



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 245 OF 2014

CONSOLIDATED WITH

MISC. CIVIL APPLICATION NO. 244 OF 2014

V. CHOKAA & CO. ADVOCATES.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF MOMBASA as a Successor of

MUNICIPAL COUNCIL OF MOMBASA.....RESPONDENT

R U L I N G

1. By a notice of motion dated 25/1/2017 and filed in court on 29/6/2017, the Applicant/Advocate sought from the court orders that:-

i. That judgment be entered for the Applicant against the Respondent in the sum of Kshs.52,556.20 with interest therein at 14% per annum in accordance with the certificate of Taxation and issued hereon on 15/1/2017.

ii. That the costs of the Application be paid by the Respondent.

2. The application is premised on the provisions of section 51(2) of the Advocates Act and on grounds that the costs have been taxed and certificate of costs issued, the said costs remain unpaid and that there is no dispute as to retainer.

3. Similar application was made in Misc. No. 244/204 save that the certificate of costs sought to be converted into a judgment was issued in the sum of Kshs.91,592.20 on the 18/5/2017. If not for the sums and the dates, the applications and the affidavits in support are word for word the same hence it was by consent agreed that the same be consolidated and this ruling shall apply to both files.

4. The application was opposed by the client/respondent by the grounds of opposition dated 9/10/2017. In summary the points of opposition are that; there exist no legal basis from the application for judgment to be made in the same file in which the taxation was conducted and that the file became spent the moment its purpose, taxation of bill of costs, was concluded hence the proper and only avenue available to the Advocate/applicant is to file a fresh suit or cause.

5. On the date set for hearing Ms. Kimuli appeared for the Advocate/Applicant while Mr. Mwangunya appeared for the client/Respondent. Ms. Kimuli was very brief in her submissions to the effect that there being a certificate of costs which is yet to be challenged or set aside and there being no dispute as to retainer the matter ought to be moved towards conclusion by entry of judgment.

6. The counsel relied on the decision by Wakiaga J, in *Gachuri Kariuki & Co. Advocates vs Invesco Assurance Co. Ltd[2014] eKLR* for the prospect that where there is in existence a Certificate of taxation issued the only bar to entry of judgment is the existence of a dispute as to retainer. The same decision cites a decision by Ringera J in *H.O. Abuya t.a Abuya & Co. Advocates vs Kuguru Foods Complex Ltd NBI HCC Appl. No. 400 of 2001* in which the Judge said where there exists a certificate unaltered and no dispute as to retainer, there is no need to file a suit for recovery of costs.

7. The advocate then adopted the same submissions for Misc. Application No. 244/2014 and prayed that the two application be allowed as prayed.

8. For the Client/Respondent, Mr Mwangunya opposed the applications on the basis of the grounds of opposition filed and stressed that failure

to comply with the law render all actions a nullity. To him there exist no suit currently in the file to sustain the application as this file ended its purpose the moment the Deputy Register taxed the advocate/client costs on the 15/12/2016. He relied upon and cited to court the decision by *S.O. Okongo J, in Cyrus Minda t/a Minda & Co. Advocates vs Yunes Kerubo Oruta [2013] eKLR* for the proposition that neither order 49 Civil Procedure Act nor Rule 68A of the Advocates Remuneration Order empowers the court to enter judgment in a miscellaneous application in favour of an advocate on the strength of a certificate of Taxation. For that reason he prayed that the application be dismissed with costs and that the advocate takes advice on how to proceed in an appropriate manner.

Issues, Analysis and determination

9. The only issue for determination in this matter is whether or not there should be entered judgment on the basis and foot of the certificate of taxation. However before that is determined, there is the issue raised by the Respondent of whether or not the application has been appropriately brought having been filed in the file in which taxation was conducted.

10. I propose to decide on the propriety of filling the applications in the files on which the taxations were conducted and only if I agree on the propriety would I move to the substance of whether or not to enter judgment.

11. To this Court, the Advocates Act, on questions of taxation and recovery of taxed costs, is a complete code and does not require the invitation of other provisions of other legislation in that regard. In *Machira & Co. Advocates vs Arithur Magugu & Another NBI, Milimani HC Misc. Appl. No. 358 of 2001 [unreported]* Ringera J affirmed that position in very elaborate and explanatory manner.

12. In this matter, the Advocate/applicant did file the bill of costs on 31/7/2014 in the manner the court does not doubt resonates and complies with the dictates of Rule 13(3), Advocate Remuneration Order. There is to me no provision in the Act and the Rules that require that once a taxing officer issues a certificate then the advocate files a suit for recovery save for where there is dispute as to retainer in which event the suit filed after taxation would be largely for the determination of the question of retainer only. To this court the clear and directory provision in this regard is Section 51.

13. But, what would be the rationale for the submissions that one needs and must file a fresh suit only for seeking judgment on taxed costs even where retainer is not in dispute?

14. Mr. Mwangunya relied heavily and solely on the decision in *Cyrus Minda* (supra). I have had a chance to read my brother's decision and it is clear to me that application he considered was grounded upon the provisions of Order 49 Civil Procedure Rule and Rule 68A. Advocate Remuneration Order. It is also clear to me that the attention of the court was not drawn to the various decisions of the High Court and the Court of Appeal to the effect that the Advocates Act and the Rules made, thereunder is a complete code on matters of taxation and recovery of costs so taxed.

15. This could have ensued, owing to the fact that the judgment does not reveal that the issue of propriety of the application was brought up and addressed by the parties. Had that been canvassed I hold the view that the court's attention would have been drawn to the provisions of section 2 of Civil Procedure Act, defining a suit to be 'all civil proceedings commenced in any manner prescribed' and the prescription under Rule 13(3) that a bill of costs be filed in a miscellaneous cause. A marriage of the two provisions would lead one to the conclusion that a miscellaneous application for the taxation of costs is a suit and therefore one doesn't need to file yet another suit purely for purposes of obtaining a judgment. I hold the view that to accede to the position taken by Mr. Mwangunya in opposing the application, would be to act counter the provisions of Article 159(2) as well as those of the now pervasive provisions on the overriding objective of the court militating against escalation of costs and urging efficient use of judicial resources.

16. Additionally, I hold the view that unless there be a dispute as to retainer, the purpose of taxation is to ascertain the quantum of costs payable. Once that is resolved what remains to rest such a file would be the recovery of such costs. Recovery would invariably involve enforcement of a decision of a court. It is a dictate of the law that a suit for recovery of any adjudged entitlement is not to be done by a separate suit but in the same file in which the determination was made. That is the learning derived from the provisions of section 34 Civil Procedure Act.

17. This far, it is enough to say that it is not a requirement of the law that, where there exist no dispute as to retainer, an advocate who has had his costs taxed and a certificate issued, files a suit merely to pray and obtain judgment. If that were the position of law, the provision of section 51(2) of the Act would be irrelevant or merely otiose. I therefore determine that the application seeking judgment on the strength of Certificate of Taxation issued having been filed in the file in which the taxation was conducted was properly filed and that the file had not been spent upon taxation and prior to the said sums being paid out or recovered after judgment.

Should Judgment be entered?

18. Section 51(2) is couched in plain and unambiguous words. It provides:-

“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.”

19. I read and understand the provision to say that, it is the court, as defined by the Act, that reserves the right to alter or set aside the certificate of taxation and before it does so, the certificate of taxation is final as to the costs covered thereby, and it is also the court to make orders on such certificate, including an order for entry of judgment, unless there be raised a question as to retainer.

20. Before me has been exhibited certificates of taxation in the consolidated files. There was never any allegation that the certificate have been challenged nor was there a dispute as to retainer. That only means that the question as to how much cost is due and owing from the client to the Advocates has been made final and the court is duty bound now to make orders for purposes of resting the dispute between the parties. The order that recommends itself to the court, in those circumstances, is that a judgment be entered for the Advocate in terms of the Certificates of taxation dated 10/01/2017 in Misc. Application No. 245/2014 and 18/5/2017 in HC Misc. Application No. 244/2014.

21. On the 12/10/2017, when the two advocates appeared before court to argue similar applications in HC Misc. Applications No. 234 and 235 of 2014, it was by consent agreed that the determination in this files as consolidated, do bind those of the other two files.

22. On the basis of the consent, Judgment is entered for the Advocate/Applicant in those two other files in the sum certified in the certificate of Taxation. The sum for which judgment has been entered shall in terms of Rule 7, Advocate Remuneration Order, attract interest from the date of the Certificates of costs till payment is full.

23. This being a matter involving the sole issue of recovery of costs, and in order to avoid prospects of one seeking to recover the costs of proceedings after taxation in another litigation, and thereby setting in a chance of unending litigation, I award to the Advocate/Applicant the costs of proceedings after taxation in the sum of Kshs.5,000/= per file.

24. It is so ordered.

Dated and delivered at Mombasa on this 13th day of October 2017.

P.J.O. OTIENO

JUDGE