



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL MISC. APPL. NO. 386 OF 2012**

**LUMUMBA MUMMA & KALUMA ADVOCATES.....APPLICANT**

**-V E R S U S -**

**ASHA AMADAHAN .....1<sup>ST</sup> RESPONDENT**

**HALIMA NAWA .....2<sup>ND</sup> RESPONDENT**

**RULING**

1) The subject matter of this ruling is the motion dated 19.8.2013 and taken out by the firm of Lumumba Mumma and Kaluma Advocates, the applicant herein, in which they sought for the following orders:

***1. Judgement be entered for the sum taxed and certified by the taxing officer on 9<sup>th</sup> day of July 2013.***

***2. The certified costs be paid with interest at the rate of 9% per annum from 11<sup>th</sup> July, 2012 being date of filing the bill of costs until payment in full.***

***3. The costs of this application be awarded to the applicant herein.***

2) The motion is supported by the affidavit of Thomas K'Bahati sworn on 19.8.2013. When served with the motion, Asha Ramadhan, the 1<sup>st</sup> respondent herein filed the replying affidavit she swore on 17.3.2017 to oppose the motion. When the motion came up for interpartes hearing learned counsels recorded a consent order to have the motion disposed of by written submissions.

3) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application. It is the submission of the applicant that the advocate/client bill of costs has been taxed and a certificate of costs issued which certificate has not been set aside. The applicant further argued that the retainer has not been disputed. It was also submitted that the client/respondent is yet to settle the bill therefore it is only just and fair to enter judgment as prayed to pave way for execution to recover the same from the client.

4) The 1<sup>st</sup> respondent is of the opinion that the motion is incompetent, untenable and bad in law since it is filed in a file which was primarily meant for the assessment of the advocates costs and once the same was done, no further proceedings can arise there from. This court was implored upon to find that if an advocate was to recover costs he must file a separate miscellaneous cause to enforce the certificate of costs. It is also pointed out by the respondent/client that the applicant did not take into account the retainer fee that was paid by the respondent. When she gave instructions in H.C.C.C no. 85 of 2008 therefore judgment should not be entered until that issue was sorted out. This court was beseeched to

allow the parties time to adjust their claims against each other.

5) Having considered the rival submissions and the material placed before this court, it is apparent that the clients/respondents do not dispute the fact that the advocate/client bill of costs was taxed and a certificate of taxation was issued. It is also not disputed that none of the parties has sought to impugn the decision of the taxing officer. The main issue raised and argued is a preliminary point of law. The question is whether or not a party can go back to the taxation file and file an application for entry of judgment. In my humble understanding, I do not think it is fatal if a party, like in this case, went ahead and applied for entry of judgement in the same file where costs have been taxed. I find the motion dated 19.8.2013 to be properly before this court.

6) Having determined the preliminary point of law, let me now focus my attention on the merits of the application. It is the respondent's view that the retainer fee already paid to the applicant has not been factored and deducted from the taxed bill of costs. In my humble consideration, I find the issue relating to retainer fee to be contentious. It is presumed that when parties appear before a taxing officer, they will bring out all their claims and counter-claims to be determined by the taxing officer. In this case, there is an assertion that the retainer fee was never canvassed before the taxing officer. In my view, the respondent lost that right to claim the retainer's fee at the taxation stage. It cannot be urged at this stage.

7) In the end, I find the motion dated 19.8.2017 to be well grounded. The same is allowed as prayed.

Dated, Signed and Delivered in open court this 19<sup>th</sup> day of October, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent