



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA

MISC. APPLICATION NO. 4 OF 2015

SHERWIN NJOROGЕ & ASSOCIATESADVOCATE/APPLICANT

VERSUS

BRIDGE INTERNATIONAL ACADEMIES LTD.....CLIENT/RESPONDENT

RULING

1. The applicant's Bill of costs filed by Sherwin Njoroge & Associates against the client Bridge International Academies on 25th February, 2015 was met by opposition through the client's replying affidavit filed on 13/4/15, ahead of the hearing slated for the 15th August 2015. The said Bill is herein after referred to as the first Bill of costs.
2. The respondent client took objection to the fact that the first Bill had not been filed by an a person recognised under the Advocates Act. No party appeared in court on the date set for the taxation but a further date was taken at the registry by the applicant on 15/4/15 for the bill to be taxed on 20/5/15.
3. On the latter date, again no party attended, but it does appear that the applicant subsequently fixed the matter for hearing on 24/7/15. I cannot however see the related registry minute in this regard on the record. However the record shows that on 8/7/15 the applicant filed a notice of withdrawal under Order 25 r 1 of the Civil Procedure Rules in respect of the Bill of costs and contemporaneously, before the withdrawal could be endorsed by the DR, the applicant filed a fresh Bill of costs dated 8th July 2015(the second Bill of costs.)
4. The client respondent also filed a Replying Affidavit to the latter Bill raising objections primarily similar to those earlier made. The respondent's counsel was advised by the taxing master on 15/9/15, the date to which the matter had been adjourned on 24/7/15, seemingly due to the absence of the applicant, to file a notice of preliminary objection. He duly complied and the matter was referred to this court. Subsequently, the parties agreed on 1.10.15 to dispose of the matter by way of written submissions.
5. From the notice of Preliminary Objection dated 21st September 2015 and submissions of the Respondent the gist of the Preliminary Objection is as follows:
 - a. That the first Bill of costs was not filed by a qualified person within the meaning of section 9 and 34 of the Advocates Act as the applicant did not hold a current practicing certificate on the material date.
 - b. That the said Bill of costs is therefore a nullity and is not available for withdrawal as sought under 025r1 of the Civil Procedure Rules. For this proposition, the Respondent relied on the case of *National Bank of Kenya versus Wilson Ndolo Ayah Civil appeal No. 119 of 2002. [unreported]*.

Secondly, the withdrawal of the said Bill was ineffective as the same had already been set down for hearing at the time of the filing of the Notice of Withdrawal.

- c. That the second Bill of costs was improperly filed while the first Bill was pending in court thereby duplicating proceedings in the same cause. The Respondent prays that both Bills be struck out with costs to the Respondent.

6. The Applicant filed grounds of opposition on 30th September 2015 and argued through the submissions dated 15th October 2015. It is the Applicant's position that the objection based on Order 9 of the Civil Procedure Rules was not substantiated but with regard to sections 9 and 34 of the Advocate's Act, it was argued that the advocate was entitled to act in person under order 9 rule 1 of the Civil Procedure Rules and that the right to pursue costs is not dependent on the advocates possession of a practising certificate. The applicant cited the decision in ***Mbugua and Mbugua Advocates versus Kenindia Assurance Co. Ltd (2006) eKLR*** in support of the latter proposition.

7. The applicant contends that he withdrew the first Bill in order to avoid the clients' "side shows" adverse to his Bill. That in light of the said withdrawal the second Bill is properly before the court. Citing the case of ***Edward A.H. Onyango versus Kenya Commercial Bank (2014) eKLR*** the Applicant has argued that a notice of withdrawal brought under Order 25 rule 1 of the Civil Procedure Rules is null and void when the suit has already been set down for hearing. The Applicant urged the court to dismiss the Preliminary Objection and to allow the second Bill of costs to proceed to hearing on merit.

8. Having considered the Preliminary Objection and related submissions, I am of the view that the following issues have been raised and require determination:-

1. Whether a Bill of costs is a suit capable of withdrawal under Order 25 Rule 1 of the Civil Procedure Rules.
2. Whether the first Bill of costs was filed by a qualified person.
3. Whether the first Bill of costs is a nullity or is indeed valid.
4. Whether the first bill was properly withdrawn under Order 25 Rule 1 of the Civil Procedure Rules.
5. Whether the second Bill of costs is properly before the taxing master and should proceed for taxation.

9. On the first question, I think the answer is partly found in Section 48 of the Advocates Act which provides 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 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 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. It is clear from subsection 3 above as read with Section 49 that the bill of costs forms the basis of a suit by an advocate against the client for the recovery of his costs and may be filed before, during or after the suit has been filed. A consent judgment in such suit may be entered by the parties before taxation of the Bill of Costs. The practice over the years has been for advocates to file their Bill of Costs and to have it taxed either by consent or through hearing before filing a recovery suit against the client.

11. The Bill of Costs is a demand which itemizes the costs claimed by an advocate from a client. The Bill of Costs is taxed in accordance with the applicable schedules and is subject to the current Advocates Remuneration Order. Stricto sensu, the Bill is therefore not a suit as such.

12. However, it would be unreasonable to suggest that because no specific provision provides for its withdrawal such withdrawal is not contemplated in the law and resort must be had to the Civil Procedure Rules. The possibility of withdrawal can be implied from the provisions of the Advocates Act that enable the filing of Bills for taxation.

13. The Bill filed by an advocate is an action in every sense but it is not a suit *pe rse* as defined under section 2 of the Civil Procedure Act, in light of the provisions of Section 48 and 49 of the Advocates Act. It is more of a pre-suit action. Thus I would hesitate to apply willy-nilly the provisions of the Civil Procedure Rules, including Order 25 rule 1 of the Civil Procedure Rules to a bill of costs filed under the Advocates Act.

14. I however find and hold that the advocate who files a Bill of costs is entitled to withdraw it subject to costs incurred by the client, on the basis that costs follow the event.

15. Turning to issues 2 and 3, it seems beyond question that at the time of filing the Bill of costs, the applicant did not possess a current practicing certificate for the year 2015. The explanation given by the Advocate for the withdrawal of the first Bill is to my mind a flippant one. He could not possibly have withdrawn the first bill to avoid “sideshows” when he contemporaneously filed the second Bill of costs alongside the notice of withdrawal.

16. Whether the applicant was an unqualified person at the time of the first bill which is therefore a nullity cannot be answered by relying on the authority of *Mbugua and Mbugua* cited by the Applicant, as the applicant therein indeed had a current practicing certificate at the time of filing the bill. Secondly, we had filed a recovery suit after taxation of the bill.

17. The Supreme Court’s recent decision that reversed the precedent in the case of the *National Bank of Kenya versus Wilson Ndolo Ayah civil Appeal No. 119 of 2002* (unreported) has illuminated the vexed questions raised by the application of section 34 of the Advocates Act, where advocates have drawn documents while not holding current practicing certificates.

18. In the case of *National Bank of Kenya Ltd versus Anaj Warehousing Ltd (2015) eKLR* the Supreme Court of Kenya observed as follows:

“[48]

The decision by the Appellant court in Ndolo Ayah was based on certain fundamental assumptions. The first of these was that the phrase “ an unqualified person” is synonymous with “an advocate without a practicing certificate”. On the face of section 34 (1) of the Advocates Act, this assumption is not without merit, especially taking into account the provisions of section 2 of that Act which defines “an unqualified person” as “ a person not qualified under section 9 to act as an advocate”.

Section 9 of the Advocates Act in turn provides that:

“... No person shall be qualified to act as an advocate unless

(a) he has been admitted as an advocate; and

(b) his name is for the time being on the Roll; and

(c) he has in force a practicing certificate “

19. The Supreme Court proceeded to state that the full purport of the above provisions could only be gathered by reading the provisions alongside Section 2 and Section 10 of the Advocates Act the latter which does not make reference to the requirement of a practicing certificate.

20. The Supreme Court then posed the following questions at paragraph 53:

“ What is the real intention of section 34 of the Advocates Act? Is it aimed exclusively at advocates “without practicing certificates”, or persons who are not advocates within the terms of section 2,12 and 13 (regarding qualification) of the Advocates Act? Does one cease to be “an advocate” on account of not taking out a practicing certificate? Or does one remain “an advocate” but “one who is not qualified to perform the tasks of an advocate”?.

21. At paragraph 55 the court stated:

“ The Appellate Court’s second assumption, in Ndolo Ayah, was that section 34 (1) of the Advocates Act had the effect of rendering all instruments of conveyance prepared by advocates without current practicing certificates, null and void for all purposes. It is now clear that such an assumption was not based on any express or implied meaning of section 34 or other provisions of the Advocates Act. In the reasoning of the Appellate Court, the ground for invalidating such documents rests in public policy...”

22. The Supreme Court categorized the ratio decidendi in the **Ndolo Ayah** case as the general “announced rule” which can in apposite situations be departed from. The Court concluded by stating that:

“ [68] the facts of this case, and its clear merits, leads into a finding and the proper directions in law, that, no instrument or document of conveyance becomes invalid under section 34(1) (a) of the Advocates Act, only by dint of it its having been prepared by an advocate who at the time was not holding a current practicing certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non- advocates or advocates whose names have been struck off the roll of advocates, shall be void for all purposes”

23. Applying the decision of the Supreme Court to the matter at hand, there is no dispute that the parties herein had a client- advocate relationship and that certain services were rendered by counsel on the basis of the said relationship. The advocate may not have held a practicing certificate at the time of filing his bill but he was not unqualified person in terms of Section 34 of the Advocates Act.

24. Secondly, the mere fact that he did not have a current practicing certificate did not invalidate the filed bill. Similarly in **Mbugua and Mbugua** the applicant had earned the costs but unlike the present case judgment had been entered for the advocate.

25. I am therefore wary of relying on the statement therein that the recovery of earned costs (by suit) was not dependent on whether or not the advocate had a practicing certificate. Suffice to say, with regard to the Applicant’s and Respondents authorities, that they have been overtaken by the Supreme Court decision in **National Bank of Kenya versus Anaj Warehousing**.

26. Consequently I do find and hold that the applicant was not an unqualified person as contemplated in Section 34 of the Advocates Act at the time of filing his Bill of Costs, and further that the first Bill of Costs, was not null and void; it was valid. However the said Bill, albeit withdrawn under the wrong provision of law must be deemed as properly withdrawn by implication by virtue of the provisions of Sections 48 and 49 of the Advocates Act.

27. Ideally, the notice of withdrawal ought to have been minuted for the signature of the Deputy Registrar before the second Bill of Costs was filed. That was not done in this matter but in my view the omission does not in any way prejudice the Respondent who had been served with the notice of the withdrawal.

28. Under the Remuneration Order however, a party seeking to alter a bill of costs must do so with the

consent of the adverse party or by leave of the court. The second Bill filed on 22/7/15 is a replica of the original Bill. It verges on abuse of the court process for the applicant to withdraw a bill of costs in reaction to obvious defects pointed out and for which he is culpable, only to file a similar one once he covers up the said defects. In this case, rather than admit the bill's shortcomings occasioned by his failure to secure a practicing certificate on time, the applicant resorted to the excuse that he was avoiding the Respondents "side shows".

29. The second Bill of Costs cannot be properly filed in the same proceedings wherein the initial Bill was withdrawn. Thus, it is my view that the said Bill of Costs is not properly on record and must be struck off.

30. Having so found, I order that the second Bill of costs be struck off with costs to the Respondent. To this extent the Preliminary Objection has succeeded.

31. However, I will order that all the costs occasioned by the Preliminary Objection be borne by the applicant as his failure to take out a practicing certificate promptly occasioned the Preliminary Objection

Delivered and signed in Naivasha this 23rd day of March, 2016

In the presence of:-

For the Applicant N/A

For the Respondent Mr. Gichuki holding brief for Mr. Mungai

Court assistant Baraza

C. W. MEOLI

JUDGE