



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANOUS CIVIL APPLICATION NO 248 OF 2007

**IN THE MATTER OF ADVOCATE/CLIENT COSTS UNDER THE ADVOCATES
REMUNERATION ORDER OF THE ADVOCATES ACT (CAP 16 LAWS OF KENYA)**

NZEI & COMPANY ADVOCATES.....APPLICANT

VERSUS

DAVIS MUTISO NTHENGE.....RESPONDENT

RULING

The Application

The application before the court for determination is a Notice of Motion dated 26th August 2015. The Applicant is seeking the following orders therein:

1. THAT this Court do enter judgment against the Respondent for a sum of Kshs 1,322,936/= (one million, three hundred thousand, nine hundred and thirty six shillings), being the taxed and certified costs payable by the Respondent to the Applicant.
2. THAT this Court do award interest at court rates on the above stated sum of Kshs 1,322,936/=, to be calculated from the date of such award until payment in full.
3. The costs of the application be paid by the Respondent.

The application is premised on the grounds that the Applicant herein rendered legal services to the Respondent in **Machakos High Court Succession Cause No. 193 of 2002 - In the Matter of the Estate of Philip Nthenge Mukonyo- Deceased**, but that the Respondent failed to pay the appropriate legal fees and disbursements to the Applicant forcing the Applicant to file an Advocate/Client Bill of Costs for taxation by the Court.

Further, that the said Advocate/Client Bill of Costs was taxed on 23rd February 2010 in the sum of Kshs 1,322,936/=, and a certificate of costs duly issued on 25th February 2010. However, that the Respondent has refused to pay the said amount despite demands made in this regard, and the Applicant attached a copy of the said certificate of costs and of a demand letter dated 22nd March 2010 to its supporting affidavit sworn on 26th August 2015 by Agnes Nzei, an Advocate in the Applicant firm.

The Applicants filed submissions dated 31st October 2016, wherein reliance was placed on Rule 11(2) of

the Advocates Remuneration Order for the argument that the Respondent has never filed an objection to the decision of the taxing officer, and also on section 51(2) of the Advocates Act for the position that the certificate of costs issued herein has never been set aside. Further, that it is now six years since the certificate of costs was issued, which was within the 12 year limitation period within which a decree or order of the Court can be enforced under section 4(4) of the Limitation of Actions Act.

It was further argued that any allegations or objections ought to have been made during the taxation process in which the Respondent fully participated. Lastly, the Applicant submitted that Rule 7 of the Advocates Remuneration Order allows for an Advocate to charge interest before the amount of the bill is tendered or paid in full.

The Response

The Respondent opposed the Applicants' application in Grounds of Opposition he filed on 15th February 2016 of the same date. It was stated therein that the Respondent was not accorded an opportunity to contest the Advocate's Bill of Costs, and that there was non-disclosure on the part of the Applicant with respect to amounts already paid to them by the Respondents. Further, that no issue on an agreement with Wandugi & Co Advocates as regards legal fees was raised, and that while the certificate of costs was issued in 2010, it was being enforced in 2015. Lastly, that the prayer for interest was without merit as the certificate of costs is inclusive of interest.

The Respondent's learned counsel, Wandugi & Co Advocates filed submissions on 19th September 2016, wherein it was urged that the taxing officer failed to carefully analyze the services offered by the Respondent in the Bill of Costs, and an example was given of the instruction fee which it is claimed was grossly exaggerated. Further, that the taxing officer failed to give reasons for his decision. It was also submitted that there is material non-disclosure on the part of the Applicant, as the said Bill of Costs failed to take into account the sums that the Respondent had paid as part of the legal fees for services rendered to him. Reliance in this regard was placed on the decision in **Charterhouse Investment Limited vs Simon K. Sang & 3 Others**, (2012) e KLR.

The Issues and Determination

I have read and carefully considered the pleadings and submissions filed. The issue to be determined is whether this Court should enter judgment for the Applicant in terms of the costs stated in the certificate of costs and the interest sought thereon. I note in this regard that the Applicant proceeded under the provisions of section 51(2) of the Advocates Act, sections 1A, 1B, 3, 3A and 27 of the Civil Procedure Act, as well as Order 51 Rule 1 of the Civil Procedure Rules.

Section 51 (2) of the Advocates Act provides 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 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.”

The position in law therefore is that once a taxing officer has taxed the costs, issued a Certificate of costs and there is no reference against his or her ruling, or ruling to set aside and/or alter the taxed costs, this Court can proceed to enter judgment on the amount of taxed costs in the certificate of costs. The aforesaid position has been held in **E.W. Njeru & Co Advocates vs Zakhem Construction (K) Limited**, HC Misc 486 of 2012 and **E.W. Njeru & Co Advocates vs Zakhem Construction (K) Limited**, HC Misc 487 of 2012, regarding the entry of judgment upon issuance of a Certificate of Costs that had not been set aside or impugned.

This Court in this regards has considered the Respondent's arguments and submissions on not being accorded an opportunity to participate in the taxation of costs, and on non-disclosure by the Applicant

about payment of some of the legal fees before taxation. These arguments ought to be raised either in a reference, or application to set aside the taxed costs. The provisions of Order 11 of the Advocates Remuneration Order require such an objection to taxed costs to be filed within fourteen days from the receipt of the reasons given by a taxing officer for his or her decision, unless such period is extended by the High Court upon application.

I have perused the record herein and note that after the certificate of costs was issued herein on 25th February 2010, Wandugi & Co Advocates for the Respondent herein wrote a letter dated 4th March 2010 to the Deputy Registrar of this Court, who was the taxing Officer, which letter was filed on 5th March 2010, objecting to items in the taxed Bill of costs and seeking his response to the said items. No such response is on the Court record. On 23rd June 2011, the said firm of Advocates then filed an application by way of Notice of Motion seeking that the Court sets aside the orders of 23rd February 2010 and seeking extension of time to file a Notice under Rule 11 of the Advocates Act. The said application appears not to have been heard and determined, whereupon the Applicant filed the instant application on 27th August 2015.

In the circumstances I find merit in the Respondent's arguments that he was not given the opportunity to ventilate his concerns. The proper orders to make in the circumstances is to stay of the proceedings on the Applicant's application for Judgment on taxed costs by way of the Notice of Motion dated 26th August 2015, pending the hearing and determination of the Respondent's Notice of Motion dated 23rd June 2011. However, I am also mindful in this regard that the Respondent has not taken any steps to prosecute his application dated 23rd June 2011, and accordingly further order that the aforesaid stay of proceedings shall only be on condition that the Respondent shall take such steps to have the Notice of Motion dated 23rd June 2011 heard within 6 months of the date of this ruling, failing which the said stay orders shall lapse, and this Court shall proceed to give orders on the Applicant's application dated 26th August 2015.

There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 16th day of November 2016.

P. NYAMWEYA

JUDGE