



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL MISC. APPLICATION NO. 458 OF 2016

CONSOLIDATED WITH

COMMERCIAL MISC. APPLICATION NO. 459 OF 2016 & 460 OF 2016

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

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT

RULING

1. The three applications herein were filed on 9th December, 2016. They were consolidated on 25th April, 2017 and heard together. Save for the amounts claimed in the applications, the other prayers are similar in nature. In very brief submissions by Counsel on record, Mr. Mokaya, for the applicant sought judgment to be entered against the respondent in the three matters for the sums of money indicated in each application pursuant to certificates of taxation dated 30th September, 2016. He relied on the supporting affidavits of the applicant sworn on 9th December, 2016 and further affidavits sworn on 27th March, 2017.

2. Mr. Mohammed, Learned Counsel for the respondent opposed the applications and relied on the averments in the replying affidavits. He prayed for the applications to be dismissed with costs.

ANALYSIS AND DETERMINATION

3. In Mombasa High Court Commercial Misc. application No. 458 of 2016, the applicant seeks judgment in its favour as against the respondent for the sum of Kshs.316,171.80 being the sum taxed and certified by the Deputy Registrar on 21st September, 2016 together with interest. In his supporting affidavit, the applicant deposes that he was instructed by the respondent to represent it in Mombasa SRMCC No. 2347 of 2010, Municipal Council of Mombasa vs Mfaki Bin Kombo, which he did. A perusal of the said affidavit further states that the applicant filed a Client/Advocate Bill of Costs which was not contested by the respondent, hence the Taxing Master on 21st September, 2016 gave a ruling taxing the said Bill at Kshs.316,171.80 A certificate of taxation was issued on 30th September, 2016. A copy of the said certificate and ruling are attached to the supporting affidavit. The applicant deposes in the said affidavit that the certificate of costs (sic) was served on the respondent on 6th December, 2016 but it had failed to settle the amount due.

4. In Mombasa High Court Commercial Misc. application No. 459 of 2016, the applicant seeks judgment in its favour as against the respondent for the sum of Kshs.572,082.24 being the sum taxed by the Deputy Registrar on 21st September, 2016. The deponent states in the supporting affidavit that the respondent

instructed the applicant to act for it in Mombasa High Court Civil Case No. 145 of 2000, Harry Kitula Mumo vs Municipal Council of Mombasa & Amin Hassan Salim, which he did. The said affidavit further states that the applicant filed a Client/Advocate Bill of Costs which was not contested by the respondent, hence the Taxing Master on 21st September, 2016 gave a ruling taxing the said Bill at Kshs. 572,082.24. Thereafter, a certificate of costs (sic) was issued on 30th September, 2016. A copy of the said certificate and ruling are attached to the supporting affidavit. It is the applicant's deposition that the certificate of costs (sic) was served on the respondent on 6th December, 2016 but the respondent has not settled the claim.

5. In Mombasa High Court Commercial Misc. application No. 460 of 2016, the applicant seeks judgment as against the respondent for the sum of Kshs. 419,779.00 being the sum taxed by the Deputy Registrar on 21st September, 2016 as due to the applicant, together with interest thereon and costs. The deponent states in the supporting affidavit that his law firm was instructed to represent the respondent in Mombasa SRMCC No. 2731 of 2012, Municipal Council of Mombasa vs East African Gas Company Limited. He further deposes that his Client/Advocate Bill of Costs was not contested by the respondent thus the taxation and subsequent issuance of a certificate of costs (sic) on 30th September, 2016. The said certificate was served on the respondents on 6th December, 2016 but they had failed to settle the amount due.

6. The contents of the three replying affidavits filed on 8th March, 2017 by the respondent are similar. They were sworn by Jimmy Waliula who deposes that the certificate of costs (sic) is only final where it is not set aside or varied under a reference filed by the respondent for purposes of clarifying the claim against it. He further averred that the suit is fatally defective for failing to comply with the clearly laid out provisions of the Advocates Act and Advocates (Remuneration Order) requiring that a claim under a certificate of costs (sic) to be pursued through filing of a suit or the procedure under reference. The deponent further avers that the applicant was instructed by the defunct Municipal Council of Mombasa and not the respondent, thus the issue of retainer should be addressed first.

7. In the further affidavits filed in the three applications, the deponent therein reiterates that the respondent was served with Bills of Costs but failed to challenge the same. It is further deposed that the respondent took up liabilities of the defunct Municipal Council of Mombasa upon promulgation of the Constitution of Kenya, 2010 and the passing into law of the Urban Areas and Cities Act, No. 3 of 2011.

8. This court has looked at the provisions of Section 51 (2) of the Advocates Act. They provide 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 courts 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 in the manner he has done by way of Notices of Motion. In this case, the certificates of taxation were neither set aside by a court nor was a reference filed by the respondent 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. 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.”

16. A perusal of the taxation proceedings before the Deputy Registrar reveal that the respondent **failed to attend court despite having been notified of the date for taxation of the Bill of Costs. Secondly, if the respondent felt that no fees was due to the applicant on the basis of an agreement between it and him, it could have filed a suit for a declaration to that effect even before the said bill was taxed or it could have sought stay orders in the suit.** The respondent was also at liberty to file a reference to the High Court to contest the taxation of the Bill of Costs but it did not. It is too late in the day for it to raise an argument on a matter that squarely fell within its powers.

17. The upshot of the foregoing is that I enter Judgment in favour of the applicant as against the respondent as follows:-

(i) In Mombasa HC Commercial Misc. application No. 458 of 2016, for the sum of Kshs. 316,171.80;

(ii) In Mombasa HC Commercial Misc. application No. 459 of 2016, for the sum of Kshs. 572,082.24;

(iii) In Mombasa HC Commercial Misc. application No. 460 of 2016; for the sum of Kshs. 419,779.00; and

(iv) Costs are awarded to the applicant. Interest is also awarded to the applicant at court rates.

DELIVERED, DATED and SIGNED at MOMBASA on this 25th day of September, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms. Mwaka holding brief for Mr. Malombo for the applicant

No appearance for the respondent

Mr. Oliver Musundi - Court Assistant