



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CIVIL CAUSE NO. 15 OF 2016

OTIENO RAGOT & CO. ADVOCATES ADVOCATE/APPLICANT

VERSUS

NATIONAL BANK OF KENYA LIMITED CLIENT/RESPONDENT

JUDGMENT

Before me is the Advocate's Notice of Motion dated 15th December 2016 seeking orders that the Certificate of Costs herein be adopted as a judgment in favour of the Advocate against the Defendant for Kshs.489,401/60 together with costs at 14% per annum from 1st March 2015 until payment in full.

The application was opposed on the ground that there was a retainer agreement between the Advocate and the Client and as such the costs should be based on the agreement.

Mr. Otieno D, appearing for the Advocate urged this Court to find as it did in another matter that the issue of a retainer agreement could not be raised at this stage but rather that it ought to have been raised during the taxation. He contended that as the bill had been taxed and no reference had been filed then judgment ought to be entered for the Advocate in terms of the Certificate of Costs. He also contended that the Advocates Act and Remuneration Order are a complete Code that determines how the relationship between an Advocate and the Client is to be determined. He further submitted that this is not one of those causes which were stayed by the Court of Appeal; that as there is a Certificate of Costs this Court has no alternative but to enter judgment as prayed.

Mr. Orieyo, for the Client, relying on an affidavit sworn by one Steven Oigo dated 31st March 2017 urged this Court to find first there was a retained agreement between the parties and secondly that this matter was among those stayed by the Court of Appeal and hence decline to grant the application.

I have perused the file carefully and I have not found the order that is said to have stayed this matter. I shall therefore proceed to consider the application.

Mr. Otieno D, Advocate has submitted that once a Certificate of Costs signed by the taxing officer is issued this Court has no alternative but to enter judgment under Section 52(1) of the Advocates Act. I beg to differ. Section 51(2) of the Advocates Act states:-

“51(2) The certificate of the taxing office 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.”

A reading of this section clearly indicates first that the Certificate of Costs is only final unless set aside by the court and secondly that it is not mandatory that the court enter judgment in terms of the certificate. This Court can therefore set aside the Certificate of Costs herein even at this stage. If I remember well in the matter referred to by Counsel for the Advocate this Court only entered judgment for the Advocate, despite there being an agreement for costs, because firstly, Counsel for the Client had expressly consented to the taxation and some of the costs before the taxing officer and secondly when they appeared before me the same Counsel consented to the entry of judgment in terms of the Certificate of Costs. In that cause I held that Counsel for the Client having consented to the entry of judgment could then not be heard to argue that there was already an agreement for fees. That is not the same scenario here. In this cause I note there is a Notice of Motion by the Client seeking to stay execution of the costs awarded herein and also asking this Court to cap the bill of costs in accordance with the retainer agreement. Much as it may not be a reference its effect were it to be canvassed would be similar to that of a reference as this Court could be persuaded to set aside the certificate. Indeed I do find that there is reason to do so. Among the documents annexed to the application is an agreement for fees between the Advocate and the Client herein. The agreement is dated 1st April 2005 and was accepted by the Advocate in their letter dated May 3, 2005 which is also annexed. The said agreement capped the fees for non-contentious work to 30% of the scale fees subject to a limit of 300,000/= and states that the balance may be recovered directly from the Bank's customer. The same is also said of the fees for contentious work. The agreement gives the Advocate discretion to ask for a further fee of 30% directly from the Bank in contentious matters whenever full recovery is made. Section 45 of the Advocates Act renders such agreements binding on the parties. The Advocate herein is therefore bound by the agreement and should the argument be that the agreement is invalid by dint of Section 46(d) of the Act the Court of Appeal in **Njogu & Company Advocates V. National Bank of Kenya Limited [2016]eKLR** held:-

***“26. In our view an advocate who willingly and knowingly enters into an agreement in regard to the payment of his fees that is contrary to the Advocates Remuneration Order, cannot maintain proceedings whose purport is to avoid the illegal agreement by reverting to the court to tax his advocate/client bill of costs in accordance with the Advocates Remuneration Orders. We concur with the Learned Judge that the appellant having made his bed must lie on it. That is to say that notwithstanding the illegality of the contract, this Court cannot come to the appellant's aid as the appellant is estopped by his conduct from seeking the Court's intervention*”**

In **Wanga & Company Advocates V. APA Insurance Company Limited** a Legal Notice had not been brought to the attention of the Judge by any of the parties and leave was not sought to introduce it in the Court of Appeal and for that reason the Judges rejected arguments based on it. Here we have an agreement for fees that was well within the knowledge of both the Client and the Advocate and is therefore not a new issue. It has been raised before this Court and as we have seen Section 51(2) of the Advocates Act power to set aside a Certificate of Costs. I am satisfied that there are sufficient grounds to set aside the Certificate of Costs herein. Accordingly the application by the Advocate for judgment in terms of the certificate is dismissed and the bill of costs is remitted to the taxing officer to tax it in accordance with the agreement between the parties. The Advocate shall bear the costs of this application. It is so ordered.

E. N. MAINA

JUDGE

30/5/2017

Ruling signed, dated and delivered in open court in presence of:-

Mr. Otieno D for the Advocate/Applicant

N/A for Client/Respondent

Serah Sidera - Interpreter

MR. OTIENO D: May I pray for leave to appeal.

COURT: Leave is granted.

E. N. MAINA

JUDGE

30/5/2017