foregoing decisions that would persuade me to arrive at a different decision in this matter. The end result

is that the applicant has satisfied this court that he is entitled to the orders sought as per the certificate of taxation issued on 8th September, 2016.

19. I therefore enter Judgment for the applicant as against the respondent for the sum of Ksh 417,117.96/= as prayed. I also award costs and interest to the applicant.

DELIVERED, DATED and SIGNED at MOMBASA on this 27th day of April, 2017.

NJOKI MWANGI

JUDGE

In the presence of:

No appearance for the applicant

Mr. Owino holding brief Mr. Mohammed for the respondent

Mr. Oliver Musundi - Court Assistant