



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
MISCELLANEOUS CIVIL APPLICATION NO.170 OF 2006

MERCY NDUTA MWANGI T/A

MWANGI KENGARA & CO.ADVOCATE.....ADVOCATE/APPLICANT

VERSUS

INVESCO ASSURANCE CO. LIMITED.....CLIENT/RESPONDENT

RULING OF THE COURT

1. The Advocate/Applicant has filed a Notice of Motion dated 6/2/2017 seeking for the following prayers:-

(a) That judgment be entered for the taxed Advocate/Client costs of Kshs.36,679/= contained in the Certificate of Taxation dated 5/12/2016 with interest thereon at the rate of 14% per annum with effect from 17/11/2006 (being the date of service of the bill of costs) until payment in full.

(b) That the costs of this Application and the suit be awarded to the Advocate/Applicant.

Application is supported by an affidavit of Mercy Nduta Mwangi Advocate sworn on even date and further on the following grounds:-

(a) That the Applicant was issued with a Certificate of Taxation for her costs in MACHAKOS HC MISC. 170 OF 2006 on 15/12/2016 for Kshs.36.679/=.

(b) That a notice to charge interest at the rate of 14% per annum on the Advocate/Applicant's unpaid legal fees was served upon the Client/Respondent on 20/1/2017.

(c) That the Certificate of Taxation dated 5/12/2016, has hitherto not been set aside or varied through an order of this Honourable Court.

(d) There is no dispute on retainer.

(e) That no payment has been made by the Client/Respondent towards settlement of the Certificate of Taxation dated 5/12/2016.

(f) That it is in the interest of justice that the orders sought herein are granted.

2. The Application is opposed by the Client/Respondent. Several grounds of opposition were raised namely:-

(a) That the Application does not meet the mandatory requirement of Section 51(2) of the Advocates Act as there is a dispute as to the retainer.

(b) The Application is fatally defective in that the charging of interest only applies to matters whose instructions were given before the year 2014 and the law cannot be applied retrospectively.

(c) That the Advocate was fully paid in the primary suit that is the subject of this matter and is trying to hide behind the law in order to avoid accounting for the same.

(d) That there are triable issues that can only be heard and determined via viva voce evidence if the matter goes for trial.

(e) That the Application is frivolous, vexatious and fatally defective.

(f) That the Application is otherwise a gross abuse of the court process and is meant to circumvent justice.

(g) That the Application be dismissed with costs.

3. The Applicant's case is that her law firm had represented the Respondent in **Civil Suit No. 8 of 2005 at Kithimani Law Courts** and that subsequently thereafter had her Bill of Costs herein taxed by the Deputy Registrar and a Certificate of Taxation dated 5/12/2016 issued for the sum of Kshs.36,679/=. It is further the Applicant's case that the Bill of Costs was taxed in the presence of both counsels for the parties and that since the Respondent has neither set aside nor varied the said Certificate of Taxation, the Applicant should now be allowed to apply for judgment so as to recover the taxed costs.

4. The Respondent's case is that the Applicant had already been paid vide the primary suit and that the Application has not complied with the Provisions of Section 51(2) of the Advocates Act since there is a dispute on the retainer. It is further the Respondent's contention that there are triable issues that can only be heard and determined by way of viva voce evidence. Finally it is the Respondent's contention that the Application herein is meant to circumvent justice.

5. I have considered the Application, the Affidavit in support and annexures as well as the grounds of opposition. I have also considered the authorities cited herein. It is not in dispute that the Advocate's Bill of Costs was taxed by the Deputy Registrar with the participation of both counsels for Applicant and Respondent and a Certificate of Taxation was thereafter issued and is dated 5/12/2016. It is also not in dispute that the said Certificate of Taxation has neither been set aside nor varied by the court. That being the position, the Applicant was thus entitled under Section 51(2) of the Advocate's Act to apply for judgment of the taxed costs. The said Section 51(2) 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.

6. From the above Section 51(2) of the Advocates Act, three (3) conditions has to be met namely that there is a Certificate of Taxation by the Taxing Officer, the Certificate of Taxation has not been set aside or varied by the court and that the retainer is not disputed. Indeed the first two conditions herein appear not in dispute since the taxation exercise was carried out in the participation of both counsels for Advocates and client and the Deputy Registrar thereafter issued a Certificate of Taxation for Kshs.36,679/=. As regards the third condition, counsel for the Respondent has raised in its grounds of opposition that there is a dispute on the retainer and further that the issue herein should have been properly canvassed by way of viva voce evidence. It is noted that the Applicant's Application was not responded to by the Respondent in form of a Replying affidavit deponed by the client as to the issue of a

retainer or lack thereof. The Respondent should have at least deponed in a replying affidavit as regards the matter of a retainer. Again the Respondent's claim that the Applicant had been paid pursuant to the said retainer should have been canvassed during the taxation of the Bill of Costs. The Respondent had participated fully in the taxation without raising the issue now being raised. Further the Respondent had the option of filing suit for a declaration in which the issue of whether or not the Advocate had been paid pursuant to the retainer. The failure by the Respondent to seek to set aside or vary the Certificate of Taxation is a clear indication that there was no dispute as to a retainer. Again Section 51(2) of the Advocates Act did not provide for a procedure under which Advocates could seek to obtain judgments for taxed costs and therefore the mode adopted herein is not unprocedural in any way. Hence I find the Applicant has complied with the conditions of Section 51(2) of the Advocates Act. In any event, when it comes to taxation of any decree, the Applicant is under obligation to indicate and give credit for any sums received from the Respondent if any.

7. Finally, the Applicant has sought for interest on the taxed sums at 14%. The Applicant had already notified the Respondent over the issue of interest. Respondent's Counsel has objected to the issue of interest and pointed that interest could only be charged on matter whose instructions were given before 2014 and as such the law could not be applied retrospectively. The Applicant was retained vide a letter dated 16/6/2003 and instruction to take up the primary suit were given by Respondent to Applicant on 25/02/2005. It is thus clear that instructions were given before the year 2014 and therefore Applicant is entitled to interest.

8. In the result, it is the finding of this court that the Applicants' Application dated 6/2/2017 has merit. The same is allowed as prayed.

It is so ordered.

Dated, signed and delivered at Machakos this 22ND day of MAY 2017.

D. K. KEMEI

JUDGE

In the presence of:-

Kyalo for Miss Mwangi for Applicant

C/A: Kituva