



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION - MILIMANI
CIVIL SUIT NO. 172 OF 2014

WAIGANJO WAWERU & CO.APPLICANT

-VERSUS-

GRACE NJERIRESPONDENT

R U L I N G

1. This matter comes before the Court on the Advocate's Application dated 14th March 2016. The Application seeks orders for confirmation of costs pursuant to a Certificate of Taxation dated 7th March 2016. It seeks the following Orders:

(i) This Honourable Court be pleased to confirm the costs due to the Advocate/Applicant against the Client/Respondent as taxed and certified by the Certificate of Taxation dated 7th March, 2016.

(ii) This Honourable Court be pleased to enter Judgment in terms of the Certificate of Taxation dated 7th March, 2016 for Kenya Shillings One Hundred and Eighteen Thousand and Thirty (Kshs.118,030/-).

(iii) This Honourable Court be pleased to order that the said costs be paid with interest from 12th October, 2015 till payment in full.

(iv) Costs of the application and the suit be borne by the Defendant.

2. The Grounds relied upon are:

(i) The Advocate – Client Bill of Costs relating to **Milimani CMCC No. 5056 of 2010** was taxed on 12th October, 2015.

(ii) The taxing officer on 7th March, 2016 issued a Certificate of Taxation in **Misc. 172 of 2014** to Waiganjo Wachira & Co., the Applicant Advocates against the Respondent herein the sum of Kenya Shillings One Hundred and Eighteen Thousand and Thirty (Kshs.118,030/-).

- (iii) The Respondent has not challenged the Taxing Officer's Ruling on costs in this matter.
- (iv) The Certificate of Taxation has not been set aside or altered by any Court.
- (v) The fact that the Respondent retained the Applicant to act for her in **Milimani CMCC No. 5056 of 2010** and **High Court Civil Appeal No. 111 of 2011** has never been disputed.
- (vi) The Respondent has failed to settle the costs owing to the Applicant as taxed and certified.
- (vii) It is in the interest of justice that the application be allowed as prayed.

3. The Certificate of Taxation is dated 7th March 2016. It relates to a Bill of Costs lodged on 17th April 2014 and taxed on 12th October 2015. The record also includes an Affidavit of service showing that the notice of taxation was served on the Respondent. The sum allowed was Kshs.118,030/- only. The Record shows that there was no objection or challenge to the Bill of Costs. At the Taxation Hearing, the Respondent neither attended, nor was she represented by her Advocate.

4. As stated, The Application was filed on 15th March 2016. It was due to be heard on 18th April 2016. On 15th April, 2016 the Respondent filed a Notice of April 2016. On 15th April 2016 the Respondent filed a Notice of Preliminary Objection. That Notice was not served before the Hearing on 18th April 2016 but Counsel for the Respondent attempted to serve the Applicant in Court. "Service" in Court is not good service.

5. The Preliminary Objection is made in the following terms:

*(i) This matter arises out of **HCCA No. 111 of 2011** which is pending judgment before Hon. Justice Onyancha and it would be premature for the Honourable Court to allow execution of taxed bill of costs.*

(ii) Where there has been a change of advocates or more than one change of advocates, the advocate finally on the record shall draw a single bill for the whole matter in respect of which costs have been awarded. In this case it is M/s Anambo & Co. Advocates and not M/s Waiganjo Wachira Advocates who should draw, file and tax the bill of costs.

6. On 13th April the Respondent filed a Replying Affidavit. Unfortunately it was incorrectly entitled "SUPPORTING AFFIDAVIT" causing some confusion as to its purport.

7. The gist of the Respondent's opposition to the confirmation of costs are set out in paragraphs 3–6 of the Replying Affidavit, incorrectly entitled Supporting Affidavit. They can be summarised thus:

(i) The taxation arises out of **CMCC No. 5056 of 2010** which is the subject of an Appeal in **HCCA 111 of 2011**.

(ii) The Appeal is pending the judgment of Onyancha J.

(iii) The parties had agreed part payment/payment in instalments that could be set off against payments received.

(iv) It would be fair to await the outcome of the Appeal.

(v) The Respondent has asked for a review of the ruling of Hon. Wanjala dated 14th July, 2014.

There is nothing exhibited to show that the lower court acceded to either the Application for a Review or an Application for a stay.

8. The Parties have filed their Written Submissions and were accorded an opportunity to highlight their arguments. However, this is a matter that turns on its facts. It is common ground that the Applicant was engaged by the Respondent to provide professional services. Those included representation in **Milimani CMCC 5056 of 2010**. The matter went to Appeal. The Applicant says their services were dispensed with. The Respondent also states it went to appeal but leaves out the detail. It seems that the Applicant's services were in fact dispensed with. That detail is also omitted from the Replying Affidavit what is said is that the Advocate agreed to wait until the Appeal is concluded. The Applicant states in the Ruling of Hon. Ougo J it was held the former Advocate could sue for his fees. The Respondent's evidence is that the judgment on appeal has still not been delivered and will be delivered by Hon. Onyancha J. Hon. Onyancha J retired at the end of February 2016. He was on leave before that. There is no evidence before the Court as to when that is likely to happen, if ever.

9. Notwithstanding that the Respondent's version of events is implausible, the Applicant deals with the real issues in his Written Submissions. Principally that this is not an issue that is covered by **Section 62A** of the **Advocates Act** as it is not the bill of the Advocate with current conduct of the Matter. In **Macharia & Co. Advocates vs Arthur Magugu & Another Civil Appeal No. 199 of 2002** it was held that **Section 62 A(1)** does not apply to the advocate/client bill. An Advocate who has had his retainer terminated is entitled to immediate payment of his fees. He does not have to wait.

10. The Respondent then says the Advocate agreed to wait. She does not explain why he would make such an agreement and on what basis. Again it is implausible as the relationship had deteriorated. No estoppel argument was raised.

11. As it is abundantly clear and well known that the process of a Taxation culminates in a certificate of costs, the Respondent cannot have been taken by surprise by that outcome. The Respondent did not participate in that process. She did so willingly for more than 2 years ago. Nowhere was it said that the Applicant was estopped from going to taxation and/or claiming his costs because he was obliged to wait by operation of law and agreement. It is too late to raise that argument now. Even had it not been so, the grounds relied upon are not substantiated by any contemporaneous documentary proof of such agreement.

12. Section 51 of the Advocates Act deals with the question of remuneration of Advocates. Section 51(2) provides:

(2) 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.

13. The Respondent has not made any application to review or set aside. Therefore the Certificate is final. The argument put forward in the Submissions does not accord with the Preliminary Objection notwithstanding the Court's direction on that. It says the Respondent is prejudiced because she has to pay her Advocates. Those are services for which they were engaged. She has been the beneficiary of those services and the outcome of any proceedings does not detract from the fact that services rendered must be paid for. The Respondent's Submissions are asking the Court to stay execution. The process of execution has not commenced. There has been no act signifying the commencement of execution. There is no application for stay. In the circumstances that request is premature and speculative.

14. It therefore follows, and the Court Orders that:

- (1) The application to confirm the certificate is allowed; and
- (2) The Certificate is adopted as a Judgment of this Court;
- (3) The preliminary objection is dismissed;
- (4) Respondents to pay the Applicant's costs to be taxed if not agreed;

Order accordingly,

FARAH S.M. AMIN

JUDGE

Dated, signed and delivered on 17th May, 2017

In The presence of :

Court clerk: Patrick Mwangi

In Open Court No Appearance by either Party