



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISC. CIVIL APPLICATION NO. 130 OF 2015

IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER

AND

IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE & CLIENT

BETWEEN

FRANCIS M.O. KADIMA T/A

KADIMA & COMPANY ADVOCATESADVOCATE

AND

KHUNAIF TRADING CO. LTD. CLIENT

FROM

MOMBASA HIGH COURT CIVIL SUIT NO. 105 OF 2014

BETWEEN

KHUNAIF TRADING CO. LTD.PLAINTIFF

VERSUS

EQUITY BANK LTD & TREVO AUCTIONEERS.....DEFENDANTS

RULING

1. In a Notice of Motion application dated 5th of May, 2016 brought under order 51 rule 1 of the Civil procedure rules, sections 3, 63(e) of the Civil Procedure Act, rule 13A of the Advocates Remuneration order, section 51(2) of the Advocates Act and all other enabling provisions of the law, the applicant seeks the following orders:-

- (i) That the court be pleased to order that the certificate of costs for Three Hundred and Ninety One Thousand, Seven Hundred and Sixty One Shillings and Fifty Cents (Kshs.391,761.50) dated the 29th day of January, 2016, be entered as Judgment against the Respondent and the same executed (sic) as a decree of this court;

(ii) Interest do accrue at 9% from date of service of the decree upon the respondent; and

(iii) That the costs of the application be provided for.

The application is supported by the grounds on the body application and the affidavit of Francis Osundwa Kadima dated 5th May, 2016.

APPLICANT'S SUBMISSIONS

2. Ms Rajab, Learned Counsel for the applicant's submissions were concise and straight to the point. She prayed for Judgment to be entered in terms of the certificate of costs which was annexed to the supporting affidavit and marked as annexure 1. She also relied on the grounds in support of the application.

RESPONDENT'S SUBMISSIONS

3. Mr. Mwawasi, Learned Counsel for the respondent informed the Court that he relied entirely on the grounds of opposition filed on 29th June, 2016. These were to the effect that:-

(i) The application was not made in good faith;

(ii) The amount claimed arises out of a strictly fiduciary relationship and it ought not to be recoverable as an ordinary civil debt;

(iii) The orders sought herein would be highly prejudicial to the respondent if granted; and

(iv) The matter can best be sorted out amicably without further burdening and encumbering the justice system

ANALYSIS AND DETERMINATION

The issues for determination are:-

(i) If the certificate of costs in this case is final; and

(ii) If the applicant is entitled to interest at the rate of 9% from the date of service of the decree.

4. The respondent was served with a Notice of taxation/Accounts on 10th June, 2015 as per the affidavit of service dated 27th July, 2015. The respondent was duly notified that the bill of costs dated 27th May, 2015 would be taxed on 27th July, 2015. Come that day, there was no appearance for the respondent. The bill of costs was rescheduled for taxation on 31st August, 2015.

5. On 31st August, 2015, parties attended Court and by consent the taxation of the bill of costs was stood over to 26th October, 2015. On the said date, the respondent was not represented in Court. The Deputy Registrar proceeded to tax the said bill of costs and delivered her ruling on 29th January, 2016. She taxed the said bill at the sum of Kshs. 391,761.50 against the respondent and a Certificate of Costs was issued accordingly.

6. In the affidavit in support of the application, the deponent deposes in paragraphs 4 and 5 that the certificate of costs was served upon the respondent on 10th February, 2016, but it had failed to pay the said amount to the applicant thus the prayer sought.

7. This court notes that the respondent was well aware of the date when the bill of costs would be taxed, it raised no objection with the Taxing Master and it did not file a reference to the High Court to contest the said taxation. It is therefore my finding that the grounds of opposition filed by the respondent, which

were not expounded by its Counsel, raise no tangible ground for this Court to interfere with the Certificate of Costs.

8. Section 51(2) of the Advocates Act stipulates as follows:-

“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 recovered thereby; and the Court may make such order in relation thereto as it thinks fit, including, where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with Costs”.

9. In the present case, the respondent did not contend that the Certificate of Costs dated 29th January, 2016 was either set aside, altered or that there is a matter pending in Court appertaining to the said bill of costs. It is my finding that the opposition to the instant application is unwarranted and the applicant is entitled to the fruits of his labour. I therefore hold that the certificate of Costs in this case is final.

10. The applicant herein has claimed the award of interest at the rate of 9% from the date of service of the decree. With regard to the foregoing, Rule 7 of the Advocates Remuneration order provides as follows:-

“An Advocate may charge interest at 14% per disbursement and Costs, whether by scale or expiration of one month from the delivery of his bill to the client, providing such claim for interest is raised before the amount of the bill has been paid or tendered in full”. (emphasis mine)

11. Justice J. Kamau, distinguished the interest provided under Rule 7 of the Advocates Remuneration order and the interest the Court can award, in H.C Misc. 486 of 2012, **E.W Njeru & Co. Advocates vs Zakhem Construction (K) Limited** and H.C Misc. 487 of 2012, **E.W Njeru & Co. Advocates vs Zakhem Construction (K) Limited**, where the court held that if an Advocate files his bill of costs without raising the issue of interest as provided for under Rule 7 of the Advocates Remuneration Order, the Court can only award the interest at Court rates.

12. In the instant case, the applicant did not include a claim for interest at the rate of 14% in its bill of costs, thus the claim of interest at the rate of 9% that is now being sought. Having considered the proceedings herein, I make the following orders:-

- (i) Judgment is hereby entered for the applicant for the sum of Kshs.391,761.50 against the Respondent;
- (ii) Interest on the taxed amount will be at Court rates payable as from the 10th of July, 2015; and
- (iii) Costs to the applicant.

It is so ordered.

DELIVERED, DATED and SIGNED in open Court at Mombasa on this 18th day of August, 2016.

NJOKI MWANGI

JUDGE

In the presence of:-

.....for the applicant

.....for the respondent

.....Court Assistant